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SCSL-2003-08-PT
(1772-2248)

1772

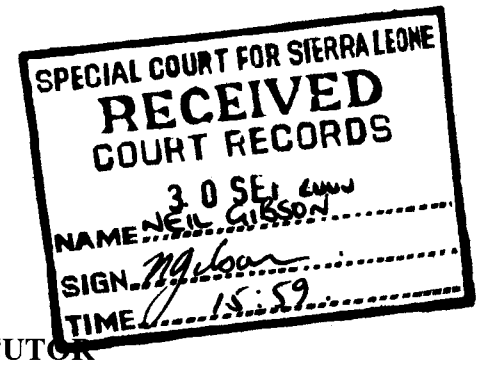
**SPECIAL COURT FOR SIERRA LEONE**
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

**IN THE APPEALS CHAMBER**

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge Renate Winter

Registrar: Mr. Robin Vincent

Date filed: 30 September 2003




**THE PROSECUTOR**

**Against**

**SAM HINGA NORMAN**

CASE NO. SCSL – 2003 – 08 – PT

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**PROSECUTION AUTHORITIES FILED PURSUANT TO THE DIRECTION ON FILING AUTHORITIES OF 26 SEPTEMBER 2003**

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Office of the Prosecutor:
Mr Desmond de Silva, QC, Deputy Prosecutor
Mr Walter Marcus-Jones, Senior Appellate Counsel
Mr Christopher Staker, Senior Appellate Counsel
Mr Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:
Mr. James Blyden Jenkins-Johnston
Mr. Sulaiman Banja Tejan-Sie II

**SPECIAL COURT FOR SIERRA LEONE**
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The Prosecution files herewith the authorities required to be filed by the "Direction on Filing Authorities",[1] issued by the Pre-Hearing Judge on 26 September 2003.

Freetown, 30 September 2003.

For the Prosecution,

Desmond de Silva, QC

Walter Marcus-Jones

Christopher Staker

Abdul Tejan-Cole

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[1] Registry page nos. 1768-1771.

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8. A. Cassesse, *International Criminal Law* (Oxford, Oxford University Press, 2003), Chapter 3 "War Crimes", and Chapter 7 "General Principles"
The prosecution relies on the entirety of the portion reproduced, in particular pages 50-53 and 142-143.

9. M. Dixon, *Textbook on International Law* (4th edition, London, Blackstone Press, 2000), Chapter Five "Personality, statehood and recognition"
The prosecution relies on the entirety of the portion reproduced, in particular pages 106-114.

10. *Akehurst's Modern Introduction to International Law* (7th revised edition, P. Malanczuk (ed.), London and New York, Routledge, 1997), Chapter 5 "States and Governments"
The prosecution relies on the entirety of the portion reproduced, in particular pages 75-81.

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1776

*(1990) 12 EHRR 266, [1989] ECHR 10486/83*

**Hauschildt** v Denmark (App. no. 10486/83)

EUROPEAN COURT OF HUMAN RIGHTS

(1990) 12 EHRR 266, [1989] ECHR 10486/83

**24** MAY 1989

**PANEL:** JUDGE RYSSDAL (PRESIDENT), JUDGES, CREMONA, THR VILHJLMSSON, GLCKL, MATSCHER, PETTITI, WALSH, SIR VINCENT EVANS, MACDONALD, RUSSO, BERNHARDT, SPIELMANN, DE MEYER, VALTICOS, MARTENS, PALM, GOMARD, AD HOC JUDGE, AND MR M A EISSEN, REGISTRAR, AND MR H PETZOLD, DEPUTY REGISTRAR

**CATCHWORDS:**
Human rights - Fair trial - Criminal charge - Applicant remanded into custody - Continued detention on remand until trial - Decision to continue detention on remand carried out in part by judge who was subsequently to preside over trial court hearing applicant's case - Whether judge impartial - Whether applicant deprived of right to a fair trial - European Convention on Human Rights, Article 6(1)

**HEADNOTE:**
This judgment has been summarised by Butterworths' editorial staff.

On 1 February the Copenhagen city court charged the applicant, a Danish citizen, with fraud and tax evasion. The following day the applicant was remanded in custody in solitary confinement under the Administration of Justice Act. In accordance with the Act the applicant's continued detention on remand was subject to regular judicial control carried out at intervals of a maximum of four weeks. He also spent further time in solitary confinement. Between his arrest and the start of the trial on 27 April 1981 approximately 40 court sittings were held in connection with the case: 20 of which were concerned with remand in custody and also with the question of solitary confinement. Of those decisions, 15 were taken by the judge who was subsequently to preside over the trial court that heard the applicant's case. On five of those occasions, he ordered the applicant's solitary confinement to be continued. On 1 November 1982 the applicant was found guilty of all charges and sentenced to seven years' imprisonment. The applicant appealed to the eastern high court of Denmark. The appeal began on 15 August 1983 and on 2 March 1984 the high court found the applicant guilty of six of the eight counts and sentenced him to five years' imprisonment. The court took into account the fact that the applicant had been held in custody on remand since 31 January 1980 and released him that day. The applicant complained that he had not received a fair trial by an impartial tribunal within a reasonable time, contrary to Article 6 of the European Convention on Human Rights. In support of that contention he pointed out, inter alia, that the presiding judge, who had respectively convicted him and examined his appeal, had taken before and during his trial numerous decisions regarding his detention on remand and other procedural matters

Held: (By a majority) In deciding whether in any given case there was a legitimate fear that a particular judge lacked impartiality, the standpoint of the accused was important but not decisive. What was decisive was whether the fear could be

objectively justified. In the instant case the fear of lack of impartiality was based on the fact the judge who presided over the trial and the high court judges who eventually took part in deciding the case on appeal had already had to deal with the case at an earlier stage in the proceedings and had given various decisions with regard to the applicant at the pre-trial stage. In view of the particular circumstances of the case the impartiality of the courts in question was capable of appearing to be open to doubt and that the applicants fears in this respect could be considered to objectively justified. Accordingly there had been a violation of Article 6(1) of the Convention.

**INTRODUCTION:**
PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 October 1987, within the three-month period laid down by Article 32(1) and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The case originated in an application (no. 10486/83) against Kingdom of Denmark lodged with the Commission on 27 October 1982 under Article 25 by a Danish citizen, Mr Mogens **Hauschildt.**

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Denmark recognised the compulsory jurisdiction of the Court (art 46). The purpose of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6(1).

2. In response to the enquiry made in accordance with r 33(3)(d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (r 30).

3. The Chamber to be constituted included, as ex officio members, Mr J Gersing, the elected judge of Danish nationality (art 43 of the Convention), and Mr R Ryssdal, the President of the Court (r 21 para. 3 (b)). On 30 November 1987, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr J Pinheiro Farinha, Mr R Macdonald, Mr R Bernhardt, Mr A Spielmann and Mr J De Meyer (art 43 in fine of the Convention and r 21 para. 4). Subsequently, Professor B Gomard was appointed by the Government of Denmark ("the Government") on 1 August 1988 to sit as an ad hoc judge in place of Mr Gersing, who had died, and Mr C Russo replaced Mr Pinheiro Farinha, who was prevented from taking part in the consideration of the case (rr 22 para. 1, 23 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (r 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the applicant's lawyer on the need for a written procedure (r 37 para. 1). Thereafter, in accordance with the President's orders and directions, the registry received on 29 April 1988 the applicant's memorial and on 16 May 1988 the Government's memorial.

By letter of 4 August 1988, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, the representatives who would be appearing before the Court, the President directed on 4 August 1988 that the oral

proceedings should open on 26 September 1988 (r 38).

6. The hearing took place in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before it opened, the Chamber held a preparatory meeting, in the course of which it decided to relinquish jurisdiction forthwith in favour of the plenary Court (r 50).

There appeared before the Court: (a) for the Government: T Lehmann, Ministry of Foreign Affairs (Agent), I Foighel, Professor of Law (Counsel), J Bernhard, Ministry of Foreign Affairs, K Hagel-Srensen, Ministry of Justice, J Hald, Ministry of Justice, N Holst-Christensen, Ministry of Justice (Advisers); (b) for the Commission: H Danelius (Delegate); (c) for the applicant: G Robertson, Barrister-at-Law (Counsel), F Reindel, K Starmer (Advisers).

The Court heard addresses by Mr Lehmann and Mr Foighel for the Government, by Mr Danelius for the Commission and by Mr Robertson and Mr Reindel for the applicant, as well as their replies to its questions. The Agent of the Government and counsel for the applicant filed several documents during the hearing.

7. On various dates between 26 September 1988 and 27 January 1989, the registry received the applicant's claims under Article 50 of the Convention and the observations of the Government and the Commission thereon.

**FACTS:**
AS TO THE FACTS

I. The particular facts of the case

8. The applicant, Mr Mogens **Hauschildt,** who is a Danish citizen born in 1941, currently resides in Switzerland.

In 1974, he established a company, Scandinavian Capital Exchange PLC ("SCE"), which traded as a bullion dealer and also provided financial services. SCE became the largest bullion dealer in Scandinavia, with associated companies in Sweden, Norway, the Netherlands, the United Kingdom and Switzerland. The applicant was appointed its managing director.

9. Over the years and until the end of 1979, difficulties arose between SCE and the Danish National Bank, the Internal Revenue Service and the Ministry of Trade. They concerned the flow of money to and from SCE and its associated companies abroad.

A. Criminal proceedings against the applicant

1. Investigation stage

10. On 30 January 1980 the Internal Revenue Service forwarded a complaint to the police in which it stated that the activities of the applicant and SCE seemed to involve violations of the Danish tax laws and the Penal Code.

After obtaining a warrant from a court, the police arrested the applicant, seized all available documents at the seat of the company and closed its business on 31 January 1980.

11. The applicant was brought before the Copenhagen City Court (Kbenhavns byret) the following day and charged with fraud and tax evasion. The court directed that he should be kept under arrest for three consecutive periods of twenty-four hours; no objection was raised.

On 2 February 1980, after hearing the prosecution and the defence, the City Court held that the charges were not ill-founded and remanded the applicant in custody in solitary confinement under ss 762 and 770(3) of the Administration of Justice Act (Retsplejeloven - "the Act"; see paras 33 and 36 below).

As a result of successive decisions, a number of which were taken by Judge Claus Larsen, Mr **Hauschildt** was held in detention on remand until the public trial began before the City Court on 27 April 1981 (see paras 19-21 below). He also spent some time in solitary confinement (31 January to 27 August 1980).

12. During the investigation stage, the police seized further documents and property. Inquiries were also carried out in the United Kingdom, the Netherlands, Belgium, Switzerland, Liechtenstein and the United States of America. In accordance with the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, the judge of the City Court on several occasions authorised the prosecution to seek co-operation from other European countries in securing documents as well as in other matters (see para 22 below).

On 4 February 1981 the indictment, which ran to 86 pages, was served on Mr **Hauschildt.** He was charged with fraud and embezzlement on eight counts involving approximately 45 million Danish crowns.

2. First-instance proceedings

13. The trial at first instance began before the City Court, sitting with one professional judge, Judge Larsen, and two lay judges, on 27 April 1981. According to the applicant, he had complained about the presiding judge before the trial, but no formal request was made on the matter. At the trial he was advised by his lawyers that s.60(2) of the Act debarred any challenge of the judge on the basis of the pre-trial decisions that he had made (see paras 20-22 and 28 below).

14. In the course of over 130 court sittings at the trial the City Court heard some 150 witnesses as well as the applicant and examined a substantial number of documents. Furthermore, opinions from appointed experts, in particular accountants, were taken into consideration. The court also issued numerous orders concerning the remand in custody and solitary confinement of the applicant, the sending of commissions rogatory and other procedural matters (see para 24 below).

15. The City Court, with Judge Larsen presiding, gave judgment on 1 November 1982. It found Mr **Hauschildt** guilty on all counts and sentenced him to seven years' imprisonment.

3. Appeal proceedings

16. The applicant appealed to the High Court of Eastern Denmark (stre Landsret). This court sat with three professional judges and three lay judges. Its jurisdiction extended to both the law and the facts, and involved a trial de novo.

The hearing of the appeal began on 15 August 1983. Before the appeal hearing, the applicant had raised with the presiding judge an objection against one of the judges on the ground of his involvement in a City Court decision to seize the applicant's correspondence and assets. However, counsel for the defence refused to argue this point on the basis of s.60(2) of the Act, and Mr **Hauschildt** withdrew the objection.

17. On 2 March 1984 the High Court found the applicant guilty on six of the eight counts and sentenced him to five years' imprisonment.

The extensive character of the fraud was treated as an aggravating factor. On the other hand, the court took into account the fact that the applicant had been held in custody on remand since 31 January 1980, and considered this detention harsher than regular imprisonment. Mr **Hauschildt** was released on the same day.

18. The applicant's subsequent application for leave to appeal to the Supreme Court (Hjesteret) was rejected by the Ministry of Justice on 4 May 1984.

B. Mr **Hauschildt's** detention on remand and other procedural matters

1. At the investigation stage

19. As already mentioned (see para 11 above), the City Court judge had decided on 2 February 1980 to remand Mr **Hauschildt** in custody in solitary confinement. In the judge's opinion, there were reasons to believe that the applicant, if at large, would abscond or impede the investigation (s.762(1) nos.1 and 3 and s.770(3) of the Act; see paras 33 and 36 below). As justification for the detention he listed the following elements:

(1) the circumstance that the applicant had lived outside Denmark until 1976 and at the time of his arrest was planning to move to Sweden;

(2) his economic interests abroad;

(3) the importance of the case;

(4) the risk of his obstructing the investigation by exerting influence on persons in Denmark and abroad.

20. In accordance with s.767 of the Act, the applicant's continued detention on remand was subject to regular judicial control carried out at maximum intervals of four weeks. The elements set out in the initial decision of 2 February 1980, which had been taken by Judge Rasmussen, were the basis for the applicant's detention until 10 April 1980.

On 10 April the City Court judge, Mr Larsen, who was subsequently to preside over the trial court that heard the applicant's case (see para 13 above), also relied on s.762(1) no. 2 as a ground for his remand in custody (danger of his committing new crimes; see para 33 below). The reason prompting that decision was the fact that the applicant had, whilst in custody, secretly communicated with his wife and asked her to remove money from certain bank accounts as well as certain personal property. Subsequently, on 30 April, the same judge ordered her detention on remand and the stopping of a letter written by the applicant.

At a later stage, when ruling on 5 September 1980 on an appeal against an order of further remand in custody, the High Court referred in addition to s.762 sub-s(2) (see para 33 below), since the investigations carried out by the police at that time indicated a possible loss by the injured parties of approximately 19,5 million Danish crowns. From 24 September on, Judge Larsen also relied additionally on this sub-section.

The applicant's detention on remand continued to be based on each of the three paras of sub-section (1) and on sub-section (2) of section 762 (see para 33 below) until 17 August 1982 when para 3 of sub-section (1) was no longer relied on.

21. As from the applicant's arrest on 31 January 1980 and until the trial started on 27 April 1981, police investigations and his continuing detention on remand necessitated decisions to be taken by the City Court sitting with one professional judge. A total of approximately forty court sittings were held in connection with the case during this period, twenty of which were concerned with remand in custody and, from 31 January to 27 August 1980, also with the question of solitary confinement. Fifteen of these decisions were taken by Judge Larsen (10 April, 30 April, 28 May, 25 June, 20 August, 27 August, 24 September, 15 October, 12 November, 3 December and 10 December 1980 and 4 February, 25 February, 11 March and 8 April 1981). On five of these occasions he ordered prolongation of the applicant's solitary confinement (10 April, 30 April, 28 May, 25 June and 20 August 1980). On 27 August 1980, however, he terminated the solitary confinement.

22. During this period, the City Court decided on three occasions (5 March, 16 June and 13 August), on application by the police, to request the co-operation of other countries in securing documents and in other matters (see para 12 above). Two of these decisions were taken by Judge Larsen (16 June and 13 August 1980).

The City Court judge was furthermore called on to rule on a number of other procedural matters such as the seizure of the applicant's property and documents, his contacts with the press, access to police reports, visits in prison, payment of defence counsel fees and correspondence. Besides the order of 30 April 1980 to detain Mr **Hauschildt's** wife on remand (see para 20 above), Judge Larsen gave directions on 28 May 1980 as to the stopping of another of the applicant's letters, on 12 November 1980 as to the seizure of a certain amount of money which allegedly belonged to the applicant, on 4 February 1981 as to a change of defence counsel, and finally on 11 March 1981 as to the applicant's access to certain parts of the police files. These rulings were delivered at the request either of the prosecutor or of the defence counsel.

23. Mr **Hauschildt** brought various decisions taken by the City Court judge before the High Court sitting on appeal with three professional judges. On five occasions the High Court was called upon to inquire into the applicant's continued remand in custody.

Altogether thirteen different judges participated in these decisions, none of whom was subsequently involved in the appeal proceedings regarding conviction and sentence. The same applied to the six judges who heard appeals on other procedural matters.

2. During the trial at first instance

24. During Mr **Hauschildt's** trial, from 27 April 1981 to 1 November 1982 (see paras 13-15 above), the City Court, sitting with Judge Larsen as presiding judge and two lay judges, was also required to give rulings on a number of procedural matters. In particular, the court prolonged the applicant's detention on remand twenty-three times on the basis of s.762(1) and (2). Except on two occasions, these orders were made by Judge Larsen and, on four, he was joined by the two lay judges. Furthermore, from 2 July to 7 October 1981, the applicant was kept in solitary confinement at the request of the prosecuting authorities. Although the first order to this effect was made by another judge, Judge Larsen on two occasions prolonged the solitary confinement. In addition, on five occasions, he authorised the seeking of the co-operation of other countries.

25. The applicant entered nineteen appeals against these various rulings to the High Court. On twelve occasions, the High Court upheld the decision of the City Court concerning remand in custody. Fourteen judges participated in these judgments, none of whom was subsequently involved in the hearing of the applicant's appeal against conviction and sentence. The applicant's other appeals related to matters such as the appointment of defence counsel, the hearing of further witnesses, the issue of search warrants, custody in solitary confinement and travel expenses for defence counsel. Twelve different judges took part in these decisions. On 14 July 1981 three High Court judges upheld the order continuing the applicant's solitary confinement, one of whom also sat on the court for the hearing of the applicant's appeal against judgment.

3. During the appeal proceedings

26. According to Danish law, the applicant was still considered as being in custody on remand during the appeal proceedings (see paras 16-17 above). The High Court had accordingly to review the detention at least every four weeks. Out of the nineteen renewals ordered, ten were ordered before the hearing opened, whereas the remaining nine were ordered during the sittings. With a few exceptions all decisions concerning detention on remand were adopted by the same judges as took part in the proceedings on appeal. During the hearing (15 August 1983 to 2 March 1984), the professional judges were joined by three lay judges.

The above-mentioned rulings of the High Court were based on s.762(1) no. 1 and 762(2) of the Act (see para 33 below). The court attached particular importance to the gravity of the charges and to the fact that the applicant had lived abroad and still had substantial economic interests abroad.

27. The applicant twice obtained leave from the Ministry of Justice to bring the issue of his continued detention on remand before the Supreme Court. On 26 January 1983 the Supreme Court upheld the decision of the High Court, while considering that the detention should also be based on s.762(1) no. 2 (see para 33 below).

In fact, some of the offences for which the applicant had been convicted by the City Court had been committed whilst he had been in custody on remand. On 9 December 1983 the Supreme Court directed that the detention should continue but be based solely on s.762(1) nos.1 and 2 (see para 33 below). The majority of the court found that the public interest no longer required the applicant to be kept in custody under s.762(2).

II. Relevant domestic law

28. The challenge of a judge is governed by ss.60 to 63 of the Act:

Section 60

"(1) No one may act as a judge in a case where he,

1. is himself a party to the case, or has an interest in its outcome, or, if it is a criminal case, has suffered injury as a result of the criminal offence;

2. is related by blood or marriage to one of the parties in a civil case or with the accused in a criminal case, whether in lineal ascent or descent or collaterally up to and including first cousins, or is the spouse, guardian, adoptive or foster parent or adoptive or foster child of one of the parties or of the accused;

3. is married, or related by blood or marriage in lineal ascent or descent or collaterally up to and including first cousins, to a lawyer or other person representing one of the parties in a civil case or, in a criminal case, to the injured party or his representative or to any public prosecutor or police officer appearing in such a case or to the accused's defence counsel;

4. has appeared as a witness or as an expert (syn- og sknsmand) in the case, or, if the case is a civil one, has acted in it as a lawyer or otherwise as representative of one of the parties, or, if the case is a criminal one, as a police officer, public prosecutor, defence counsel or other representative of the injured party;

5. has dealt with the case as a judge in the lower instance, or, if it is a criminal case, as member of the jury or as lay judge.

(2) The fact that the judge may previously have had to deal with a case as a result of his holding several official functions shall not disqualify him, when there is no ground, in the circumstances of the case, to presume that he has any special interest in the outcome of the case."

Section 61

"In the situations mentioned in the preceding section, the judge shall, if he sits as a single judge, withdraw from sitting on the court by a decision pronounced by himself. If he sits on the court together with other judges, he shall inform the court of the circumstances which according to the preceding section may disqualify him. Likewise, the other judges on the court, whenever aware of such circumstances, are entitled and have the duty to raise the question of disqualification, whereafter the question is decided by the court, without the judge in question being excluded from taking part in the decision."

Section 62

"(1) The parties can not only demand that a judge withdraw from sitting in the instances referred to in s.60 but may also object to a judge hearing a case when other circumstances are capable of raising doubt about his complete impartiality. In such instances the judge, too, if he fears that the parties cannot trust him fully, may withdraw from sitting even when no objection is lodged against him. Where a case is heard by several judges, any one of them may raise the question whether any of the

judges on the bench should step down on account of the circumstances described above.

(2) The questions which might arise under this section shall be decided in the same manner as is laid down in s.61 in regard to the situations enumerated in s.60."

Section 63

"The question whether or not a judge should remain on the bench, which when raised by one of the parties in civil matters is treated as other procedural objections, should as far as possible be raised before the beginning of the oral hearing. This question may be decided without the parties having been given the opportunity to submit comments."

29. According to the Government, no case-law on s.60(2) had been established by the Supreme Court at the time when the applicant's case was pending before the Danish courts. However, by a ruling of 12 March 1987, the Supreme Court held that if a judge has directed the remand in custody of a person charged with a criminal offence, this shall not in itself be deemed to disqualify the judge from taking part in the subsequent trial and delivery of judgment.

30. In connection with an amendment extending the application of s.762(2) (see para 35 below), s.60 was amended on 10 June 1987 by the Danish Parliament. Sub-s.(2) as amended now provides that

"no one shall act as a judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned to be remanded into custody solely under s.762(2), unless the case is tried as a case in which the accused pleads guilty."

This amendment came into force on 1 July 1987.

31. In Denmark, the investigation is carried out by the prosecuting authorities, with the assistance of the police, and not by a judge. The functions of the police at the investigation stage are regulated by ss.742 and 743 of the Act, which provide:

Section 742

"(1) Information about criminal offences shall be submitted to the police.

(2) The police shall set in motion an investigation either on the basis of such information or on their own initiative where there is a reasonable ground for believing that a criminal offence which is subject to public prosecution has been committed."

Section 743

"The aim of the investigation is to clarify whether the requirements for establishing criminal responsibility or for imposing any other sanction under criminal law are fulfilled and to produce information to be used in the determination of the case as well as to prepare the case for trial."

32. Section 746 of the Act governs the role of the court:

"The court shall settle disputes concerning the lawfulness of measures of investigation taken by the police as well as those concerning the rights of the suspect and the defence counsel, including requests from the defence counsel or the suspect concerning the carrying out of further investigation measures. The decision shall be taken on request by order of the court."

33. Arrest and detention on remand are dealt with in ss.760 and 762 of the Act:

Section 760

"(1) Any person who is taken into custody shall be released as soon as the reason for the arrest is no longer present. The time of his release shall appear in the report.

(2) Where the person taken into custody has not been released at an earlier stage he shall be brought before a judge within 24 hours after his arrest. The time of his arrest and of his appearance in court shall appear in the court transcript."

Section 762

"(1) A suspect may be detained on remand when there is a justified reason to believe that he has committed an offence which is subject to public prosecution, provided the offence may under the law result in imprisonment for one year and six months or more and if

1. according to information received concerning the suspect's situation there is specific reason to believe that he will evade prosecution or execution of judgment, or

2. according to information received concerning the suspect's situation there is specific reason to fear that, if at large, he will commit a new offence of the nature described above, or

3. in view of the circumstances of the case there is specific reason to believe that the suspect will impede the investigation, in particular by removing evidence or by warning or influencing others.

(2) A suspect may furthermore be detained on remand when there is a 'particularly confirmed suspicion' [translation supplied by the Government of the Danish phrase saerlig bestyrket mistanke] that he has committed an offence which is subject to public prosecution and which may under the law result in imprisonment for six years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty.

(3) Detention on remand may not be imposed if the offence can be expected to result in a fine or in light imprisonment (haefte) or if the deprivation of liberty will be disproportionate to the interference with the suspect's situation, the importance of the case and the outcome expected if the suspect is found guilty."

34. Section 762 sub-s.(2) is applicable even in the absence of any of the conditions set out in sub-s.1. Section 762(2) was first inserted in the Act in 1935, following an aggravated rape case. In the Parliamentary record concerning this amendment (Rigsdagstidende, 1934-35 Pt B, col. 2159), it is stated:

"When everyone assumes that the accused is guilty and therefore anticipates serious criminal prosecution against him, it may in the circumstances be highly objectionable that people, in their business and social lives, still have to observe and endure his moving around freely. Even though his guilt and its consequences have not yet been established by final judgment, the impression may be given of a lack of seriousness and consistency in the enforcement of the law, which may be likely to confuse the concept of justice."

35. Section 762(2) was amended in 1987 in order to extend its application to certain crimes of violence which were expected to entail a minimum of sixty days' imprisonment. In reply to a criticism in an editorial in the newspaper Politiken, the Danish Minister of Justice wrote on 30 December 1986:

"In so far as it . . . has been suggested that the Bill opens possibilities for the imprisonment of innocent persons, I find reason to stress that my proposed Bill makes it a condition that there is a particularly confirmed suspicion [the Minister's emphasis] that the accused has committed the crime before he can be remanded in custody. Thus there has to be a very high degree of clarity with regard to the question of guilt before the provision can be applied and this is the very means of ensuring that innocent persons are not imprisoned."

36. Solitary confinement is governed by s.770(3) of the Act, which at the relevant time read as follows:

"On application by the police the court may decide that the detainee shall be totally or partially isolated if the purpose of the detention on remand so requires."

This provision was amended on 6 June 1984.

PROCEEDINGS BEFORE THE COMMISSION

37. Mr **Hauschildt** first wrote to the Commission on 26 August 1980. In this and further communications registered as application no. 10486/83, he referred to Articles 3, 5, 6, 7 and 10 of the Convention and Article 1 of Protocol No. 4.

As regards Article 6, he claimed that he did not receive a fair trial by an impartial tribunal within a reasonable time; in support of this contention, he pointed out, inter alia, that the presiding judge of the City Court and the High Court judges, who had respectively convicted him and examined his appeal, had taken before and during his trials numerous decisions regarding his detention on remand and other procedural matters.

38. On 9 October 1986 the Commission declared the application admissible as regards this last complaint but inadmissible in all other respects.

In its report adopted on 16 July 1987, the Commission expressed the opinion that there had been no violation of Article 6(1) of the Convention (nine votes to seven). The full text of the Commission's opinion and of the collective dissenting opinion contained in the report is reproduced as an annex to this judgment.

**DECISION:**
AS TO THE LAW

I. Preliminary objection of non-exhaustion of domestic remedies

39. The Government pleaded before the Court - as they had already unsuccessfully done before the Commission - that the application was inadmissible for failure to exhaust domestic remedies (art 26 of the Convention). In support of this preliminary objection, they argued that, in so far as Mr **Hauschildt** feared that Judge Larsen and the judges of the High Court lacked impartiality as a consequence of having made several pre-trial decisions in his case, he could have challenged them under ss.60(2) and 62 of the Act (see para 28 above), but never did so.

40. The applicant countered by explaining that he had been advised by counsel that the Act did not permit such a course of action. This advice was based on reading s.62 of the Act in conjunction with s.60(2) and inferring therefrom that challenge of a judge relying on the fact of his having given pre-trial decisions - that is having acted in an official function other than that of trial judge - could be successfully made only on the ground that he had some "special interest in the outcome of the case"(s.60(2)). This ground, in the opinion of counsel, did not apply in the instant case.

The Government described this construction of the relevant sections of the Act as a "quite obvious misinterpretation". On their own interpretation, it would have been open to the applicant to challenge both Judge Larsen and the High Court judges on the ground that their responsibility for a number of pre-trial decisions raised doubts as to their complete impartiality. In support of this contention, they referred to a decision of 12 March 1987 by the Danish Supreme Court, where it was held that the making of orders as to detention on remand at the pre-trial stage should not per se be deemed to disqualify the judge from sitting in the subsequent trial (see para 29 above).

41. It is incumbent on the Government to satisfy the Court that the remedy in question was available and effective at the relevant time - that is to say, at the opening of Mr **Hauschildt's** trial (27 April 1981) and at the opening of the hearing on appeal (15 August 1983).

The Court cannot share the Government's view that the interpretation put on ss.60(2) and 62 of the Act by counsel for the defence was quite obviously wrong.

The Government have not alleged ascertainable facts - such as previous case-law or doctrine - which should have caused counsel for the defence to have doubts concerning his interpretation of the Act. On the contrary, they did not deny that for several years nobody had ever challenged a trial judge on the ground of his having made pre-trial decisions in the case. The latter fact suggests general acceptance of the system, or at least of the interpretation relied on by counsel for the defence. The Supreme Court's decision of 12 March 1987, whatever its relevance to the circumstances of the present case, does not alter the position as it existed at the time of Mr **Hauschildt's** trial (see, inter alia and mutatis mutandis, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 32-33, para. 61).

It is significant, moreover, that both Judge Larsen and the President of the High Court, although aware of the apprehensions and unease harboured by Mr **Hauschildt** (see paras 13 and 16 above), did not think it necessary to take any initiative themselves, notwithstanding the wording of ss.61 and 62 (see para 28 above).

In the circumstances, counsel for the defence could well at the time reasonably believe that any objection on the basis of a particular judge having made several pre-trial decisions was doomed to failure.

42. The Court concludes that the Government have not shown that there was available under Danish law at the relevant time an effective remedy to which the applicant could be expected to have resorted.

II. Alleged Violation of Article 6(1)

43. Mr **Hauschildt** alleged that he had not received a hearing by an "impartial tribunal" within the meaning of Article 6(1) which, in so far as relevant, provides:

"In the determination of . . . any criminal charge against him, everyone is entitled to a fair . . . hearing by animpartial tribunal . . . "

The applicant, while not objecting in principle to a system such as that existing in Denmark whereby a judge is entrusted with a supervisory role in the investigation process (see paras 32-33 above), criticised it in so far as the very same judge is then expected to conduct the trial with a mind entirely free from prejudice. He did not claim that a judge in such a position would conduct himself with personal bias, but argued that the kind of decisions he would be called upon to make at the pre-trial stage would require him, under the law, to assess the strength of the evidence and the character of the accused, thereby inevitably colouring his appreciation of the evidence and issues at the subsequent trial. In the applicant's submission, a defendant was entitled to face trial with reasonable confidence in the impartiality of the court sitting in judgment on him. He contended that any reasonable observer would consider that a trial judge who had performed such a supervisory function could not but engender apprehension and unease on the part of the defendant. The same reasoning applied in principle to appeal-court judges responsible for decisions on detention pending appeal or other procedural matters.

As to the facts of his own case, Mr **Hauschildt** pointed out above all that the presiding judge of the City Court, Judge Larsen, had taken numerous decisions on detention on remand and other procedural matters, especially at the pre-trial stage. He referred in particular to the application of s.762(2) of the Act (see paras 20 and 33 above). He expressed similar objections as regards the judges of the High Court on account of their dual role during the appeal proceedings (see para 26 above) and also, in relation to some of them, because of their intervention at the first-instance stage (see paras 16 and 25 above).

44. The Government and the majority of the Commission considered that the mere fact that a trial judge or an appeal-court judge had previously ordered the accused's remand in custody or issued various procedural directions in his regard could not reasonably be taken to affect the judge's impartiality, and that no other ground had been established in the present case to cast doubt on the impartiality of the City Court or the High Court.

On the other hand, a minority of the Commission expressed the opinion that, having regard to the circumstances of the case, Mr **Hauschildt** was entitled to entertain legitimate misgivings as to the presence of Judge Larsen on the bench of the City Court as presiding judge.

45. The Court's task is not to review the relevant law and practice in abstracto, but to determine whether the manner in which they were applied to or affected Mr **Hauschildt** gave rise to a violation of Article 6(1).

46. The existence of impartiality for the purposes of Article 6(1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24).

47. As to the subjective test, the applicant has not alleged, either before the Commission or before the Court, that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

There thus remains the application of the objective test.

48. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, para. 31). What is decisive is whether this fear can be held objectively justified.

49. In the instant case the fear of lack of impartiality was based on the fact that the City Court judge who presided over the trial and the High Court judges who eventually took part in deciding the case on appeal had already had to deal with the case at an earlier stage of the proceedings and had given various decisions with regard to the applicant at the pre-trial stage (see paras 20-22 and 26 above).

This kind of situation may occasion misgivings on the part of the accused as to the impartiality of the judge, misgivings which are understandable, but which nevertheless cannot necessarily be treated as objectively justified. Whether they should be so treated depends on the circumstances of each particular case.

50. As appears from ss.742 and 743 of the Act (see para 31 above), in Denmark investigation and prosecution are exclusively the domain of the police and the prosecution. The judge's functions on the exercise of which the applicant's fear of lack of impartiality is based, and which relate to the pre-trial stage, are those of an independent judge who is not responsible for preparing the case for trial or deciding whether the accused should be brought to trial (ss 746, 760, 762 and 770 - see paras 32, 33 and 36 above). This is in fact true of the decisions referred to by the applicant, including those concerning the continuation of his detention on remand

and his solitary confinement. Those decisions were all given at the request of the police, which request was or could have been contested by the applicant, assisted by counsel (see paras 23 and 24 above). Hearings on these matters are as a rule held in open court. Indeed, as to the nature of the functions which the judges involved in this case exercised before taking part in its determination, this case is distinguishable from the Piersack and the De Cubber cases (judgments previously cited) and from the Ben Yaacoub case (judgment of 27 November 1987, Series A no. 127-A, p 7, para. 9).

Moreover, the questions which the judge has to answer when taking such pre-trial decisions are not the same as those which are decisive for his final judgment. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether prima facie the police have grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same (see, for example, the Lutz judgment of 25 August 1987, Series A no. 123-A, pp. 25-26, para. 62).

In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

51. Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr **Hauschildt's** detention on remand, Judge Larsen relied specifically on s.762(2) of the Act (see para 20 above). Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions (see paras 26-27 above).

52. The application of s.762(2) of the Act requires, inter alia, that the judge be satisfied that there is a "particularly confirmed suspicion" that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt (see paras 34-35 above). Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous.

The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered objectively justified.

53. The Court thus concludes that there has been a violation of Article 6(1) of the Convention.

III. The application of Article 50

54. Under Article 50 of the Convention:

"If the Court finds that a decision or a measure taken by a legal authority or any

other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant submitted that, should the Court find a violation of Article 6, his conviction should be quashed and any disqualifications or restrictions placed on him removed. The Court, however, is not empowered under the Convention to provide for the quashing of a judgment or to give any directions on the last-mentioned matters (see, mutatis mutandis, the Gillow judgment of 14 September 1987, Series A no. 124-C, p. 26, para. 9).

The applicant also sought compensation for damage and reimbursement of costs and expenses.

A. Damage

55. Mr **Hauschildt** submitted that a finding of a violation of Article 6 would cast doubt on his conviction and that this, in turn, would bring into question the lawfulness of each of his 1,492 days of detention on remand. Accordingly, he sought compensation comparable to that to which he would have been entitled if the trial court had found him not guilty, to be calculated on the basis of 500/1,000 Danish crowns (DKr) per day.

The applicant also contended that his health had suffered due to the 309 days he had spent in solitary confinement, that his reputation had been seriously injured and that his lengthy detention on remand had caused him a substantial loss of income.

56. In their observations of 10 October 1988 and 23 January 1989, the Government pointed to the existence of a remedy at national level, in that, under s.977(3) of the Act, Mr **Hauschildt** could ask the Special Court of Revision (Den saerlige Klageret) to refer the case back to the City Court if there were a high degree of probability that the evidence had not been properly evaluated.

The Court notes in this respect that the violation found in the present judgment (see para 53 above) relates to the composition of the courts concerned and not to their assessment of the evidence.

Accordingly, the remedy in question does not allow reparation for the consequences of the violation, within the meaning of Article 50 (see, mutatis mutandis, the De Cubber judgment of 14 September 1987, Series A no. 124-B, pp. 17-18, para. 21).

57. It will be recalled that, with regard to the judges concerned, the Court has excluded personal bias (see para 47 above). What it has found is that, in the circumstances of the case, the impartiality of the relevant tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect can be considered to be objectively justified (see para 52 above). This finding does not entail that his conviction was not well founded. The Court cannot speculate as to what the result of the proceedings might have been if the violation of the Convention had not occurred (see the above-mentioned De Cubber judgment, Series A no. 124-B, p. 18, para. 23).

Indeed the applicant has not even attempted to argue that the result would have been more favourable to him, and moreover, given the established lack of personal bias, the Court has nothing before it that would justify such a conclusion.

The Court thus agrees with the Government and the Commission that no causal link has been established between the violation found and the alleged damage in question.

58. Mr **Hauschildt** also claimed compensation for non-pecuniary damage, on the ground that he had lost the opportunity of being tried by an impartial tribunal. The Delegate of the Commission submitted that an amount, which he did not quantify, should be awarded under this head.

The Court, however, is of the view that, in the particular circumstances of the case, its finding in the present judgment will constitute in itself adequate just satisfaction under this head.

B. Costs and expenses

59. The Delegate of the Commission viewed favourably the applicant's claim for reimbursement of costs and expenses, although he did not indicate any amount. The Government reserved their right, should it prove necessary, to set up a "counterclaim".

The Court considers, however, that it has sufficient material to take a decision on this point.

1. Proceedings outside Strasbourg

60. Mr **Hauschildt** sought reimbursement of the costs he had incurred:

(a) in respect of the investigation and first-instance trial in Denmark (3,061,960 DKr);

(b) in respect of several bankruptcy proceedings pending in Denmark (7,100,000 DKr); and

(c) in Switzerland and other European countries in connection with the bankruptcy of **Hauschildt** & Co (1,700,000 Swiss francs).

61. The Court is unable to accept these claims.

As to item (a), this rests on the erroneous assumption that the finding of a violation in this case operates so as to erase the applicant's conviction. As to items (b) and (c), it is not established that there is any connection between the violation found in the present judgment and the bankruptcy proceedings referred to.

2. Proceedings in Strasbourg

62. Mr **Hauschildt** also sought reimbursement of the following items referable to the proceedings before the Convention institutions, totalling £26,463:

(a) fees of his counsel, Mr Robertson (£11,048), and Mr Reindel (£5,770);

(b) translation fees (£1,725);

(c) fees of Ms Eva Smith, who prepared for him a report on the relevant Danish legislation (£420);

(d) his own personal costs and expenses (£7,500).

63. The Court has no reason to suppose that the foregoing expenditure was not actually incurred. However, it entertains doubts as to whether part of it - especially as regards Mr **Hauschildt's** personal costs and expenses - was necessarily incurred and as to whether all the items can be considered reasonable as to quantum.

In these circumstances, the Court is unable to award the totality of the sums claimed. Making an assessment on an equitable basis, it finds that the applicant should be reimbursed £20,000.

FOR THESE REASONS, THE COURT

1. Rejects by fourteen votes to three, as unfounded, the Government's preliminary objection of non-exhaustion of domestic remedies;

2. Holds by twelve votes to five that there has been a breach of Article 6(1) of the Convention;

3. Holds unanimously that Denmark is to pay to the applicant, for costs and expenses £20,000 (twenty thousand pounds sterling);

4. Rejects unanimously the remainder of the claim for just satisfaction.

CONCURRING OPINION OF JUDGE RYSSDAL

The first sentence of s.62(1) of the Administration of Justice Act entitles the parties to object to a judge hearing a case when circumstances, other than those referred to in s.60, "are capable of raising doubt about his complete impartiality". This wording would seem to indicate that Mr **Hauschildt** could have challenged Judge Larsen and the High Court judges on the ground that they had applied s.762(2) of the Act in pre-trial decisions concerning his detention on remand.

However, having regard to the specific provision in s.60(2) of the Act and to the fact that it was common practice in Denmark at the relevant time not to challenge a trial judge on the ground of his having made pre-trial decisions in the same case, I have come to the conclusion that Mr **Hauschildt** could not be expected to have objected to the judges in question. I therefore agree that the Government's plea of non-exhaustion of domestic remedies must be rejected.

JOINT DISSENTING OPINION OF JUDGES THR VILHJLMSSON, PALM AND GOMARD

1. Sections 60(2) and 62 of the Administration of Justice Act ("the Act"), which are cited in full in para 28 of the Court's judgment, clearly indicate - in accordance with the explanations given on pages 21 and 22 of the original proposal, dated March 1875, that led to the adoption of the Act - that normally a judge in a criminal case is not disqualified because he has had to deal with the case in another capacity before

trial, but that disqualification may ensue because of special circumstances as mentioned in those sections.

Consequently an appeal founded on the system itself, ie. on the fact that judges who delivered pre-trial decisions are not normally disqualified from taking part in the trial, would undoubtedly have been unsuccessful. The relevant questions in the present case, however, are whether on a special appeal the Court of Appeal (the High Court) or the Supreme Court would have found that the impartiality of Judge Larsen or of the High Court judges was impaired because of his or their involvement in the case before the first-instance or the second-instance trial. Under the relevant provisions of the Act, the result of an appeal alleging that the first-instance judge or the second-instance judges lacked impartiality would have depended on the circumstances of the case as it stood before the City Court or later before the High Court. At that time - in 1981 and in 1983 - all relevant information could have been produced to and evaluated by the High Court or the Supreme Court. The only information available now, years later, in the case before this Court is a simple list of the number and contents of decisions made by various judges. It is not possible to arrive, solely on the basis of such a list, at a well-informed opinion on the partiality or impartiality of the trial judges.

Mr **Hauschildt** and his counsel decided at the relevant time against raising the question of impartiality. Mr **Hauschildt's** present application is therefore, in our opinion, inadmissible because of failure to exhaust domestic remedies (art 26 of the Convention).

2. If Mr **Hauschildt's** application is not found inadmissible for failure to have recourse to an available and relevant domestic remedy as required by Article 26 of the Convention, the objection of partiality now raised by him has to be examined and decided in the present case.

As stated in para 50 of the Court's judgment, the mere fact that a member of the trial court has also taken part as a judge in preliminary decisions in the case does not in itself justify fears as to his or her impartiality. The doubts that have been raised as to whether this is also true where the decisions have been rendered under s.762(2) of the Act are an indication that the wording of this particular provision - as it appears in the translations - may not be fortunate. This, however, does not alter the fact that the strong traditions of the judiciary and the ability of the judges, deriving from their education and training, provide the necessary effective and visible guarantee of impartiality. Judicial control of the question whether the prosecution has reasonable grounds for requesting detention on remand, solitary confinement, searches and seizure, etc. is a function that is different from the court's evaluation of the evidence presented by the parties at the trial. For authorisation of detention on remand, information is not presented in the same way as evidence during the hearings before the trial court. The procedure is a summary one. Court sittings at the pre-trial stage are concluded in a matter of hours, whereas both of Mr **Hauschildt's** trials lasted for months. After the City Court had passed judgment, that judgment became an important factor for the High Court judges in determining whether Mr **Hauschildt** should remain in custody during his de novo trial on appeal.

The role of judges at the pre-trial stage is confined to ascertaining whether the prosecution's requests satisfy the conditions set out in the relevant section(s) of the Act. This judicial control may be exercised by any judge or panel of judges belonging to the competent court. In the present case the City Court's first - and important -

decision that Mr **Hauschildt** be detained on remand, that of 1 and 2 February 1980, was rendered not by Judge Larsen but by another judge (Mr Dalgas Rasmussen). Where the court proceedings last for several months, as in Mr **Hauschildt's** case, the rule in s.767 of the Act that detention on remand cannot be authorised for more than four weeks necessitates continued decisions on this matter during the trial.

Judgment in Mr **Hauschildt's** case - as in other cases - was passed on the basis of the evidence presented and commented on by both parties at the trials, first before the City Court and later before the High Court. There is no indication whatsoever of any lack of impartiality on the part of the judges involved in Mr **Hauschildt's** case. There was no objective or reasonable subjective ground to fear that either Judge Larsen or the High Court judges could have had any improper motive when passing judgment. There is no indication that any of the judges involved in Mr **Hauschildt's** case was not able - as qualified, professional judges are able - to form his opinion on the basis of the materials presented at the trial and of nothing else. Mr **Hauschildt** has not pointed to any ground for doubting the impartiality of the judges other than their having taken part in various decisions before and during trial, as described in paras 10 et seq. of the European Court's judgment.

For these reasons, Mr **Hauschildt's** complaint that his case was not tried by an impartial tribunal must be rejected. In our opinion, Article 6 of the Convention has not been violated in the present case.

JOINT DISSENTING OPINION OF JUDGES GLCKL AND MATSCHER (Translation)

The majority of the Court rightly considered that - in a system such as that existing in Denmark, where there is no division of responsibilities between investigating judge and trial judge, with all the guarantees inherent in such a division of responsibilities - the mere fact that a trial judge or an appeal-court judge also takes certain pre-trial decisions, in particular concerning detention on remand, is not sufficient in itself to justify apprehensions as to the impartiality of the judge in question.

However, the majority reached the opposite conclusion, and found a violation of Article 6(1) , in this case on the ground that the trial judge and the appeal-court judges took several decisions on the continuation of the applicant's detention on remand and based those decisions specifically on s.762(2) of the Danish Administration of Justice Act, whose application requires a "particularly confirmed suspicion".

It is our view that this fact does not justify the majority's conclusion. In a legal system in which the function of investigating judge does not exist (and its existence is in no way required by the Convention), it naturally falls to the trial judge (or appeal-court judge) to take all the pre-trial measures which call for the intervention of a judge. Indeed it is of course the trial judge (or appeal-court judge) who is the most familiar with the case and who consequently is the best placed to determine the appropriateness of or the necessity for the measures envisaged, even if this assessment requires him to adopt a fairly clear-cut position on the case. This does not mean however that he may be regarded as lacking sufficient impartiality to decide the merits of the case.

Nor do we find the quantitative argument particularly convincing.

In a case involving economic offences of a wide-ranging and extremely complicated

nature, it will inevitably be necessary for the judge to make several interventions in the investigation and, acccordingly, to take a number of decisions concerning the extension of detention on remand.

CONCURRING OPINION OF JUDGE DE MEYER

I fully subscribe to the operative provisions of the judgment and to most of its reasoning. I cannot, however, agree with para 50.

The "pre-trial functions" relating to detention on remand or to solitary confinement which were exercised in the present case by certain judges under ss.760, 762 and 770(3) of the Danish Administration of Justice Act, as applicable at the relevant time, were not essentially different from those which were exercised by the investigating judge in the De Cubber case.

In my view, the mere fact that a trial judge has previously exercised such functions in the case which he has to try, objectively justifies legitimate fears as to his impartiality, and this applies not only to functions exercised under s.762(2), but also to functions exercised under the other provisions just referred to.

***169** Piersack v. Belgium
Series A, No. 53
Application No. 8692/79
(Fair trial)

Before the European Court of Human Rights

ECHR

(The President, Judge Wiarda; Judges Ganshof van der Meersch, Lagergren, Liesch, Gölcüklü, Pinheiro Farinha, Bernhardt )

1 October 1982

The applicant was convicted of murder by a court presided over by a judge who, when senior deputy *procureur* , had been in charge of the department which decided to prosecute the applicant. An appeal to the Belgian *Cour de Cassation* having been unsuccessful, the applicant complained that the trial court had not acted as an independent and impartial tribunal established by law. The Commission unanimously held that the tribunal had not been impartial and referred the case to the Court.
Held, unanimously, by the Court, that the trial court lacked the appearance of impartiality and this was a violation of Article 6(1). The application of Article 50was reserved.

**Fair trial. Independent and impartial tribunal. Public prosecutor acting as judge (Article 6(1)).**

1.
(a) There was no evidence that the trial court was not independent [27].
(b) Impartiality normally denotes actual absence of prejudice or bias on the part of the tribunal or judge, but it may also require that the tribunal should appear objectively to be free from any legitimate doubt in this respect. The mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacked impartiality. If an individual, after holding an office in the public prosecutor's department whose nature is such that he may have to deal with a case in the course of his duties, subsequently sits in the same case as a judge, the impartiality of the tribunal is capable of appearing open to doubt. This constituted a violation of Article 6(1). [30-31]
2. **Tribunal established by Law. Judicial impartiality (Article 6(1)).**
The Court found it unnecessary to consider whether a court which lacks the appearance of impartiality could be a tribunal established by law. [33]

**Representation**

J. Niset, Legal Adviser, Ministry of Justice (Agent);
Miss Anne de Bluts, Advocate (Counsel) for the Government;
G. Tenekides, Delegate, and M. Lancaster , the applicant's lawyer, for the Commission.
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The following cases are referred to in the judgment:
1. Delcourt v. Belgium (1970) Series A, No. 11; 1 E.H.R.R. 355.
2. Le Compte, Van Leuven and de Meyere v. Belgium (1981) Series A, No. 43; 4 E.H.R.R. 1.
3. Winterwerp v. Netherlands(1979) Series A, No. 33; 2 E.H.R.R. 387.
4. X v. United Kingdom(1981) Series A, No. 46; 4 E.H.R.R. 188.

**The Facts**

## I. THE PARTICULAR FACTS OF THE CASE

7. The applicant, a Belgian national born in 1948, is a gunsmith. He is in the process of serving in Mons prison a sentence of 18 years' hard labour imposed on him on 10 November 1978 by the Brabant Assize Court for murder.
8. During the night of 22-23 April 1976, two Frenchmen, Mr. Gilles Gros and Mr. Michel Dulon, were killed by revolver shots in Brussels whilst they were in a motor-car with Mr. Piersack, Mr. Constantinos Kavadias (against whom proceedings were subsequently discontinued) and a Portuguese national, Mr. Joao Tadeo Santos de Sousa Gravo.

*A. From the opening of proceedings until reference of the case to the Court of Cassation*

9. On 9 July 1976, Mr. Preuveneers, an investigating judge at the Brussels Court of First Instance, issued a warrant for the arrest of the applicant, who was suspected of having caused both deaths. He was in France at the time, but was arrested by the French authorities who, after agreeing to grant his extradition, handed him over to the Belgian police (*gendarmerie*) on 13 January 1977. The Courtrai *procureur du Roi* (public prosecutor) so informed his colleague in Brussels by a letter of the same date. Mr. Pierre Van de Walle, a senior deputy *procureur*, initialled the letter and forwarded it to the official in the public prosecutor's department (*parquet*) who was dealing with the case, Mrs. del Carril. She transmitted it to Mr. Preuveneers with a covering note (*apostille* ) dated 17 January.
10. On 4 February 1977, the investigating judge wrote to the Brussels *procureur du Roi*to enquire whether, as regards the co-accused Santos de Sousa, the public prosecutor's department intended to report the facts to the Portuguese authorities, those authorities apparently being no longer willing to grant his extradition. On his covering note, the judge added in manuscript, between brackets, the words 'for the attention of Mr. P. Van de Walle'. Mrs. del Carril replied to Mr. Preuveneers on 9 February 1977.
11. On 20 June, the *procureur général* (State prosecutor) attached to the Brussels Court of Appeal sent to the *procureur du Roi* the results of letters rogatory executed in Portugal concerning Mr. Santos de Sousa. After initialling the covering note, Mr. Van de ***171** Walle forwarded it to Mr. De Nauw, the deputy who had taken over from Mrs. del Carril in dealing with the case; Mr. De Nauw transmitted the note to the investigating judge on 22 June.
12. On 13 December 1977, Mr. Van de Walle took his oath as a judge of the Brussels Court of Appeal, to which office he had been appointed on 18 November. Most of the investigations had been completed by that time, although some further formal steps were taken at a later date.
13. On 12 May 1978, the deputy, Mr. De Nauw, signed an application for an arrest warrant (*réquisitoire de prise de corps*); prior to that, in a report of 45 pages, he had referred the matter to the *procureur général* attached to the Court of Appeal, who had replied on 11 May. By judgment of 16 June, the Indictments Chamber (*Chambre des mises en accusation*) of the Brussels Court of Appeal remitted the applicant for trial before the Brabant Assize Court on charges of voluntary and premeditated manslaughter of Mr. Gros and Mr. Dulon. The *procureur général* drew up the formal indictment on 27 June.
14. The trial took place from 6 to 10 November 1978 before the Assize Court which was presided over by Mr. Van de Walle. After the court had heard, amongst others, numerous prosecution and defence witnesses, the 12 members of the jury withdrew to consider their verdict. Mr. Piersack had maintained throughout that he was innocent. On the third question put to them, concerning the 'principal count', they arrived at a verdict of guilty, but only by seven votes to five. After deliberating on that question in private, the President and the two other judges (*assesseurs*) declared that they agreed with the

majority.
In the final event, the Assize Court convicted the applicant of the murder of Mr. Dulon and acquitted him as regards the other charges; it accepted that there were mitigating circumstances and sentenced him on 10 November 1978 to 18 years' hard labour. It also recorded that on account of his nationality it had not been possible to obtain the extradition to Belgium of Mr. Santos de Sousa, who had been arrested in Portugal.
15. The applicant then appealed on points of law to the Court of Cassation. His sixth ground of appeal, the only ground that is relevant in the present case, was that there had been a violation of Article 127 of the Judicial Code, which provides that 'proceedings before an assize court shall be null and void if they have been presided over by a judicial officer who has acted in the case as public prosecutor (*ministère public*) ...'. He contended that the words 'for the attention of Mr. P. Van de Walle'appearing in manuscript on the covering note of 4 February 1977 (see paragraph 10 above) showed that Mr. Van de Walle, and not some other judicial officer in the public prosecutor's department, had been dealing with the matter at the relevant time and had, accordingly, taken some part or other in the investigation of the case. Mr. Piersack made no ***172*** mention of the letter of 13 January and the note of 20 June 1977 (see paragraphs 9 and 11 above), since at that stage neither he nor his lawyer had identified the author of the initials marked thereon; the Government on their own initiative supplied this information to the Commission in their written observations of March 1980 on the admissibility of the application.

*B. Submissions of the public prosecutor's department attached to the Court of Cassation*

16. In his submissions, Mr. Velu, an *avocat général*, retraced developments in the relevant Belgian legislation and judicial decisions, distinguishing between three periods:
(a) Before 1955, although there were no written rules on the subject, the Court of Cassation had delivered eight judgments in which it had been held that a judicial officer who had acted as public prosecutor in criminal proceedings could not thereafter sit in the case as a judge and, in particular, on the assize court bench. The Court of Cassation founded this prohibition on a general and absolute principle that was said to derive from the very nature of the functions. The *avocat général* summarised the judgments as follows:
It is of little moment--that the judicial officer in the public prosecutor's department intervened in the case only occasionally or by chance ...;
-- that his intervention did not implicate one or more of the accused by name;
-- that his intervention did not involve a formal step in the process of investigation. It suffices that the judicial officer in the public prosecutor's department personally played some part in the conduct of the prosecution in the case in question.
There is incompatibility as soon as the judicial officer, during the course of the prosecution, has personally intervened in the case in the capacity of member of the public prosecutor's department.
(b) The second period (1955-1968), during which the Court of Cassation apparently did not have occasion to rule on the problem of incompatibility between the functions of public prosecutor and the functions of judge, was marked by two new factors: the incorporation of the Convention into the Belgian domestic legal system and the developments in domestic case-law with regard to the general principle of law whereby cases must be impartially examined by the court.
The litigant's right to 'an impartial tribunal' , within the meaning of Article 6(1) of the Convention, could imply either that a judge was simply obliged to withdraw if he were at all biased as regards the case or, alternatively, that he was under the more extensive duty of withdrawing whenever there was a legitimate reason to doubt whether he offered the requisite guarantees of impartiality. The *avocat général* rejected the first interpretation, which he described as 'restrictive', in favour of the second, the 'extensive', interpretation; he relied notably on ***173*** Article 31 of the Vienna Convention on the Law of Treaties (account to be taken of the object and purpose) and on the Delcourtjudgment.

[FN1] As regards the general principle of law whereby cases must be impartially examined by the court, he also referred to judgments of the Belgian Court of Cassation and the Belgian *Conseil d'Etat*. In addition, he cited the following passage from an inaugural address of 1 September 1970 to the Court of Cassation: 'any judge whose impartiality may legitimately give rise to doubts must refrain from taking part in the decision'.

FN1 Delcourt v. Belgium(1970) 1 E.H.R.R. 355, para. 25 *in fine*.

(c) The third period saw the entry into force of Articles 127 and 292 of the Judicial Code [FN2] and the application by the Court of Cassation of the second of these Articles to cases where a decision had been given by a judge who had previously acted as a member of the public prosecutor's department. According to the *avocat général*, the five judgments that he listed followed the same approach as those delivered in the first period and established that:
(i) notwithstanding Article 292 of the Judicial Code, the general principle of law whereby cases must be impartially examined by the court had retained its full force;
(ii) for the purposes of that Article, the expression 'dealing with a case in the exercise of the functions of public prosecutor' signified intervening therein in the capacity of prosecuting party;
(iii) there could not be said to have been such an intervention if, in the case concerned, a judicial officer in the public prosecutor's department had simply
-- appeared at a hearing at which the court did no more than adopt a purely procedural measure; or
-- taken some step which was manifestly without effect on the conduct of the prosecution.

FN2 See para. 22 *infra*.

In the light of the foregoing, the *avocat général* concluded that the Court of Cassation should 'set aside the judgment under appeal ... whether on the sixth ground adduced by the appellant or on the ground, to be taken into consideration by the Court of its own motion, of violation either of Article 6(1)of the Convention ... or of the general principle of law whereby cases must be impartially examined by the court'.
The *avocat général*stressed that the covering note of 4 February 1977 emanated from the investigating judge, the person who quite naturally was best informed not only as to the background to the case but also as to the identity of the judicial officer or officers in the public prosecutor's department who were dealing with the prosecution. And Mr. Preuveneers had added to the covering note, in manuscript, the words 'for the attention of Mr. P. Van de Walle', thereby indicating the specific addressee for whom the note was personally intended: ***174**
If the investigating judge marked this covering note as being for Mr. P. Van de Walle's attention, it is logical to suppose that he knew that that judicial officer had personally played some part or other in the conduct of the prosecution.
What other reasonable explanation can be given for such a course of action ... which surely would not have been taken unless the two officers had been in contact regarding the investigation of the case? It is of little moment that other judicial officers in the public prosecutor's department intervened in the case, for example to follow up the investigating judge's covering note, or that Mr. Van de Walle intervened only by chance or occasionally, or that such intervention has not been shown to have implicated the appellant or a co-accused by name or ... to have involved a formal step in the process of investigation.
Finally, there would be no reasonable explanation for the handwritten words ... if Mr. Van de Walle's intervention in the case had until then been limited to steps that were purely routine or ... were manifestly without effect on the conduct of the prosecution.
Even if the Court of Cassation were not to allow the appeal on the sixth ground, which

was based on Article 127 of the Judicial Code, the circumstances described above were, in the opinion of the *avocat général*, Mr. Velu, sufficient to give rise to legitimate doubts as to whether the President of the Assize Court had offered the guarantees of impartiality required both by Article 6(1) of the Convention and by the general principle whereby cases must be impartially examined by the court.

*C. Judgment of the Court of Cassation*

17. The Court of Cassation dismissed the appeal on 21 February 1979.
As regards the sixth ground of appeal, the Court of Cassation observed firstly that the mere despatch of the covering note of 4 February 1977 did not necessarily show that Mr. Van de Walle had 'acted in the case as public prosecutor', within the meaning of Article 127 of the Judicial Code.
The Court of Cassation also took into consideration of its own motion Article 6(1) of the Convention and the general principle of law establishing the right to the impartiality of the court. It was true that both of these norms obliged a judge to refrain from taking part in the decision if there were a legitimate reason to doubt whether he offered the guarantees of impartiality to which every accused person was entitled. However, the Court held that the documents which it could take into account did not reveal that after the public prosecutor's department had received the covering note mentioned in the ground of appeal, Mr. Van de Walle, who was then a senior deputy to the Brussels *procureur du Roi*, had taken any decision or intervened in any manner whatsoever in the conduct of the prosecution relating to the facts in question. Admittedly, for a judge's impartiality to be regarded as compromised on account of his previous intervention in the capacity of judicial officer in the public prosecutor's department, it was not essential that such intervention should have ***175** consisted of adopting a personal standpoint in the matter or taking a specific step in the process of prosecution or investigation. Nevertheless, it could not be assumed that a judicial officer in the public prosecutor's department had intervened in a case in or on the occasion of the exercise of his functions as such an officer merely because there was a covering note which had been addressed to him personally by the investigating judge but which had not been shown by any evidence to have been received by the officer or to have caused him to take even an indirect interest in the case. In this connection, the Court of Cassation noted finally that it was not the senior deputy Van de Walle who had replied to the covering note.

## II. THE RELEVANT LEGISLATION AND PRACTICE

*A. The Public Prosecutor's Department (Ministère Public)*

18. In criminal matters, the public prosecutor's department 'conducts prosecutions in the manner specified by law'. [FN3] In that capacity, it investigates, and institutes proceedings in respect of, offences and then, if appropriate, appears at the trial in order to argue the case for the prosecution.

FN3 Art. 138, first para. of the Judicial Code.

All the judicial officers in the public prosecutor's department form a hierarchical body which is generally recognised as being characterised by unity, indivisibility and independence.
In addition to the departments of the *procureur général* at the Court of Cassation and of the *procureurs généraux* at the Courts of Appeal, there is a *procureur du Roi* for each district; subject to the supervision and directions of the *procureur général* attached to the Court of Appeal, a *procureur du Roi* acts as public prosecutor before the District Courts, the Courts of First Instance, the Commercial Courts and the District Police Courts (Article 150 of the Judicial Code). He is aided by one or more deputies who are subject to his personal supervision and directions, including one or more senior deputies appointed by

Royal Decree who assist him in the management of the public prosecutor's department. [FN4]

FN4 Art. 151 of the Judicial Code.

19. In the Brussels public prosecutor's department, there are several dozen judicial officers all of whom are answerable to the *procureur du Roi*. The department is divided into sections, with a senior deputy at the head of each section. As a strict matter of law, the individual deputies come under the sole authority of the *procureur du Roi* who himself comes under the authority of the *procureur général*attached to the Court of Appeal, but in practice a senior deputy exercises certain administrative powers over the deputies. In particular, he revises their written submissions to the courts, discusses with them the approach to be adopted in a specific case and, if the occasion arises, gives them advice on points of law.
***176** One of the above-mentioned sections--section B--deals with indictable and non-indictable offences (*crimes et délits* ) against the person. Mr. P. Van de Walle was the head of this section during the period in question, until his appointment to the Brussels Court of Appeal. [FN5]According to the Government, the *procureur du Roi* regarded himself at that time as personally responsible for cases--like Mr. Piersack's--involving an indictable offence, the number whereof was actually fairly small; he worked on those cases directly with the deputy in charge of the file--on this occasion, Mrs. del Carril and then Mr. De Nauw--rather than through the intermediary of the senior deputy whose principal role was to countersign documents, if not to act as a 'letter-box'. The applicant contested this version of the facts, maintaining that the Government were giving an exaggerated view of the 'autonomy' enjoyed by the deputies *vis- à-vis* the senior deputies.

FN5 See para. 12 *supra.*

*B. Assize Courts*

20. Under Article 98 of the Belgian Constitution, a jury has to be constituted in all cases involving an indictable offence. Assizes are held, as a rule at the chief town in each province, in order to try accused persons remitted for trial there by the Court of Appeal. [FN6]

FN6 Arts. 114 to 116 of the Judicial Code and Art. 231 of the Code of Criminal Procedure.

Each assize court is composed of a President and two other judges (*assesseurs*); for criminal matters, it sits with a jury of 12 members. [FN7]

FN7 Arts. 119 to 124 of the Judicial Code.

The President's duties include directing the jurors in the exercise of their functions, summing-up the case on which they have to deliberate, presiding over the whole of the procedure and determining the order in which those wishing to do so shall address the court; he also keeps order in court. [FN8] He is entitled by law to take, at his discretion and on his own initiative, any steps which he may consider expedient for the purpose of establishing the truth, and he is bound in honour and conscience to make every effort to that end, for example by ordering of his own motion the attendance of witnesses or the production of documents. [FN9]

FN8 Art. 267 of the Code of Criminal Procedure.

FN9 Arts. 268 and 269.

21. After closing the hearings [FN10]the President puts to the jury the questions arising from the indictment and hands the text of those questions to the foreman of the jury. [FN11] The jurors then retire to their room to deliberate together, in the absence of the President and the other judges; they may return only when they have arrived at their verdict. [FN12]

FN10 Art. 335 ***177** , last paragraph of the Code of Criminal Procedure.

FN11 Arts. 337 to 342.

FN12 Arts. 342 and 343.

To be valid, the jury's verdict must be adopted by a majority for or against the accused; if the voting is equal, he is acquitted. [FN13] However, if he is found guilty on the principal count by no more than the simple majority of seven votes to five--as was the case for Mr. Piersack [FN14]--the President and the two other judges deliberate together on the same question; if a majority of them does not agree with the majority of the jury, the accused is acquitted. [FN15] If there is a finding of guilt, the judges retire with the jurors to the jury-room and they deliberate as a single body, under the chairmanship of the President of the Court, on the sentence to be imposed in accordance with the criminal law; the decision is taken by an absolute majority. [FN16]

FN13 Art. 347.

FN14 See para. 14 *supra.*

FN15 Art. 351.

FN16 Art. 364.

*C. Incompatibilities*

22. Article 292 of the 1967 Judicial Code prohibits the concurrent exercise of different judicial functions, except where otherwise provided by law; it lays down that 'any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function' shall be null and void. Article 127 specifies that 'proceedings before an assize court shall be null and void if they have been presided over by a judicial officer who has acted in the case as ... public prosecutor (*ministère public*) or has delivered rulings on the conduct of the investigations' .

**PROCEEDINGS BEFORE THE COMMISSION**

23. In his application of 15 March 1979 to the Commission [FN17]Mr. Piersack claimed to have been the victim of a violation of Article 6(1) of the Convention; he contended that he had not received a hearing by 'an independent and impartial tribunal established by law', since Mr. Van de Walle, the President of the Assize Court which convicted him, had allegedly dealt with the case at an earlier stage in the capacity of a senior deputy to the *procureur du Roi*.

FN17 App. No. 8692/79.

24. The Commission declared the application admissible on 15 July 1980. In its report of 13 May 1981, [FN18] the Commission expressed the unanimous opinion that there had been a breach of one of the requirements of Article 6(1), namely that the tribunal be impartial.

FN18 Art. 31 of the Convention.

The report contains one separate, concurring opinion.

**FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT**

25. At the hearings, the Government requested the Court 'to hold that there has been no violation of Article 6(1) of the Convention in the present case'.

***178* JUDGMENT**

[FN19]

FN19 Drawn up in French and English, the French text being authentic.

**I. THE ALLEGED VIOLATION OF ARTICLE 6(1)**

26. Under Article 6(1) of the Convention,
In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ...

*1. 'Independent Tribunal'*

27. According to the applicant, the court by which he was convicted on 10 November 1978 was not an 'independent tribunal'. This assertion, for which he adduced no supporting evidence, does not stand up to examination. Under the Constitution [FN20] and by statute, the three judges of whom Belgian assize courts are composed enjoy extensive guarantees designed to shield them from outside pressures, and the same purpose underlies certain of the strict rules governing the nomination of members of juries. [FN21]

FN20 Arts. 99-100.

FN21 Arts. 217-253.

*2. 'Impartial Tribunal'*

28. Mr. Van de Walle, the judge who presided over the Brabant Assize Court in the instant case, had previously served as a senior deputy to the Brussels *procureur du Roi*; until his appointment to the Court of Appeal, he was the head of section B of the Brussels public prosecutor's department, this being the section dealing with indictable and non-indictable offences against the person and, therefore, the very section to which Mr. Piersack's case was referred. [FN22]

FN22 See paras. 9, 12, 14 and 19 *supra.*

29. On the strength of this fact the applicant argued that his case had not been heard by an 'impartial tribunal': in his view, 'if one has dealt with a matter as public prosecutor for a year and a half, one cannot but be prejudiced'.
According to the Government, at the relevant time it was the *procureur du Roi* himself, and not the senior deputy, Mr. Van de Walle, who handled cases involving an indictable offence; they maintained that each of the deputies--on this occasion, Mrs. del Carril and then Mr. De Nauw--reported to the *procureur* on such cases directly and not through Mr. Van de Walle, the latter's role being principally an administrative one that was unconnected with the conduct of the prosecution and consisted, *inter alia*, of initialling numerous documents, such as the covering notes of 13 January and 20 June 1977.

[FN23] As regards the covering note of 4 February 1977, [FN24] the investigating judge, Mr. Preuveneers, was said to have written ***179*** thereon the words 'for the attention of Mr. P. Van de Walle' solely because he knew that Mrs. del Carril was frequently on sick-leave. In addition, so the Government stated, there was no evidence to show that Mr. Van de Walle had received that note and, in any event, it was not he but Mrs. del Carril who had replied to Mr. Preuveneers.

FN23 See paras. 9, 11 and 19 *supra.*

FN24 See para. 10 *supra.*

30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6(1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.
(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary. [FN25]

FN25 See Le Compte, Van Leuven and de Meyere v. Belgium(1981) 4 E.H.R.R. 1, para. 58.

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance. [FN26]As the Belgian Court of Cassation observed in its judgment of 21 February 1979, [FN27]any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.

FN26 See Delcourt v. Belgium(1970) 1 E.H.R.R. 355, para. 31.

FN27 See para. 17 *supra.*

(b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the Court concurs with the Government on this point.
(c) The Belgian Court of Cassation, which took Article 6(1) into consideration of its own motion, adopted in this case a criterion based on the functions exercised, namely whether the judge had previously intervened 'in the case in or on the occasion of the ***180*** exercise of ... functions as a judicial officer in the public prosecutor's department'. It dismissed Mr. Piersack's appeal on points of law because the documents before it did not, in its view, show that there had been any such intervention on the part of Mr. Van de Walle in the capacity of senior deputy to the Brussels *procureur du Roi,* even in some form other than the adoption of a personal standpoint or the taking of a specific step in the process of prosecution or investigation. [FN28]

FN28 See para. 17 *supra.*

(d) Even when clarified in the manner just mentioned, a criterion of this kind does not fully meet the requirements of Article 6(1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.
31. This was what occurred in the present case. In November 1978, Mr. Van de Walle presided over the Brabant Assize Court before which the Indictments Chamber of the Brussels Court of Appeal had remitted the applicant for trial. In that capacity, he enjoyed during the hearings and the deliberations extensive powers to which, moreover, he was led to have recourse, for example the discretionary power conferred by Article 268 of the Judicial Code and the power of deciding, with the other judges, on the guilt of the accused should the jury arrive at a verdict of guilty by no more than a simple majority. [FN29]

FN29 See paras. 13, 14, 20, 21 *supra.*

Yet previously and until November 1977, Mr. Van de Walle had been the head of section B of the Brussels public prosecutor's department, which was responsible for the prosecution instituted against Mr. Piersack. As the hierarchical superior of the deputies in charge of the file, Mrs. del Carril and then Mr. De Nauw, he had been entitled to revise any written submissions by them to the courts, to discuss with them the approach to be adopted in the case and to give them advice on points of law. [FN30] Besides, the information obtained by the Commission and the Court [FN31] tends to confirm that Mr. Van de Walle did in fact play a certain part in the proceedings.

FN30 See para. 19 *supra.*

FN31 See paras. 9-11 *supra.*

Whether or not Mr. Piersack was, as the Government believe, unaware of all these facts at the relevant time is of little moment. Neither is it necessary to endeavour to gauge the precise extent of the role played by Mr. Van de Walle, by undertaking further enquiries in order to ascertain, for example, whether or not he received the covering note of 4 February 1977 himself and whether or not he discussed this particular case with Mrs. del Carril and Mr. ***181*** De Nauw. It is sufficient to find that the impartiality of the ' tribunal' which had to determine the merits (in the French text: 'bien- fondé' ) of the charge was capable of appearing open to doubt.
32. In this respect, the Court therefore concludes that there was a violation of Article 6(1).

*3. 'Tribunal Established by Law'*

33. Initially, the applicant also claimed that the Brabant Assize Court was not a 'tribunal established by law', arguing that Mr. Van de Walle's presence on the bench contravened, *inter alia*, Article 127 of the Judicial Code.
In order to resolve this issue, it would have to be determined whether the phrase 'established by law'covers not only the legal basis for the very existence of the 'tribunal'--as to which there can be no dispute on this occasion [FN32]--but also the composition of the bench in each case; if so, whether the European Court can review the manner in which national courts--such as the Belgian Court of Cassation in its judgment of 21 February 1979 [FN33]-- interpret and apply on this point their domestic law; and, finally,

whether that law should not itself be in conformity with the Convention and notably the requirement of impartiality that appears in Article 6(1). [FN34]

FN32 See Article 98 of the Belgian Constitution.

FN33 See para. 17 *supra.*

FN34 Cf. in the context of Art. 5, Winterwerp v. the Netherlands (1979) 2 E.H.R.R. 387, paras. 45-46 and X v. United Kingdom(1981) 4 E.H.R.R. 188 , para. 41.

In the particular circumstances, it does not prove to be necessary to examine this issue, for in the present case the complaint, although made in a different legal context, coincides in substance with the complaint which has been held in the preceding paragraph to be well-founded; besides, the applicant did not revert to the former complaint either in his written observations of April 1980 on admissibility or during the hearings of 10 December 1980 before the Commission and of 25 March 1982 before the Court.

## II. THE APPLICATION OF ARTICLE 50

34. At the hearings, Mr. Piersack's lawyer stated that his client was seeking under Article 50 of the Convention his immediate release, in accordance with 'arrangements to be discussed', and also financial compensation to be used to meet the fees of his lawyers before the Belgian Court of Cassation (50,000 Bfrs) and in Strasbourg (150,000 Bfrs), subject to deduction of the amount paid by the Council of Europe by way of legal aid (3,500 F).
Counsel for the Government replied that, were the Court to find a violation, publication of the judgment would itself constitute adequate just satisfaction. She added that she was unaware of the authorities' present view on early release of the applicant.
***182** 35. Accordingly, although it was raised under Rule 47 *bis* of the Rules of Court, this question is not ready for decision. The Court must therefore reserve it and fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant.

**Order**

For these reasons, THE COURT unanimously
1. *Holds* that there has been a violation of Article 6(1) of the Convention;
2. *Holds* that the question of the application of Article 50 is not ready for decision; accordingly,
(a) *reserves*the whole of the said question;
(b) *invites*the Commission to submit to the Court, within two months from the delivery of the present judgment, the Commission's written observations on the said question and, in particular, to notify the Court of any friendly settlement at which the Government and the applicant may have arrived;
(c) *reserves*the further procedure and *delegates* to the President of the Chamber power to fix the same if need be.



(1983) 5 E.H.R.R. 169

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*236 **De Cubber** v. Belgium
Application No. 9186/80
Series A, No. 86
(Investigating Judge)

Before the European Court of Human Rights

ECHR

(The President, Judge Wiarda; Judges Ganshof van der Meersch, Bindschedler-Robert, Gölcüklü, Matscher, Sir Vincent Evans, Bernhardt)

26 October 1984

The applicant, a Belgian citizen, was convicted of offences of forgery and uttering forged documents. He complained that the court which convicted him was not an impartial tribunal since one of the judges had previously acted as investigating judge in the same case. The Commission unanimously held that this was a violation of Article 6(1) and referred the case to the Court.
Held, unanimously, that there had been a breach of Article 6(1).

**Criminal proceedings: impartial tribunal.**

1.
(a) Personal impartiality of a judge is to be presumed until there is proof to the contrary. There was no evidence of hostility, or ill-will towards the defendant on the part of the investigating judge. [25]
(b) The presence of the investigating judge as a member of the trial court did give the applicant legitimate grounds for doubting the impartiality of the trial court. His powers and status were in certain respects similar to those of a *procureur du roi*, his preparatory investigation was conducted in secret in the absence of the parties, and unlike the other trial judges he would have a particularly detailed knowledge of the case which might allow him to play a crucial rôle in the trial or give him a preformed opinion. [26-30].
(c) Article 6(1) primarily concerns courts of first instance; even when its guarantees, including impartiality, are provided by Courts of Appeal or Cassation, it does not follow that lower courts do not have to comply with its requirements. There was no justification for reducing those requirements in their application to courts of the classic kind. [31-32]
(d) Although a higher court may in some circumstances make reparation for an initial violation of the Convention, the judgment of the Court of Appeal in the present case did not cure the defective composition of the trial court since it did not quash the first instance proceedings on that ground. [33]
(e) Contracting States are under an obligation to organise their legal systems to ensure compliance with Article 6(1). Impartiality is one of the foremost of those requirements. [34-35] *237

**Representation**

J. Niset, Legal Adviser, Ministry of Justice (Agent); A. De Bluts, Advocate (Counsel), for the Government.
M. Melchior (Delegate) for the Commission.
Mrs. F De Croo-Desguin, Advocate (Counsel), for the applicant.

The following cases are cited in the judgment;
1. Adolf v. Austria; 4 E.H.R.R. 313.

2. Albert and Le Compte v. Belgium (1983); 5 E.H.R.R. 553.
3. Campbell and Fell v. United Kingdom; 7 E.H.R.R. 165.
4. Delcourt v. Belgium; 1 E.H.R.R. 355.
5. Guincho v. Portugal (1985); 7 E.H.R.R. 223.
6. Guzzardi v. Italy; 3 E.H.R.R. 333.
7. Le Compte, Van Leuven and de Meyere v. Belgium; 4 E.H.R.R. 1.
8. Öztürk v. Germany (1984) E.H.R.R. 409.
9. Piersack v. Belgium (1983); 5 E.H.R.R. 169.
10. Sutter v. Switzerland (1984); 6 E.H.R.R. 272.
11. Van Oosterwijck v. Belgium; 3 E.H.R.R. 557.
12. Application No. 7360/76 Zand v. Austria; 15 D. & R. 78.
13. Judgment of 21 February 1979, Belgian Court of Cassation, Pasicrisie I, 750.

**The Facts**

**I. THE PARTICULAR CIRCUMSTANCES OF THE CASE**

7. The applicant is a Belgian citizen born in 1926. He lives in Brussels and is a sales manager.
8. On 4 April 1977, he was arrested by the police at his home and taken to Oudenaarde where he was questioned in connection with a car theft.
Warrants of arrest for forgery and uttering forged documents were issued against the applicant on the following day, on 6 May and on 23 September 1977. The first warrant--notice no. 10,971/76--was issued by Mr. Pilate, an investigating judge at the Oudenaarde criminal court (*tribunal correctionnel*), and the second and third--notices nos. 3136/77 and 6622/77--by Mr. Van Kerkhoven, the other investigating judge at the same court.
9. Prior to that, in the capacity of judge (*juge assesseur*) of the same court sitting either on appeal (judgment of 3 May 1968) or at first instance (judgments of 17 January, 7 March and 28 November 1969), Mr. Pilate had already dealt with criminal proceedings brought against Mr. De Cubber in connection with a number of offences; those proceedings had led variously to an unconditional or conditional discharge (*relaxe*) (17 January and 7 March 1969 respectively) or to conviction.
More recently, Mr. Pilate had had to examine, in his capacity as investigating judge, a criminal complaint filed by Mr. De Cubber (16 November 1973) and, in his capacity as judge dealing with the ***238** attachment of property (*juge des saisies*), certain civil cases concerning him (1974-1976). In regard to each of these cases, the applicant had applied to the Court of Cassation to have the case removed, on the ground of bias (*suspicion légitime*), [FN1] from Mr. Pilate or from the Oudenaarde court as a whole; each of these requests had been held inadmissible or unfounded.

FN1 Art. 648, Judicial Code.

10. At the outset Mr. Van Kerkhoven dealt with cases nos. 3136/77 and 6622/77 but he was on several occasions prevented by illness from attending his chambers. He was replaced, initially on an occasional and temporary basis and, as from October 1977, on a permanent basis, by Mr. Pilate, who retained responsibility for case no. 10,971/76.
11. In case no. 6622/77, a single-judge chamber of the Oudenaarde court (Mr. **De** Wynter) sentenced Mr. **De Cubber** on 11 May 1978 to one year's imprisonment and a fine of 4,000 BFr. He did not appeal against this decision.
12. After preliminary investigations lasting more than two years, a chamber of the court (the *chambre du conseil*) ordered the joinder of cases nos. 10,971/76 and 3136/77 and on 11 May 1979 committed Mr. De Cubber for trial. These cases related to several hundred alleged offences committed by fifteen accused, headed by the applicant; there were no fewer than nineteen persons intervening to claim damages (*parties civiles*).
For the purpose of the trial, the court, which over the years had nine or ten titular

judges, sat as a chamber composed of a president and two judges, including Mr. Pilate. Mr. **De Cubber** stated that he protested orally against the latter's presence, but he did not have recourse to any of the legal remedies open to him for this purpose, such as a formal challenge (*procédure **de** récusation*). [FN2]

FN2 Art. 828, Judicial Code.

After a hearing which lasted two half-days on 8 and 22 June 1979, the court gave judgment on 29 June 1979. Mr. **De Cubber** was acquitted on two counts and convicted on the remainder, note being taken of the fact that he was a recidivist. He was accordingly sentenced, in respect of one matter, to five years' imprisonment and a fine of 60,000 BFr. and, in respect of another, to one year's imprisonment and a fine of 8,000 BFr.; his immediate arrest was ordered.
13. Both the applicant and the public prosecutor's department appealed. On 4 February 1980, the Ghent Court of Appeal reduced the first sentence to three years' imprisonment and a fine of 20,000 BFr. and upheld the second. In addition, it unanimously imposed a third sentence, namely one month's imprisonment and a fiscal fine (*amende fiscale*), for offences which the Oudenaarde court had--wrongly, in the Court of Appeal's view--treated as being linked with others by reason of a single criminal intent.
***239** 14. Mr. De Cubber appealed to the Court of Cassation, raising some ten different points of law. One of his grounds, based on Article 292 of the Judicial Code [FN3] and Article 6(1) of the Convention, was that Mr. Pilate had been both judge and party in the case since after conducting the preliminary investigation he had acted as one of the trial judges.

FN3 Para. 19 below.

The Court of Cassation gave judgment on 15 April 1980. [FN4] It held that this combination of functions violated neither Article 292 of the Judicial Code nor any other legal provision--such as Article 6(1) of the Convention--nor the rights of the defence. On the other hand, the Court of Cassation upheld a plea concerning the confiscation of certain items of evidence and, to this extent, referred the case back to the Antwerp Court of Appeal; the latter court has in the meantime (on 4 November 1981) directed that the items in question be returned. The Court of Cassation also quashed, of its own motion and without referring the case back, the decision under appeal in so far as the appellant had been sentenced to a fiscal fine. The remainder of the appeal was dismissed.

FN4 *Pasicrisie* 1981, I, pp. 1006-1011.

## II. THE RELEVANT LEGISLATION

*A. Status and powers of investigating judges*

15. Investigating judges, who are appointed by the Crown 'from among the judges of the court of first instance', [FN5] conduct the preparatory judicial investigation. [FN6] The object of this procedure is to assemble the evidence and to establish any proof against the accused as well as any circumstances that may tell in his favour, so as to provide the *chambre du conseil* or the *chambre des mises en accusation*, as the case may be, with the material which it needs to decide whether the accused should be committed for trial. The procedure is secret; it is not conducted in the presence of both parties (*non contradictoire*) nor is there any legal representation.

FN5 Art. 79, Judicial Code.

FN6 Arts. 61 *et seq.* of the Code of Criminal Procedure.

The investigating judge also has the status of officer of the criminal investigation police (*police judiciaire*). In this capacity, he is empowered to inquire into serious and lesser offences (*crimes et délits*), to assemble evidence and to receive complaints from any person claiming to have been prejudiced by such offences. [FN7] When so acting, he is placed under the ' supervision of the *procureur général* (State prosecutor)', [FN8] although this does not include a power to give directions. 'In all cases where the suspected offender is deemed to have been caught in the act', the investigating judge ***240** may take 'directly' and in person 'any action which the *procureur du Roi* (public prosecutor) is empowered to take'. [FN9]

FN7 Arts. 8, 9 *in fine* and 63 of the Code of Criminal Procedure.

FN8 Art. 279, Code of Criminal Procedure and Art. 148 of the Judicial Code.

FN9 Art. 59, Code of Criminal Procedure.

16. Save in the latter category of case, the investigating judge can take action only after the matter has been referred to him either by means of a formal request from the *procureur du Roi* for the opening of an inquiry [FN10] or by means of a criminal complaint coupled with a claim for damages (*constitution de partie civile*). [FN11]

FN10 Arts. 47, 54, 60, 61, 64 and 138 of the Code of Criminal Procedure.

FN11 Arts. 63 and 70.

If a court includes several investigating judges, it is for the presiding judge to allocate cases amongst them. In principle, cases are assigned to them in turn, from week to week; however, this is not an inflexible rule and the presiding judge may depart therefrom, for example if the matter is urgent or if a new case has some connection with one that has already been allocated.

17. In order to facilitate the ascertainment of the truth, the investigating judge is invested with wide powers; according to the case law of the Court of Cassation, he may 'take any steps which are not forbidden by law or incompatible with the standing of his office'. [FN12] He can, *inter alia*, summon the accused to appear or issue a warrant for his detention, production before a court or arrest, [FN13] question the accused, hear witnesses, [FN14] confront witnesses with each other, [FN15] visit the scene of the crime, [FN16] visit and search premises, [FN17] take possession of evidence, [FN18] and so on. The investigating judge has to report to the *chambre du conseil* on the cases with which he is dealing [FN19]; he takes, by means of an order, decisions on the expediency of measures requested by the public prosecutor's department, such orders being subject to an appeal to the *chambre des mises en accusation* of the Court of Appeal.

FN12 Judgment of 2 May 1960, *Pasicrisie* 1960, I, p. 1020.

FN13 Arts. 91 *et seq.* of Code of Criminal Procedure.

FN14 Arts. 71 to 86 and 92 of the same Code.

FN15 Art. 942 of the Judicial Code.

FN16 Art. 62, Code of Criminal Procedure.

FN17 Arts. 87 and 88 of the same Code.

FN18 Art. 89.

FN19 Art. 127.

18. When the investigation is completed, the investigating judge transmits the case file to the *procureur du Roi*, who will return it to him with his submissions. [FN20]

FN20 Art. 61, first para.

It is then for the *chambre du conseil*, which is composed of a single judge belonging to the court of first instance, [FN21] to decide--unless it considers it should order further inquiries--whether to discharge the accused (*non- lieu*), [FN22] to commit him for trial before a district court (*tribunal de police*) [FN23] or a criminal court (*tribunal* ***241** *correctionnel*) [FN24] or to send the papers to the *procureur général* attached to the Court of Appeal, [FN25] depending upon the circumstances.

FN21 Acts of 25 October 1919, 26 July 1927 and 18 August 1928.

FN22 Art. 128 of the Code of Criminal Procedure.

FN23 Art. 129.

FN24 Art. 130.

FN25 Art. 133.

Unlike his French counterpart, the Belgian investigating judge is thus never empowered to refer a case to the trial court himself. Before taking its decision, the *chambre du conseil*--which sits *in camera*--will hear the investigating judge's report. This report will take the form of an oral account of the state of the investigations; the investigating judge will express no opinion therein as to the accused's guilt, it being for the public prosecutor's department to deliver concluding submissions calling for one decision or another.

*B. Investigating judges and incompatibilities*

19. Article 292 of the 1967 Judicial Code prohibits 'the concurrent exercise of different judicial functions ... except where otherwise provided by law'; it lays down that 'any decision given by a judge who has previously dealt with the case in the exercise of some other judicial function' shall be null and void.
This rule applies to investigating judges, amongst others. Article 127 specifies that 'proceedings before an assize court shall be null and void if the presiding judge or another judge sitting is a judicial officer who has acted in the case as investigating judge ...'.
Neither can an investigating judge sit as an appeal court judge, for otherwise he would have 'to review on appeal, and thus as last instance trial judge, the legality of investigation measures ... which [he] had taken or ordered at first instance'. [FN26]

FN26 Court of Cassation, 18 March 1981, *Pasicrisie* 1981, I, p. 770 and *Revue de droit pénal et de criminologie* 1981, pp. 703-719.

20. On the other hand, under the third paragraph of Article 79 of the Judicial Code, as amended by an an Act of 30 June 1976, 'investigating judges may continue to sit, in accordance with their seniority, to try cases brought before a court of first instance'. According to the drafting history and decided case law on this provision, it is immaterial that the cases are ones previously investigated by the judges in question: they would in that event be exercising, not 'some other judicial function' within the meaning of Article 292, but rather the same function of judge on the court of first instance; it would be only

their assignment that had changed. [FN27]

FN27 Parliamentary Documents, House of Representatives, No. 59/49 of 1 June 1967; Court of Cassation, 8 February 1977, *Pasicrisie* 1977, I, pp. 622-623; Court of Cassation judgment of 15 April 1980 in the present case, see para. 14 above.

In the case of Blaise, the Court of Cassation confirmed this line of authority in its judgment of 4 April 1984, which followed the submissions presented by the public prosecutor's department. After dismissing various arguments grounded on general principles of law, the Court of Cassation rejected the argument put forward by the appellant on the basis of Article 6(1) of the Convention: ***242**
However, as regards the application of Article 6(1) ..., when a case requires a determination of civil rights and obligations or of a criminal charge, the authority hearing the case at first instance and the procedure followed by that authority do not necessarily have to satisfy the conditions laid down by the abovementioned provision, provided that the party concerned or the accused is able to lodge an appeal against the decision affecting him taken by that authority with a court which does offer all the guarantees stipulated by Article 6(1) and has competence to review all questions of fact and of law.
In the present case, the appellant does not maintain that the Court of Appeal which convicted him did not offer those guarantees ...
In any event, the principles and the rule relied on in the ground of appeal do not have the scope therein suggested; From the sole fact that a trial judge inquired into the case as an investigating judge it cannot be inferred that the accused's right to an impartial court has been violated. It cannot legitimately be feared that the said judge does not offer the guarantees of impartiality to which every accused is entitled. The investigating judge is not a party adverse to the accused, but a judge of the court of first instance with the responsibility of assembling in an impartial manner evidence in favour of as well as against the accused.
....

**PROCEEDINGS BEFORE THE COMMISSION**

21. In his application of 10 October 1980 to the Commission, [FN28] Mr. De Cubber raised again several of the pleas which he had unsuccessfully made to the Belgian Court of Cassation. He alleged, *inter alia*, that the Oudenaarde criminal court had not constituted an impartial tribunal, within the meaning of Article 6(1) of the Convention, since one of the judges, Mr. Pilate, had previously acted as investigating judge in the same case.

FN28 No. 9186/80.

22. On 9 March 1982, the Commission declared the application admissible as regards this complaint and inadmissible as regards the remainder. In its report of 5 July 1983, [FN29] the Commission expressed the unanimous opinion that there had been a violation of Article 6(1) on the point in question. The full text of the Commission's opinion is reproduced as an annex to the present judgment.

FN29 See paras. 8, 10 and 12 above.

**JUDGMENT**

**I. ALLEGED VIOLATION OF ARTICLE 6(1)**

23. Under Article 6(1),
In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an ... impartial tribunal. ...

One of the three judges of the Oudenaarde criminal court who, on 29 June 1979, had given judgment on the charges against the applicant had previously acted as investigating judge in the two cases in question: in one case he had done so from the outset and ***243** in the other he had replaced a colleague, at first on a temporary and then on a permanent basis. [FN30] On the strength of this, Mr. De Cubber contended that he had not received a hearing by an ' impartial tribunal'; his argument was, in substance, upheld by the Commission.

FN30 See paras. 8, 10 and 12 above.

The Government disagreed. They submitted:
-- as their principal plea, that Mr. Pilate's inclusion amongst the members of the trial court had not adversely affected the impartiality of that court and had therefore not violated Article 6(1);
-- in the alternative, that only the Ghent Court of Appeal, whose impartiality had not been disputed, had to satisfy the requirements of that Article;
-- in the further alternative, that a finding of violation would entail serious consequences for courts, such as the Oudenaarde criminal court, with 'limited staff'.

*A. The Government's principal plea*

24. In its Piersack judgment of 1 October 1982, the Court specified that impartiality can 'be tested in various ways': a distinction should be drawn ' between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect'. [FN31]

FN31 5 E.H.R.R. 169, para. 30.

25. As to the subjective approach, the applicant alleged before the Commission that Mr. Pilate had for years shown himself somewhat relentless in regard to his affairs, [FN32] but his lawyer did not maintain this line of argument before the Court; the Commission, for its part, rejected the Government's criticism that it had made a subjective analysis. [FN33]

FN32 See paras. 45-47 of the Commission's Report.

FN33 See paras. 63, 68-69 and 72-73 of the Report; verbatim record of the hearings held on 23 May 1984.

However this may be, the personal impartiality of a judge is to be presumed until there is proof to the contrary, [FN34] and in the present case no such proof is to be found in the evidence adduced before the Court. In particular, there is nothing to indicate that in previous cases Mr. Pilate had displayed any hostility or ill-will towards Mr. De Cubber [FN35] or that he had 'finally arranged', for reasons extraneous to the normal rules governing the allocation of cases, to have assigned to him each of the three preliminary investigations opened in respect of the applicant in 1977. [FN36]

FN34 *Ibid.*

FN35 See para. 9 above.

FN36 See paras. 8, 10 and 16 above; para. 46 of the Commission's Report.

***244** 26. However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and

to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the Delcourt judgment of 17 January 1970, [FN37] 'justice must not only be done: it must also be seen to be done'. As the Belgian Court of Cassation has observed, [FN38] any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. [FN39]

FN37 1 E.H.R.R. 355, para. 31.

FN38 21 February 1979, *Pasicrisie* 1979, I, p. 750.

FN39 See Piersack v. Belgium(1982) 5 E.H.R.R. 169, para. 30.

27. Application of these principles led the European Court, in its Piersack judgment, to find a violation of Article 6(1): it considered that where an assize court had been presided over by a judge who had previously acted as head of the very section of the Brussels public prosecutor's department which had been responsible for dealing with the accused's case, the impartiality of the court 'was capable of appearing open to doubt'. Despite some similarities between the two cases, the Court is faced in the present proceedings with a different legal situation, namely the successive exercise of the functions of investigating judge and trial judge by one and the same person in one and the same case. [FN40]

FN40 *Ibid.* pp. 15-16, para. 31.

28. The Government put forward a series of arguments to show that this combination of functions, which was unquestionably compatible with the Judicial Code as construed in the light of its drafting history, [FN41] was also reconcilable with the Convention. They pointed out that in Belgium an investigating judge is fully independent in the performance of his duties; that unlike the judicial officers in the public prosecutor's department, whose submissions are not binding on him, he does not have the status of a party to criminal proceedings and is not 'an instrument of the prosecution'; that 'the object of his activity' is not, despite Mr. **De Cubber's** allegations, 'to establish the guilt of the person he believes to be guilty', [FN42] but to ' assemble in an impartial manner evidence in favour of as well as against the accused', whilst maintaining 'a just balance between prosecution and defence', since he 'never ceases to be a judge'; that he does not take the decision whether to commit the accused for trial--he merely presents to the *chambre du conseil*, of which he is not a member, objective reports describing the progress and state of the preliminary investigations, without expressing any opinion of his own, even assuming he has formed one. [FN43]

FN41 See para. 20, first sub-para., above.

FN42 See para. 44 of the Commission's Report.

FN43 See paras. 52-54 of the Commission's Report and the verbatim record of the hearings held on 23 May 1984.

***245** 29. This reasoning no doubt reflects several aspects of the reality of the situation [FN44] and the Court recognises its cogency. Nonetheless, it is not in itself decisive and there are various other factors telling in favour of the opposite conclusion.

FN44 See paras. 15, first sub-para., 17 *in fine* and 18 above.

To begin with, a close examination of the statutory texts shows the distinction between

judicial officers in the public prosecutor's department and investigating judges to be less clear-cut than initially appears. An investigating judge, like 'procureurs du Roi and their deputies', has the status of officer of the criminal investigation police and, as such, is 'placed under the supervision of the *procureur général*'; furthermore, 'an investigating judge' may, in cases 'where the suspected offender is deemed to have been caught in the act', 'take directly' and in person 'any action which the *procureur du Roi* is empowered to take' [FN45] (see paragraph 15, second sub-paragraph, above). [FN46]

FN45 See para. 15, second sub-para. above.

FN46 See para. 17 above.

In addition to this, as an investigating judge he has very wide-ranging powers: he can 'take any steps which are not forbidden by law or incompatible with the standing of his office'. Save as regards the warrant of arrest issued against the applicant on 5 April 1977, the Court has only limited information as to the measures taken by Mr. Pilate in the circumstances, but, to judge by the complexity of the case and the duration of the preparatory investigation, they must have been quite extensive. [FN47]

FN47 See paras. 8 and 12 above.

That is not all. Under Belgian law the preparatory investigation, which is inquisitorial in nature, is secret and is not conducted in the presence of both parties; in this respect it differs from the procedure of investigation followed at the hearing before the trial court, which, in the instant case, took place on 8 and 22 June 1979 before the Oudenaarde court. [FN48] One can accordingly understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the preparatory investigation, albeit with questions dictated by a concern to ascertain the truth.

FN48 See paras. 12 and 15 above.

Furthermore, through the various means of inquiry which he will have utilised at the investigation stage, the judge in question, unlike his colleagues, will already have acquired well before the hearing a particularly detailed knowledge of the--sometimes voluminous--file or files which he has assembled. Consequently, it is quite conceivable that he might, in the eyes of the accused, appear, firstly, to be in a position enabling him to play a crucial role in the trial court and, secondly, even to have a pre-formed ***246** opinion which is liable to weigh heavily in the balance at the moment of the decision. In addition, the criminal court (*tribunal correctionnel*) may, like the Court of Appeal, [FN49] have to review the lawfulness of measures taken or ordered by the investigating judge. The accused may view with some alarm the prospect of the investigating judge being actively involved in this process of review.

FN49 See para. 19 *in fine* above.

Finally, the Court notes that a judicial officer who has 'acted in the case as investigating judge' may not, under the terms of Article 127 of the Judicial Code, preside over or participate as judge in proceedings before an assize court; nor, as the Court of Cassation has held, may he sit as an appeal court judge. [FN50] Belgian lawmakers and case law have thereby manifested their concern to make assize courts and appeal courts free of any legitimate suspicion of partiality. However, similar considerations apply to courts of first instance.

FN50 See para. 19 above.

30. In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, [FN51] it recognises, having regard to the various factors discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. Without underestimating the force of the Government's arguments and without adopting a subjective approach, [FN52] the Court recalls that a restrictive interpretation of Article 6(1)--notably in regard to observance of the fundamental principle of the impartiality of the courts--would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a domocratic society within the meaning of the Convention. [FN53]

FN51 See para. 25 above.

FN52 See paras. 25 and 28 above.

FN53 See Delcourt v. Belgium(1970) 1 E.H.R.R. 355 , para. 25 *in fine.*

*B. The Government's first alternative plea*

31. In the alternative, the Government submitted, at the hearings on 23 May 1984, that the Court should not disregard its previous case law; they relied essentially on the Le Compte, Van Leuven and de Meyere judgment of 23 June 1981 and on the Albert and Le Compte judgment of 10 February 1983.
In both of these judgments, the Court held that proceedings instituted against the applicants before the disciplinary organs of the *Ordre des médecins* (Medical Association) gave rise to a 'contestation' (dispute) over ' Civil rights and obligations'. [FN54] Since Article 6(1) was therefore applicable, it had to be determined ***247*** whether the individuals concerned had received a hearing by a 'tribunal' satisfying the conditions which that Article lays down. Their cases had been dealt with by three bodies, namely a Provincial Council, an Appeals Council and the Court of Cassation. The European Court did not consider it 'indispensable to pursue this point' as regards the Provincial Council, for the reason which, in its judgment of 23 June 1981, was expressed in the following terms:
Whilst Article 6(1) embodies the 'right to a court' ... it nevertheless does not oblige the Contracting States to submit 'contestations' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system. [FN55]

FN54 4 E.H.R.R. 1, paras. 44-49 and 5 E.H.R.R. 553, paras. 27-28.

FN55 Le Compte, Van Leuven and de Meyere v. Belgium4 E.H.R.R. 1 , paras. 50- 51.

The judgment of 10 February 1983 developed this reasoning further:
In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6(1) is applicable, conferring powers in this manner does not in itself infringe the Convention. ... Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction'--that is to say, which has the competence to furnish 'a [judicial] determination ... of the matters in dispute, both

for questions of fact and for questions of law'--'and does provide the guarantees of Article 6(1).' [FN56]

FN56 Albert and Le Compte v. Belgium(1983) 5 E.H.R.R. 553, para. 29.

In the Government's submission, the principles thus stated apply equally to ' criminal charges' within the meaning of Article 6(1). As confirmation of this, the Government cited the Öztürk [FN57] in addition to the abovementioned judgments of 23 June 1981 and 10 February 1983. [FN58]

FN57 judgment of21 February 1984(1984) 6 E.H.R.R. 409, para. 56.

FN58 *Supra,* note 53.

In the particular circumstances, the Government noted, Mr. **De Cubber's** complaint was directed solely against the Oudenaarde court; he had no objection to make concerning the Ghent Court of Appeal, which in the present case, so they argued, constituted the 'judicial body that has full jurisdiction', as referred to in the above-quoted case law. On the whole of this issue, the Government cited the Blaise judgment of 4 April 1984, which the Belgian Court of Cassation ***248*** had delivered in a similar case, and the concordant submissions of the public prosecutor's department in that case. [FN59]

FN59 See para. 20 above.

32. The Commission's Delegate did not share this view; the Court agrees in substance with his arguments.
The thrust of the plea summarised above is that the proceedings before the Oudenaarde court fell outside the ambit of Article 6(1). At first sight, this plea contains an element of paradox. Article 6(1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up. [FN60] However, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.

FN60 See Delcourt v. Belgium(1970) 1 E.H.R.R. 355 and Sutter v. Switzerland(1984) 6 E.H.R.R. 272 , para. 28.

Furthermore, the case law relied on by the Government has to be viewed in its proper context. The judgments of 23 June 1981, 10 February 1983 and 21 February 1984 concerned litigation which was classified by the domestic law of the respondent State not as civil or criminal but as disciplinary [FN61] or administrative [FN62]; these judgments related to bodies which, within the national system, were not regarded as courts of the classic kind, for the reason that they were not integrated within the standard judicial machinery of the country. The Court would not have held Article 6(1) applicable had it not been for the 'autonomy' of the concepts of 'civil rights and obligations' and ' criminal charge'. In the present case, on the other hand, what was involved was a trial which not only the Convention but also Belgian law classified as criminal; the Oudenaarde criminal court was neither an administrative nor professional authority, nor a jurisdictional organ of a professional association, [FN63] but a proper court in both the formal and the substantive meaning of the term. [FN64] The reasoning adopted in the three abovementioned judgments, to which should be added the Campbell and Fell judgment of 28 June 1984, [FN65] cannot justify reducing the requirements of Article 6(1) in its traditional and natural sphere of application. A restrictive interpretation of this kind would

not be consonant with the object and purpose of Article 6(1). [FN66]

FN61 Le Compte, Van Leuven and de Meyere v. Belgium(1981) 4 E.H.R.R. 1 ***249** , para. 11; Albert and Le Compte v. Belgium(1983) 5 E.H.R.R. 553 .

FN62 Öztürk v. Germany (1984) 6 E.H.R.R. 409, paras. 17-33.

FN63 Le Compte, Van Leuven and de Meyere,4 E.H.R.R. 1 , at para. 51; Albert and Le Compte,(1983) 5 E.H.R.R. 553 , at para. 29, and Öztürk, (1984) 6 E.H.R.R. 409 , at para. 56.

FN64 App. No. 7360/76 Zand v. Austria15 D. & R. 78, paras. 59-60 and p. 87.

FN65 (1984) 6 E.H.R.R. 409, paras. 67-73 and 76.

FN66 See para. 30 *in fine* above.

33. At the hearings, the Commission's Delegate and the applicant's lawyer raised a further question, concerning not the applicability of Article 6(1) but rather its application to the particular facts: had not 'the subsequent intervention' of the Ghent Court of Appeal 'made good the wrong' or 'purged' the first-instance proceedings of the 'defect' that vitiated them?
The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms.
The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies, contained in Article 26. [FN67] Thus, the Adolf judgment of 26 March 1982 noted that the Austrian Supreme Court had 'cleared ... of any finding of guilt' an applicant in respect of whom a District Court had not respected the principle of presumption of innocence laid down by Article 6(2). [FN68]

FN67 See Guzzardi v. Italy3 E.H.R.R. 333 , para. 72 and Van Oosterwijck v. Belgium3 E.H.R.R. 557 , para. 34.

FN68 Adolf v. Austria4 E.H.R.R. 313 , paras. 38-41.

The circumstances of the present case, however, were different. The particular defect in question did not bear solely upon the conduct of the first instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety.

*C. The Government's further alternative plea*

34. In the further alternative, the Government pleaded that a finding by the Court of a violation of Article 6(1) would entail serious consequences for Belgian courts with 'limited staff', especially if it were to give a judgment ' on the general question of principle' rather than a judgment 'with reasoning limited to the very special' facts of the case. In this connection, the Government drew attention to the following matters. From 1970 to 1984, the workload of such courts had more than doubled, whereas there had been no increase in the number of judges. At Oudenaarde and at Nivelles, for example, taking account of vacant posts (deaths, resignations, promotions) and occasional absences (holidays, illness, etc.), there were only six or seven judges permanently in attendance, all of whom were 'very busy', if not overwhelmed with work. Accordingly, it was virtually inevitable that one of the judges had to deal in turn with different aspects of the same case. To

avoid this, it would be necessary either to constitute 'special benches'--which would be liable to occasion delays incompatible with the principle of trial 'within a reasonable time'--or to create ***250*** additional posts, an alternative that was scarcely realistic in times of budgetary stringency.
35. The Court recalls that the Contracting States are under the obligation to organise their legal systems 'so as to ensure compliance with the requirements of Article 6(1)' [FN69]; impartiality is unquestionably one of the foremost of those requirements. The Court's task is to determine whether the Contracting States have achieved the result called for by the Convention, not to indicate the particular means to be utilised.

FN69 See Guincho v. Portugal(1984) 7 E.H.R.R. 223 para. 38.

*D. Conclusion*

36. To sum up, Mr. De Cubber was the victim of a breach of Article 6(1).

**II. THE APPLICATION OF ARTICLE 50**

37. The applicant has filed claims for just satisfaction in respect of pecuniary and non-pecuniary damage, but the Government have not yet submitted their observations thereon. Since the question is thus not ready for decision, it is necessary to reserve it and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant. [FN70]

FN70 Rule 53, paras. 1 and 4 of the Rules of Court.

**Order**

For these reasons, THE COURT unanimously
1. *Holds* that there has been a breach of Article 6(1);
2. *Holds* that the question of the application of Article 50 is not ready for decision; accordingly,
(a) *reserves* the whole of the said question;
(b) *invites* the Government to submit to the Court, within the forthcoming two months, their written observations on the said question and, in particular, to notify the Court of any agreement reached between them and the applicant;
(c) *reserves* the further procedure and *delegates* to the President of the Chamber power to fix the same if need be.



(1985) 7 E.H.R.R. 236

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***1 Le Compte,** Van Leuven and de Meyere v. Belgium
Series A, No. 43

Before the European Court of Human Rights

ECHR

(The President, Judge Wiarda; Judges Ryssdal, Mosler, Zekia, Cremona, Thór Vilhjálmsson, Bindschedler-Robert, Evrigenis, Lagergren, Liesch, Gölcüklü, Matscher, Pinheiro Farinha, García de Enterría, Pettiti, Walsh, Sorensen, Sir Vincent Evans and Macdonald; and Professor A. Vanwelkenhuyzen, [FN1] judge ad hoc.)

23 June 1981

The applicants were suspended from practising medicine by a disciplinary tribunal of the Belgian *Ordre des médecins*. They complained that the obligation to join the *Ordre des médecins* (medical association) and to submit to its disciplinary jurisdiction violated Article 11 of the European Convention on Human Rights and they further alleged that they had not received the benefit of the procedural guarantees required by Article 6 and that the sanctions imposed on them contravened Article 10. Save in respect of Article 10, the Commission held these complaints admissible and found by a majority that there had been a breach of Article 6, but, unanimously, no breach of Article 11. The case was referred by the Commission to the Court.

FN1 Professor at the Free University of Brussels, sitting in place of the elected judge of Belgian nationality, who withdrew pursuant to r. 24 (2) of the Rules of Court.

Held, by 15 votes to five, that Article 6 (1) was applicable and by 16 votes to four that it had been violated in respect of some of the applicants' complaints, but that there had been no violation of Article 11.

**Determination of civil rights and obligations or criminal charges (Art. 6). Applicability to professional disciplinary proceedings.**

1.
(a) Although disciplinary proceedings cannot ordinarily be characterised as 'criminal' and do not usually involve a dispute over ' civil rights and obligations', the position may be different in certain circumstances [42].
(b) Article 6 (1) is not applicable solely to proceedings which are already in progress but may be relied on wherever there is no possibility of submitting an alleged violation of civil rights to a tribunal meeting the requirements of that Article [44].
(c) Insofar as Article 6 (1) implies the existence of a disagreement between the parties, that requirement is satisfied where there is an allegation of professional misconduct rendering the applicant liable to sanctions and the allegation is denied [45]. ***2**
(d) Article 6 (1) is applicable only where the dispute directly and decisively affects 'civil rights and obligations' and that condition is met where the private right to practice a profession is interfered with [47-49].
(e) Article 6 (1) does not require each stage in the determination of ' civil rights and obligations' to be conducted before a tribunal meeting that Article's various provisions. The prior intervention of administrative, professional or judicial bodies not satisfying all of those requirements may be justified in the interests of flexibility and efficiency [51(a)].
(f) Both in civil and criminal cases, the 'right to a court' and the right to a judicial determination of the dispute cover questions of fact as well as questions of law, and

Article 6 (1) cannot be confined to tribunals having jurisdiction only over questions of law. Proceedings before the Appeals Council of the *Ordre des médecins* and before the Court of Cassation are therefore both subject to Article 6 (1), since the latter body has no jurisdiction to rectify factual errors or to examine the appropriateness of the sanction imposed [51 (b)].

**Determination of civil rights and obligations or criminal charges (Art. 6 (1)). Compliance with requirements of Article 6 (1).**

2.
(a) Both the Court of Cassation and the Appeals Council were tribunals established by law and independent of the executive [56-57].
(b) Although half of the members of the Appeal Council were medical practitioners, the presence of judges making up half the membership, including the chairman, provided a sufficient assurance of impartiality [58].
(c) In the absence of any conditions justifying departure from the rule requiring publicity for all proceedings to which Article 6 (1) applies, the refusal of a public hearing before the Appeals Council was not permissible under Article 6, and this defect cannot be remedied by the public character of proceeding before the Court of Cassation [59-60].

**Freedom of Association (Art. 11). Requirement of joining a professional body as a condition of practising a profession.**

3.
(a) a public-law institution such as the *Ordre des médecins* cannot be considered as an association within the meaning of Article 11 [65].
(b) The existence of the *Ordre* and the obligation to register with it and to submit to its authority does not prevent practitioners from forming together or joining other professional associations and does not have the object or effect of limiting or suspending the right guaranteed by Article 11 (1) [64-65].
Case referred to the Court by the European Commission of Human Rights arising out of two individual applications lodged with the Commission by three Belgian nationals on October 1974 and October 1975 and joined by order of the Commission in March 1977. The case was heard by the Court in plenary session.

**Representation**

***3*** J. Niset, Legal Adviser, Ministry of Justice (Agent), J. M. Nelissen Grade (Counsel), J. Putzeys, S. Gehlen, lawyers for the *Ordres des médecins*, F. Verhoegen, adviser at the Ministry of Public Health, F. Virkenbosch, *secrétaire d'administration* at the Ministry of Public Health (Advisers), for the Government.
G. Sperduti and M. Melchior (Delegates), assisted by J. Bultinck (the applicants' lawyer before the Commission), for the Commission.
Messrs. Nelissen Grade, Sperduti, Melchior and Bultinck addressed the Court.

The following cases are referred to in the judgments:
1. Delcourt v. Belgium (1970), Series A, No. 11; 1 E.H.R.R. 375.
2. Deweer v. Belgium (1980), Series A, No. 35; 2 E.H.R.R. 439.
3. De Wilde, Ooms and Versyp v. Belgium (No. 1) (1971), Series A, No. 12; 1 E.H.R.R. 373.
4. Engel and Others v. the Netherlands (No. 1) (1976), Series A, No. 22; 1 E.H.R.R. 647.
5. Golder v. United Kingdom (1975), Series A, No. 18; 1 E.H.R.R. 524.
6. Guzzardi v. Italy (1980), Series A, No. 39; 3 E.H.R.R. 333.
7. König v. Germany (1978), Series A, No. 27; 2 E.H.R.R. 214.
8. Lawless v. Ireland (No. 3) (1961), Series A, No. 3; 1 E.H.R.R. 15.
9. Neumeister v. Austria (No. 1) (1968), Series A, No. 8; 1 E.H.R.R. 91.

10. Ringeisen v. Austria (No. 1) (1971), Series A, No. 13; 1 E.H.R.R. 455.
11. Schiesser v. Switzerland , (1979)Series A, No. 34; 2 E.H.R.R. 417.

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**The Facts**

**I. THE PARTICULAR CIRCUMSTANCES OF THE CASE**

**A. DR. LE COMPTE**

8. Dr. Herman **Le Compte,** a Belgian national born in 1929 and resident at Knokke-Heist, is a medical practitioner.

*1. The suspension ordered in 1970*

9. On 28 October 1970, the West Flanders Provincial Council of the *Ordre des médecins* (Medical Association), which sits in Bruges, ordered that Dr. **Le Compte's** right to practise medicine be suspended for six weeks. The ground was that he had given to a Belgian newspaper an interview considered by the Council to amount to publicity incompatible with the dignity and reputation of the profession. The applicant lodged an objection (*opposition*) against this decision, which had been given *in absentia*, but it was confirmed by the Provincial Council on 23 December 1970, the applicant again having failed to appear.
Dr. **Le Compte** thereupon referred the matter firstly to the Appeals Council of the *Ordre des médecins*, which, on 10 May 1971, held his appeal to be inadmissible, and secondly to the Court of Cassation; on 7 April 1972, the latter declared his appeal on a point of law inadmissible, on the ground that it had been filed without the assistance of a lawyer entitled to practise before that Court.
The order suspending Dr. **Le Compte's** right to practise became effective on 20 May 1972 but he did not comply with it. For this reason, on 20 February 1973, the Furnes criminal court (*tribunal correctionnel*) sentenced him, pursuant to Article 31 of Royal Decree no. 79 of 10 November 1967 on the *Ordre des médecins*, to imprisonment and a fine.
This decision was confirmed on 12 September 1973 by the Ghent Court of Appeal; an appeal by Dr. **Le Compte** on a point of law was dismissed by the Court of Cassation on 25 June 1974.

*2. The suspension ordered in 1971*

10. Concurrently with the foregoing proceedings, which are not in issue in the present case (see para. 36 below), further proceedings were in progress. In fact, on 30 June 1971 the Provincial Council of the *Ordre des médecins* had, by a decision rendered *in absentia*, ordered another suspension, for three months, of the applicant's right to practise: the Council stated that he had publicised in the press the above-mentioned decisions of the disciplinary organs of the *Ordre* and his criticisms of those organs, such conduct constituting contempt of the *Ordre*.
***5** 11. Dr. **Le Compte** had appealed to the Appeals Council of the *Ordre* which had confirmed this decision although without upholding the allegation of contempt. He had then referred the matter to the Court of Cassation, where he relied on the same grounds. He contended in the first place that compulsory membership of the *Ordre des médecins*, without which no one may practise medicine, and subjection to the jurisdiction of its disciplinary organs were contrary to the principle of freedom of association, which is guaranteed by Article 20 of the Belgian Constitution and Article 11 of the Convention.
The court rejected this plea in the following terms:
... compulsory entry on the register of an *Ordre* which, like the *Ordre des médecins*, is a

public-law institution having the function of ensuring the observance of the medical profession's rules of professional conduct and the maintenance of the reputation, standards of discretion, probity and dignity of its members cannot be regarded as incompatible with freedom of association, as guaranteed by Article 20 of the Constitution; ... the appellant does not allege that the rule which he is challenging goes beyond the bounds of the restrictions authorised by Article 11 (2) of the Convention, for example for the protection of health.

The applicant also alleged a violation of Articles 92 and 94 of the Constitution: the first provides that the courts of law shall have exclusive jurisdiction to determine disputes over civil rights and the second prohibits the establishment of extraordinary tribunals for the purpose of resolving such disputes. He pointed out that the decision complained of had nonetheless been taken by a disciplinary organ, set up by Royal Decree no. 79, and that it had given a ruling on a civil right, namely the right to practise medicine.

The Court of Cassation replied that 'disciplinary proceedings and the imposition of disciplinary sanctions are, in principle, unrelated to the disputes over which exclusive jurisdiction is reserved to the courts of law by Article 92 of the Constitution'. The court added that, since the councils of the *Ordres des médecins* did not have jurisdiction to determine such disputes, 'they are not extraordinary tribunals whose establishment is prohibited by Article 94'. Finally, the court observed that section 1 (8) (a) of the Act of 31 March 1967 (see para. 20 below) empowered the Crown ' to reform and adapt the legislation governing the practise of the various branches of medicine' and that 'the legislature was referring, *inter alia*, to the Act of 25 July 1938 establishing the *Ordre des médecins*, which Act conferred disciplinary powers on the Councils of the *Ordre*'.

Lastly, Dr. **Le Compte** alleged that there had been a violation of Article 6 (1) of the Convention. He argued that the decision complained of had been given without any public inquiry and by a tribunal composed of medical practitioners, which could not be ***6** regarded as impartial since the kind of conduct of which he was accused might harm his colleagues.

The Court of Cassation confined itself to pointing out that Article 6 (1) did not apply to disciplinary proceedings.

Accordingly, by judgment of 3 May 1974, the appeal was dismissed.

12. Dr. **Le Compte** did not comply with the order suspending his right to practise medicine, which became final following the Court of Cassation's judgment. On that account, he was sentenced by the Bruges criminal court on 16 September and 15 October 1974 to terms of imprisonment and fines. He lodged an appeal against the first decision and an objection against the second, which had been rendered *in absentia*.

13. Since that time, a number of further proceedings have been instituted, both disciplinary, for the publicity given by the applicant to his dispute with the *Ordre*, and criminal, for his refusal to comply with the measures imposed by its Councils.

One of the disciplinary proceedings resulted in Dr. **Le Compte's** being struck off the register of the *Ordre* with effect from 26 December 1975. In this connection, he lodged a further application (no. 7496/76) with the Commission on 6 May 1976; that application, which the Commission declared admissible on 4 December 1979, is not relevant for the examination of the present case.

The criminal proceedings, at first instance, led to prison sentences and to fines.

## B. DR. VAN LEUVEN AND DR. DE MEYERE

14. Dr. Frans Van Leuven and Dr. Marc De Meyere are medical practitioners, born in 1931 and 1940, respectively. Both of them reside at Merelbeke and are Belgian nationals.

15. On 20 January 1973, 13 medical practitioners practising in and around Merelbeke filed a complaint to the effect that these two applicants had committed breaches of the rules of professional conduct; it was alleged in particular, that they had systematically limited their fees to the amounts reimbursed by the Social Security, even when on emergency duty, and had distributed without charge to private houses a fortnightly magazine called *Gezond* in which general practitioners were held up to ridicule. On 14

March 1973, the applicants were heard by the Bureau of the Provincial Council of the *Ordre*. They admitted that they had limited the fees charged to their own clients but not the fees charged when they were on emergency duty. In addition, they pointed out that they were not the publishers of *Gezond* and they denied that they had lampooned their colleagues in its pages.

16. On 19 March 1973, another medical practitioner lodged a further complaint against the applicants; he alleged that, two days after their appearance before the Bureau of the Provincial Council, ***7** they had put up in the waiting rooms of the Merelbeke medical centre a notice informing the public of the first complaint and the reasons therefor. On 23 May 1973, the Bureau of the Provincial Council heard the applicants in connection with the second complaint. They declared that they were entitled to provide the public with information about the situation, especially as it was already a matter of common knowledge.

17. The East Flanders Provincial Council of the *Ordre des médecins*, which sits in Ghent, summoned Dr. Van Leuven and Dr. De Meyere to answer several allegations.

On 24 October 1973, it directed that their right to practise medicine be suspended for a period of one month for having charged fees limited to the amounts reimbursed by the Social Security, for having contributed to the magazine *Gezond* and for having made therein public utterances judged offensive to their colleagues. In addition, Dr. Van Leuven was reprimanded for his behaviour when appearing before the Bureau of the Provincial Council on 14 March 1973. These various decisions were based on Articles 6 (2) and 16 of Royal Decree No. 79.

The Provincial Council considered, on the other hand, that the posting in the waiting rooms of the medical centre of a notice judged contrary to the rules of professional conduct did not warrant a disciplinary sanction, bearing in mind that the notice had been removed following a request from the Bureau.

18. The applicants appealed to the Appeals Council.

On 24 June 1974, the latter declared the appeal admissible and upheld the Provincial Council's decision in so far as it had found established the allegations relating to the charging of fees limited to the amounts reimbursed by the Social Security and the contribution to the magazine *Gezond*. For the rest, the Appeals Council set aside the decision challenged and, after taking into account the complaint regarding the notice in the waiting rooms and joining it with the two other complaints, directed that the right of Dr. Van Leuven and Dr. De Meyere to practise medicine be suspended for a period of 15 days.

19. On 25 April 1975, the Court of Cassation ruled against the applicants, who had appealed on a point of law.

The court rejected the ground of appeal based on breach of Article 11 of the Convention; it considered that the functions of the *Ordre des médecins* 'are by no means unrelated to the protection of health and that compulsory entry ... on the register of an *Ordre* of this kind does not exceed the restrictions on freedom of association which are necessary for the protection of health'.

The court in addition declared inadmissible, for want of legal interest, the ground of appeal to the effect that the limitation of fees to the amounts reimbursed by the Social Security was in ***8** conformity with both the law and the rules of professional conduct for medical practitioners; the court found that the suspension had in fact also been imposed as a sanction for other disciplinary offences.

## II. THE ORDRE DES MEDECINS

20. The *Ordre des médecins*, which was established by an Act of 25 July 1938, was re-organised by Royal Decree No. 79 of 10 November 1967. This Decree was made under the Act of 31 March 1967 'investing the King with certain powers with a view to ensuring economic revival, acceleration of regional reconversion and a stable, balanced budget'. The Act enabled the Crown, acting by Decrees in Council, to take 'all appropriate steps ... to further the quality and ensure satisfactory provision of health care through reform and

adaptation of the legislation governing the practice of the various branches of medicine' (s. 1, 8° (*a*)); it specified that such Decrees could 'repeal, supplement, amend or replace existing legal provisions' (s. 3).

21. Article 2 of Royal Decree No. 79 provides that 'the *Ordre des médecins* shall include all physicians, surgeons and obstetricians who are permanently resident in Belgium and entered on the register of the *Ordre* for the Province where they have their permanent residence' and that 'in order to practise medicine in Belgium, every medical practitioner'--whether Belgian or foreign--' must be entered on the register of the *Ordre*'.

Military doctors, however, are only obliged to be entered on the register if they practise outside their military duties.

22. Alongside the *Ordre des médecins*, there exist in Belgium private associations formed to protect the professional interests of medical practitioners. The most important of these associations are consulted and invited to take part in collective negotiations when the Government are considering the adoption of decisions affecting those interests, to propose candidates for nomination as members of certain organs and to appoint their representatives on others, and to take various measures themselves.

**A. ORGANS**

23. The *Ordre des médecins* 'shall enjoy civil personality in public law' (Art. 1, third para., of Royal Decree No. 79). It comprises three kinds of organs, namely Provincial Councils, Appeals Councils and the National Council.

*1. Provincial Councils*

24. The Provincial Councils (of which there are ten) consist of a number, which is always even and is fixed by the Crown, of members and substitute members who are medical practitioners of ***9** Belgian nationality elected for six years by doctors entered on the register of the *Ordre*. There are also an assessor and a substitute assessor who are judges of first instance courts appointed for six years by the Crown; the assessor has a consultative status (Arts. 5 and 8 (1) of Royal Decree No. 79).

The Councils' functions are defined by Article 6 of Royal Decree No. 79 in the following terms:

1° to keep the register of the *Ordre*. They may refuse or defer entry on the register if the person applying has been guilty either of an act of such seriousness as would cause the name of a member of the *Ordre* to be struck off the register or of serious misconduct damaging the reputation or dignity of the profession. If the medical commission ... has decided and notified the *Ordre* that a medical practitioner no longer fulfils the conditions required for practising medicine or that it is necessary, for reasons of physical or mental disability, to place a restriction on the practice by him of medicine, the relevant Provincial Council shall, in the first case, remove the practitioner's name from the register and, in the second case, make the maintenance of his name thereon subject to observance of the restriction ordered.

A practitioner's name may also be removed from the register at his own request.

Reasons must be given for any decision refusing or deferring entry on the register, removing a practitioner's name therefrom or making its maintenance thereon subject to restrictive conditions;

to ensure observance of the rules of professional conduct for medical practitioners and the upholding of the reputation, standards of discretion, probity and dignity of the members of the *Ordre*. They shall to this end be responsible for disciplining misconduct committed by their registered members in or in connection with the practice of the profession and serious misconduct committed outside the realm of professional activity, whenever such misconduct is liable to damage the reputation or dignity of the profession;

3° to give, of their own motion or on request, the members of the *Ordre* advice on

matters of professional conduct ...; such advice shall be submitted to the National Council for approval ...;
4° to notify the relevant authorities of any acts involving illegal practice of medicine of which the Councils have knowledge;
5° to act, at the joint request of those concerned, as final arbitrator in disputes regarding the fees claimed by a medical practitioner from his client ...;
6° to reply to all requests for advice emanating from courts of law in connection with disputes as to fees;
7° to settle the annual subscription ... including the amount fixed by the National Council for each registered member.
25. The Provincial Councils are distinct from the medical commissions which have been set up, outside the *Ordre*, in each Province and are composed in addition to medical and pharmaceutical practitioners of members of the paramedical professions and of officials of the Ministry of Public Health (Art. 36 of Royal Decree No. 78 ***10*** ). These commissions have two functions. The first is general and consists of 'proposing to the authorities any measures designed to make a contribution to public health' and of 'ensuring that practitioners ... [and] members of the paramedical professions collaborate effectively in the implementation of the measures laid down by the authorities for the purpose of preventing or combatting diseases subject to quarantine or communicable diseases'. The second, specific function comprises various responsibilities: 'checking and ... approving practitioners' diplomas'; ' withdrawing approval or making its continuance in force subject to the acceptance by the person concerned of [certain] restrictions'; 'ensuring that the practice of medicine [is conducted] in accordance with the laws and regulations'; 'detecting and ... reporting to the prosecuting authority cases of illegal practice'; 'assessing the demand for emergency services and supervising their operation; 'informing interested parties, whether acting in a public or private capacity, of decisions taken' as regards a practitioner's exercise of his profession; 'advising the organs of the *Ordres* concerned of allegations of professional misconduct against practitioners'; 'supervising public sales where medicines are involved' (Art. 37).

*2. The Appeals Councils*

26. The two Appeals Councils--one of which uses the French and the other the Dutch language--have their seat 'in the Greater Brussels area'. They are each composed of ten medical practitioners of Belgian nationality (five members and five substitute members) elected for six years by the Provincial Councils from among persons other than their own members, and ten Court of Appeal judges (five members and five substitute members) appointed by the Crown for the same length of time. From among these judges, the Crown designates the Chairman, who has a casting vote, and the member who is to act as *rapporteur* (Art. 12 (1) and (2) of Royal Decree No. 79).
The Appeals Councils hear appeals from decisions given by the Provincial Councils on matters of registration or discipline. They deal, as the body of first and final instance, with claims concerning the regularity of elections to the Provincial Councils, the Appeals Councils and the National Council. They also decide cases on which the Provisional Councils have not given a ruling within the prescribed time-limit. Finally, they settle any dispute between Provincial Councils regarding a practitioner's place of permanent residence (Art. 13).

*3. The National Council*

27. The National Council comprises 20 persons (10 members and 10 substitute members) of Belgian nationality who are respectively ***11*** elected by each of the Provincial Councils from among medical practitioners entered on its register, and 12 persons (six members and six substitute members) appointed by the Crown from among medical practitioners nominated in lists of three candidates by the medical faculties in the country. The National Council is presided over by a judge of the Court of Cassation chosen by the

Crown and consists of two sections--one French-speaking, the other Dutch-speaking--each of which elects from its number a Vice-President (Art. 14).
The National Council formulates 'those general principles and those rules concerning the morality, reputation, standards of discretion, probity and devotion to duty essential for the practice of the profession which constitute the code of professional conduct for medical practitioners'; these principles and rules may be made compulsory by Royal Decrees in Council (a draft code failed to receive Royal approval). It keeps up to date a list of those disciplinary decisions given by the Provincial and Appeals Councils which are no longer open to appeal. It gives reasoned opinions 'on general matters, on problems of principle and on the rules of professional conduct'. It settles the amount of the subscription medical practitioners are asked to pay to the *Ordre*. More generally, it takes 'all steps necessary for the achievement of the aims of the *Ordre*' (Art. 15).

**B. PROCEDURE IN DISCIPLINARY MATTERS**

28. In the procedure relating to disciplinary and registration matters, which is primarily governed by the Royal Decree of 6 February 1970 'regulating the organisation and working of the Councils of the *Ordre des médecins*', the contending parties are always heard. There may be three stages: a ruling at first instance by the Provincial Council, a ruling at final instance by the Appeals Council and a review by the Court of Cassation of the legality of the decisions and the observance of formal requirements.

*1. Before the organs of the Ordre*

29. The procedure begins before the Provincial Council which 'acts either on its own initiative, or at the request of the National Council, the Minister responsible for public health, the *procureur du Roi* or the medical commission, or on complaint by a medical practitioner or a third party' (Art. 20 (1), first sub-para., of Royal Decree No. 79). The procedure continues before the Appeals Council if it has been seised either by the practitioner concerned, or by the Provincial Council's assessor, or by the President of the National Council acting jointly with one of the Vice-Presidents; an appeal has suspensive effect (Art. 21).
30. Investigation of the matter necessarily involves the participation of a member of the judiciary: before the Provincial Council, ***12** for the purposes of the initial investigation, this will be the assessor; before the Appeals Council, for the purposes, if need be, of a supplementary investigation, it will be the Council member acting as *rapporteur* (see paras. 24 and 26 above). Furthermore, the Provincial Council member who acted as *rapporteur* may always be heard by the Appeals Council (Arts. 7 (1), 12 (2) and 20 of Royal Decree No. 79).
31. Before the Provincial and Appeals Councils, the proceedings are conducted in private (Art. 24 (1), sub-para. 3, of Royal Decree No. 79 and Art. 19 of the Royal Decree of 6 February 1970). The medical practitioner concerned has the right to be informed as soon as possible of the opening of an inquiry against him (Art. 24 of the Royal Decree of 6 February 1970); the procedure further provides for time-limits and formalities allowing him to have adequate time and facilities for the preparation of his defence (Arts. 25 and 31); in addition, it contains guarantees concerning the use of languages (Arts. 36 to 39). The practitioner is also entitled to challenge the members of the organ hearing his case; he appears in person and may be assisted by one or more counsel who, like himself, may inspect the case-file (Arts. 26, 31 and 40 to 43).
32. The Provincial and Appeals Councils are bound to deliver their ruling within a reasonable time, to preserve the secrecy of their deliberations and to give reasons for their decision. The person concerned must be promptly informed of the decision and of any appeal which may have been entered. Decisions are taken by simple majority. However, a two-thirds majority is required for striking a practitioner off the register of the *Ordre* or for his suspension for more than a year. The same rule applies to Appeals Council decisions ordering a sanction where the Provincial Council has imposed none or

increasing the severity of the sanction imposed by the Provincial Council (Art. 25 *in fine* of Royal Decree No. 79, Arts. 4, 12, 26, 32 and 33 of the Royal Decree of 6 February 1970). The sanctions which may be imposed by the Provincial Councils-- and also, if appropriate, the Appeals Councils--are 'warning, censure, reprimand, suspension of the right to practise medicine for a period not exceeding two years and striking off the register of the *Ordre*' (Art. 16 of Royal Decree No. 79).

*2. Before the Court of Cassation*

33. Under Article 23 of Royal Decree No. 79, 'final decisions of the Provincial Councils or the Appeals Councils may be referred to the Court of Cassation either by the Minister responsible for public health, or by the President of the National Council acting jointly with one of the Vice- Presidents, or by the practitioner concerned, on the ground of contravention of the law'--the latter term being understood in a wide sense--'or of non-observance of ***13*** a formal requirement which is either a matter of substance or laid down on pain of nullity'. The court will have before it the complete case-file (decisions at first instance and on appeal, memorials and final submissions of the parties, including a detailed statement of the facts); however, it cannot verify the findings of fact made by the Councils of the *Ordre*, unless it is alleged that there has been a breach of the rules of evidence. The court does not have jurisdiction to rectify factual errors on the part of the Appeals Councils or to examine whether the sanction is proportionate to the fault.
An appeal to the Court of Cassation on a point of law has suspensive effect.

*3. Notification of the decision*

34. Decisions in a disciplinary matter which have become final are notified to the Minister of Public Health; the most important ones (striking off the register of the *Ordre* or suspension of the right to practise) are also notified to the medical commission and to the *procureur général* attached to the Court of Appeal (Art. 27 of Royal Decree No. 79 and Art. 35 of the Royal Decree of 6 February 1970).

*Proceedings before the Commission*

35. Dr. **Le Compte** applied to the Commission on 28 October 1974, Dr. Van Leuven and Dr. De Meyere on 21 October 1975.
All three applicants claimed that the obligation to join the *Ordre des médecins* and to be under the jurisdiction of its disciplinary organs contravened Article 11 of the Convention, taken alone or in conjunction with Article 17. They further alleged that during the course of the disciplinary proceedings they had not had the benefit of the guarantees laid down by Article 6 and that the sanctions imposed on them were calculated to prevent them from disseminating information and ideas, thereby violating Article 10.
36. On 6 October 1976 and 10 March 1977 respectively, the Commission declared the applications admissible save on two points: it rejected for non-exhaustion of domestic remedies (Art. 27 (3)) the complaints made by all three applicants under Article 10 and the complaints made by Dr. **Le Compte** in connection with the decision given by the West Flanders Provincial Council on 28 October 1970 (see para. 9 above).
On 10 March 1977, the Commission ordered the joinder of the applications in pursuance of Rule 29 of its Rules of Procedure.
In its report of 14 December 1979 (Art. 31 of the Convention), the Commission expressed the opinion:
-- unanimously, that there had been no breach of Article 11 (1) of the Convention since the *Ordre des médecins* did not constitute an association;
-- by eight votes to three, that Article 6 (1) was applicable to ***14*** the proceedings which led to the disciplinary measures imposed on the applicants;
-- that Article 6 (1) had been violated in that the applicants did not receive a 'public hearing' (eight votes to three) before an 'impartial tribunal' (seven votes to four).

The report contains three separate opinions, two of which are dissenting.

*Final Submissions made to the Court*

37. In their memorial, the Government submitted:
[May it please the Court] to hold that the facts of the present case do not disclose any breach by the Belgian State of its obligations under the European Convention on Human Rights.

**JUDGMENT**

[FN2]

FN2 Drawn up in French and English, the French text being authentic.

*I. The complaint made initially concerning Article 10*

38. Initially, Dr. **Le Compte,** Dr. Van Leuven and Dr. De Meyere relied on Article 10 as well as on Articles 6 (1), 11 and 17: they maintained that the disciplinary sanctions imposed on them by the Provincial and Appeals Councils were designed to prevent them from disseminating information and ideas. In so doing, they were attacking the actual content of the decisions affecting them and not the procedure leading thereto or the obligation to join the *Ordre des médecins*. Accordingly, this was not merely a further legal submission or argument adduced in support of their claims under Articles 6 (1), 11 and 17, but a separate complaint. Having been rejected by the Commission for non-exhaustion of domestic remedies (see para. 36 above), this complaint goes beyond the ambit of the case referred to the Court. [FN3]

FN3 See *inter alia* Schiesser v. Switzerland(1979) 2 E.H.R.R. 417, para. 41.

*II. The alleged violation of Article 6 (1)*

39. The applicants claimed that they were victims of violations of Article 6 (1), which reads as follows:
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
40. Having regard to the submissions of those appearing before ***15*** the Court, the first question for decision is whether this paragraph is applicable; the majority of the Commission affirmed that it was, but this was disputed by the Government.

*A. The applicability of Article 6 (1)*

41. Article 6 (1) applies only to the determination of 'civil rights and obligations or of any criminal charge' (in the French text: 'contestations sur [des] droits et obligations de caractère civil' and 'bien-fondé de toute accusation en matière pénale'). As the Court has found on several occasions, certain cases (in the French text: 'causes') are not comprised within either of these categories and thus fall outside the Article's scope. [FN4]

FN4 See *e.g.* Lawless v. Ireland (No. 3)(1961) 1 E.H.R.R. 15 , para. 12; Neumeister v. Austria (No. 1)(1968) 1 E.H.R.R. 91, para 23; Guzzardi v. Italy(1980) 3 E.H.R.R. 333,

para. 108.

42. Thus, as the Government rightly emphasised with reference to the Engel judgment, disciplinary proceedings as such cannot be characterised as ' criminal'; nevertheless, this may not hold good for certain specific cases. [FN5]

FN5 Engel and Others v. Netherlands (No. 1) (1976) 1 E.H.R.R. 647.

Again, disciplinary proceedings do not normally lead to a *contestation* (dispute) over 'civil rights and obligations'. [FN6] However, this does not mean that the position may not be different in certain circumstances. The Court has not so far had to resolve this issue expressly; in the König Case, which was cited by the Commission and the Government, the applicant was complaining solely of the duration of proceedings which he had instituted before administrative courts after an administrative body had withdrawn his authorisation to run his clinic and then his authorisation to practise medicine. [FN7]

FN6 *Ibid.,* para. 87 *in fine.*

FN7 König v. Germany (1978) 2 E.H.R.R. 214, paras. 18 and 85; see also Engel and Others v. Netherlands (No. 1)(1976) 1 E.H.R.R. 647, para. 87, first sub-para.

43. In the present case, it is necessary to determine whether Article 6 (1) applied to the whole or part of the proceedings that took place before the Provincial and Appeals Councils, which are disciplinary organs, and subsequently before the Court of Cassation, a judicial body.
At least after the admissibility decisions of 6 October 1976 and 10 March 1977, the Government, the Commission and the applicants scarcely discussed this issue other than in the context of the words 'contestations' (disputes) over ' civil rights and obligations'. The Court considers that it too should take this as its starting-point.

*1. The existence of 'contestations' (disputes) over 'civil rights and obligations'*

44. In certain respects, the meaning of the words 'contestations' (disputes) over 'civil rights and obligations' has been clarified in the Ringeisen ***16*** judgment and the König judgment.
According to the first of these judgments, the phrase in question covers 'all proceedings the result of which is decisive for private rights and obligations', even if the proceedings concern a dispute between an individual and a public authority acting in its sovereign capacity; the character 'of the legislation which governs how the matter is to be determined' and of the ' authority' which is invested with jurisdiction in the matter are of little consequence. [FN8]

FN8 Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455, para. 94.

The very notion of 'civil rights and obligations' lay at the heart of the König Case. The rights at issue included the right 'to continue his professional activities' as a medical practitioner 'for which he had obtained the necessary authorisations'. In the light of the circumstances of that case, the Court classified this right as private, and hence as civil for the purposes of Article 6 (1). [FN9]

FN9 *Loc. cit., supra,* note 5, at pp. 192-195, paras. 88-91 and 93-95.

The ramifications of this line of authority are again considerably extended as a result of the Golder judgment. The Court there concluded that 'Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal'. [FN10] One consequence of this is that Article 6 (1) is not applicable

solely to proceedings which are already in progress: it may also be relied on by anyone who considers that an interference with the exercise of one of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 (1).

FN10 Golder v. United Kingdom(1975) 1 E.H.R.R. 524, para. 36.

45. In the present case, a preliminary point needs to be resolved: can it be said that there was a veritable 'contestation' (dispute), in the sense of 'two conflicting claims or applications' (oral submissions of counsel for the Government)?
Conformity with the spirit of the Convention requires that this word should not be construed too technically and that it should be given a substantive rather than a formal meaning besides, it has no counterpart in the English text of Article 6 (1) ('In the determination of his civil rights and obligations'; *cf.* Article 49: 'dispute').
Even if the use of the French word 'contestation' implies the existence of a disagreement, the evidence clearly shows that there was one in this case. The *Ordre des médecins* alleged that the applicants had committed professional misconduct rendering them liable to sanctions and they denied those allegations. After the competent Provincial Council had found them guilty of that misconduct and ordered their suspension from practice--decisions that were taken *in absentia* in the case of Dr. **Le Compte (**West ***17*** Flanders) and after hearing submissions on issues of fact and of law from Dr. Van Leuven and Dr. De Meyere in their cases (East Flanders)--the applicants appealed to the Appeals Council. They all appeared before that Council where, with the assistance of lawyers, they pleaded amongst other things Articles 6 (1) and 11. In most respects their appeals proved unsuccessful, whereupon they turned to the Court of Cassation relying once more, *inter alia*, on the Convention (see paras. 10-11 and 15-19 above).
46. In addition, it must be shown that the 'contestation' (dispute) related to 'civil rights and obligations', in other words that the 'result of the proceedings' was 'decisive' for such a right. [FN11]

FN11 See Ringeisen v. Austria, *supra* note 6.

According to the applicants, what was at issue was their right to continue to exercise their profession; they maintained that this had been recognised to be a 'civil' right in the König judgment. [FN12]

FN12 *Supra,* note 5, at pp. 193-194, paras. 91 and 93.

According to the Government, the decisions of the Provincial and Appeals Councils had but an 'indirect effect' in the matter. It was argued that these organs, unlike the German administrative courts in the König Case, did not review the lawfulness of an earlier measure withdrawing the right to practise but had instead to satisfy themselves that breaches of the rules of professional conduct, of a kind justifying disciplinary sanctions, had actually occurred. A 'contestation' (dispute) over the right to continue to exercise the medical profession was said to have arisen, if at all, 'at a later stage', that is when Dr. **Le Compte,** Dr. Van Leuven and Dr. De Meyere contested before the Court of Cassation the lawfulness of the measures imposed on them. The Government further submitted that this right was not 'civil' and invited the Court not to follow the decision which it took in this respect in the König judgment.
47. As regards the question whether the dispute related to the above- mentioned right, the Court considers that a tenuous connection or remote consequences do not suffice for Article 6 (1), in either of its official versions ('contestation sur'; 'determination of'): civil rights and obligations must be the object--or one of the objects--of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right.
Whilst the Court agrees with the Government on this point, it does not agree that in the present case there was not this kind of direct relationship between the proceedings in

question and the right to continue to exercise the medical profession. The suspensions ordered by the Provincial Council on 30 June 1971 (Dr. **Le Compte)** and on 24 October 1973 (Dr. Van Leuven and Dr. De Meyere) were to deprive them temporarily of their right to practise. That right was directly in issue before the Appeals Council and ***18*** the Court of Cassation, which bodies had to examine the applicants' complaints against the decisions affecting them.
48. Furthermore, it is by means of private relationships with their clients or patients that medical practitioners in private practice, such as the applicants, avail themselves of the right to continue to practise; in Belgian law, these relationships are usually contractual or quasi-contractual and, in any event, are directly established between individuals on a personal basis and without any intervention of an essential or determining nature by a public authority. Accordingly, it is a private right that is at issue, notwithstanding the specific character of the medical profession--a profession which is exercised in the general interest--and the special duties incumbent on its members.
The Court thus concludes that Article 6 (1) is applicable; as in the König Case, [FN13] it does not have to determine whether the concept of 'civil rights' extends beyond those rights which have a private nature.

FN13 *Supra,* note 5 at p. 195, para. 95.

49. Two members of the Commission, Mr. Frowein and Mr. Polak, emphasised in their dissenting opinion that the present proceedings did not concern a withdrawal of the authorisation to practise, as did the König case, but a suspension for a relatively short period--three months for Dr. **Le Compte** and 15 days for Dr. Van Leuven and Dr. De Meyere. These members maintained that a suspension of this kind did not impair a civil right but was to be regarded as no more than a limitation inherent therein.
The Court is not convinced by this argument, which the Government adopted as a further alternative plea in paragraph 19 of their memorial. Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand--see para. 32 above), the suspension of which they complained undoubtedly constituted a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right [FN14]; in the 'contestations' (disputes) contemplated by Article 6 (1) the actual existence of a 'civil' right may, of course, be at stake but so may the scope of such a right or the manner in which the beneficiary may avail himself thereof.

FN14 See, *mutatis mutandis,* Golder v. United Kingdom, *supra,* note 8 at p. 531 para. 26.

50. Since the dispute over the decisions taken against the applicants has to be regarded as a dispute relating to 'civil rights and obligations', it follows that they were entitled to have their case (in French: 'cause') heard by 'a tribunal' satisfying the conditions laid down in Article 6 (1). [FN15]

FN15 *Ibid.* at p. 536, para. 36.

51. In fact, their case was dealt with by three bodies--the ***19*** Provincial Council, the Appeals Council and the Court of Cassation. The question therefore arises whether those bodies met the requirements of Article 6 (1).
(a) The Court does not consider it indispensable to pursue this point as regards the Provincial Council. Whilst Article 6 (1) embodies the ' right to a court' (see para. 44 above), it nevertheless does not oblige the Contracting States to submit 'contestations' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many

member States of the Council of Europe may be invoked in support of such a system. To this extent, the Court accepts that the arguments of the Government and of Mr. Sperduti in his Separate Opinion are correct.
(b) Once the Provincial Council had imposed on Dr. **Le Compte,** Dr. Van Leuven and Dr. De Meyere a temporary ban on the exercise of their profession, they appealed to the Appeals Council which thus had to determine the dispute over the right in question. According to the Government, the Appeals Council nevertheless did not have to meet the conditions contained in Article 6 (1) since an appeal on a point of law against its decision lay to the Court of Cassation and that court's procedure certainly did satisfy those conditions.
The Court does not agree. For civil cases, just as for criminal charges, [FN16] Article 6 (1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the ' right to a court' [FN17] and the right to a judicial determination of the dispute [FN18] cover questions of fact just as much as questions of law. Yet the Court of Cassation does not have jurisdiction to rectify factual errors or to examine whether the sanction is proportionate to the fault (see para. 33 above). It follows that Article 6 (1) was not satisfied unless its requirements were met by the Appeals Council itself.

FN16 See Deweer v. Belgium (1980) 2 E.H.R.R. 439, para. 48.

FN17 See Golder v. United Kingdom, *supra,* note 8 at p. 536, para. 36.

FN18 See König v. Germany, *supra,* note 5 at p. 196, para. 98 *in fine.*

*2. The existence of 'criminal charges'*

52. When deciding on the admissibility of the applications, the Commission stated that the organs of the *Ordre* had not been required to determine criminal charges; the same point is made at paragraph 67 of the Commission's report.
***20** 53. The Court considers it superfluous to determine this issue, which was scarcely touched on by those appearing before it: as in the König Case, [FN19] those of the Article 6 rules which the applicants alleged were violated apply to both civil and criminal matters.

FN19 *Ibid.* para. 96.

*B. Compliance with Article 6 (1)*

54. Having regard to the conclusion at paragraph 51 above, it has to be established whether in the exercise of their jurisdiction both the Appeals Council and the Court of Cassation met the conditions laid down by Article 6 (1), the former because it alone fully examined measures affecting a civil right and the latter because it conducted a final review of the lawfulness of those measures. It is therefore necessary to examine whether each of them in fact constituted a 'tribunal' which was 'established by law', 'independent' and 'impartial', and afforded the applicants a 'public hearing'.
55. Whilst the Court of Cassation, notwithstanding the limits on its jurisdiction (see paras. 33 and 51 above), obviously has the characteristics of a tribunal, it has to be ascertained whether the same may be said of the Appeals Council. The fact that it exercises judicial functions (see para. 26 above) does not suffice. According to the Court's case-law, [FN20] use of the term 'tribunal' is warranted only from an organ which satisfies a series of further requirements--independence of the executive and of the parties to the case, duration of its members' term of office, guarantees afforded by its procedure--several of which appear in the text of Article 6 (1) itself. In the Court's opinion, subject to the points mentioned below, those requirements were satisfied in the

present case.

FN20 See Neumeister v. Austria (No. 1) (1968) 1 E.H.R.R. 91, 132, para. 24; De Wilde, Ooms and Versyp v. Belgium (No. 1) (1971) 1 E.H.R.R. 373, para. 78; Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455, para. 95.

56. Since it was set up under the Constitution (Art. 95), the Court of Cassation is patently established by law. As for the Appeals Council, the Court notes, as did the Commission and the Government, that, like each of the organs of the *Ordre des médecins*, it was established by an Act of 25 July 1938 and re-organised by Royal Decree No. 79 of 10 November 1967, made under an Act of 31 March 1967 investing the King with certain powers (see para. 20 above).
57. There can be no doubt as to the independence of the Court of Cassation. [FN21] The Court, in company with the Commission and the Government, is of the opinion that this also applies to the Appeals Council. It is composed of exactly the same number of medical practitioners and members of the judiciary and one of the latter, designated by the Crown, always acts as Chairman and has ***21** a casting vote. Besides, the duration of a Council member's term of office (six years) provides a further guarantee in this respect (see para. 26 above).

FN21 Delcourt v. Belgium (1970) 1 E.H.R.R. 375, para. 35.

58. The Court of Cassation raises no problem on the issue of impartiality. [FN22]

FN22 *Ibid.,* para. 35.

The Appeals Council, so the Commission stated in its opinion, did not, in the particular circumstances, constitute an impartial tribunal: whilst the legal members were to be deemed neutral, the medical members had, on the other hand, to be considered as unfavourable to the applicants since they had interests very close to those of one of the parties to the proceedings.
The Court does not agree with this argument concerning the Council's composition. The presence--already adverted to--of judges making up half the membership, including the Chairman with a casting vote (see para. 26 above), provides a definite assurance of impartiality and the method of election of the medical members cannot suffice to bear out a charge of bias. [FN23]

FN23 *Cf., mutatis mutandis,* Ringeisen v. Austria (No. 1) 1 E.H.R.R. 455, para. 97.

Again, the personal impartiality of each member must be presumed until there is proof to the contrary; in fact, as the Government pointed out, none of the applicants exercised his right of challenge (see para. 31 above).
59. Under the Royal Decree of 6 February 1970, all publicity before the Appeals Council is excluded in a general and absolute manner, both for the hearings and for the pronouncement of the decision (see paras. 31 and 34 above).
Article 6 (1) of the Convention does admittedly provide for exceptions to the rule requiring publicity--at least in respect of the trial of the action--but it makes them subject to certain conditions. However, there is no evidence to suggest that any of these conditions was satisfied in the present case. The very nature both of the misconduct alleged against the applicants and of their own complaints against the *Ordre* was not concerned with the medical treatment of their patients. Consequently, neither matters of professional secrecy nor protection of the private life of these doctors themselves or of patients were involved; the Court does not concur with the Government's argument to the contrary. Furthermore, there is nothing to indicate that other grounds, amongst those listed in the second sentence of Article 6 (1), could have justified sitting *in camera;* the Government, moreover, did not rely on any such ground.

Dr. **Le Compte,** Dr. Van Leuven and Dr. De Meyere were thus entitled to have the proceedings conducted in public. Admittedly, neither the letter nor the spirit of Article 6 (1) would have prevented them from waiving this right of their own free will, whether ***22** expressly or tacitly [FN24]; conducting disciplinary proceedings of this kind in private does not contravene the Convention, provided that the person concerned consents. In the present case, however, the applicants clearly wanted and claimed a public hearing. To refuse them such a hearing was not permissible under Article 6 (1), since none of the circumstances set out in its second sentence existed.

FN24 *Cf.* Deweer v. Belgium (1980) 2 E.H.R.R. 439, para. 49.

60. The public character of the proceedings before the Belgian Court of Cassation cannot suffice to remedy this defect. In fact, the Court of Cassation 'shall not take cognisance of the merits of cases' [FN25]; this means that numerous issues arising in 'contestations' (disputes) concerning 'civil rights and obligations' fall out-side its jurisdiction (see paras. 33 and 51 above). On the issues of this nature arising in the present case, there was neither a public hearing nor a decision pronounced publicly as required by Article 6 (1).

FN25 Art. 95 of the Constitution and Art. 23 of Royal Decree No. 79.

61. To sum up, the applicants' case (in French: 'cause') was not heard publicly by a tribunal competent to determine all the aspects of the matter. In this respect, there was, in the particular circumstances, a breach of Article 6 (1).

*III. The alleged violation of Article 11*

62. The applicants alleged a breach of Article 11, which reads as follows:
1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
In the applicants' submission, the obligation to join the *Ordre des médecins* (see para. 21 above), inhibited freedom of association--which implied freedom not to associate--and went beyond the limits of the restrictions permitted under paragraph 2 of Article 11; furthermore, so they contended, the very existence of the *Ordre* had the effect of eliminating freedom of association.
63. In its report, the Commission expressed the unanimous opinion, corresponding in substance to the Government's contention, that the *Ordre*, by virtue of its legal nature and specifically public function, was not an association within the meaning of Article 11 (1).
***23** 64. The Court notes first that the Belgian *Ordre des médecins* is a public-law institution. It was founded not by individuals but by the legislature; it remains integrated within the structures of the State and judges are appointed to most of its organs by the Crown. It pursues an aim which is in the general interest, namely the protection of health, by exercising under the relevant legislation a form of public control over the practice of medicine. Within the context of this latter function, the *Ordre* is required in particular to keep the register of medical practitioners. For the performance of the tasks conferred on it by the Belgian State, it is legally invested with administrative as well as rule-making and disciplinary prerogatives out of the orbit of the ordinary law (*prérogatives exorbitantes du droit commun*) and, in this capacity, employs processes of a public authority (see paras. 20-34 above).

65. Having regard to these various factors taken together, the *Ordre* cannot be considered as an association within the meaning of Article 11. However, there is a further requirement: if there is not to be a violation, the setting up of the *Ordre* by the Belgian State must not prevent practitioners from forming together or joining professional associations. Totalitarian régimes have resorted--and resort--to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses. [FN26]

FN26 See *The Collected Edition of the Travaux Préparatoires,* Vol. II, pp. 116- 118.

The Court notes that in Belgium there are several associations formed to protect the professional interests of medical practitioners and which they are completely free to join or not (see para. 22 above). In these circumstances, the existence of the *Ordre* and its attendant consequence--that is to say, the obligation on practitioners to be entered on the register of the *Ordre* and to be subject to the authority of its organs--clearly have neither the object nor the effect of limiting, even less suppressing, the right guaranteed by Article 11 (1).
66. There being no interference with the freedom safeguarded by paragraph 1 of Article 11, there is no reason to examine the case under paragraph 2 or to determine whether the Convention recognises the freedom not to associate.

*IV. The application of Article 50*

67. At the hearings, the applicants' lawyer asked the Court, in the event of its finding a breach of the Convention, to afford his clients just satisfaction under Article 50. He added, however, that he was 'not yet in a position to establish the exact amount of any ***24*** damages, in view of the possibility of compensation, if only partial, being granted under Belgian law'.
The Government made no submissions regarding the application of Article 50.
68. Accordingly, although it was raised under Rule 47 *bis* of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the question should be referred back to the Chamber under Rule 50 (4) of the Rules of Court.
For these reasons, THE COURT *holds:*
1. by 15 votes to five, that Article 6 (1) of the Convention was applicable in the present case;
2. by 16 votes to four, that there has been a breach of the said provision in that the applicants' case was not heard publicly by a tribunal competent to determine all the aspects of the matter;
3. unanimously, that there has been no violation of Article 6 (1) as regards the applicants' other complaints, and no violation of Article 11;
4. unanimously, that the question of the application of Article 50 is not ready for decision;
(a) accordingly, reserves the whole of the said question;
(b) refers the said question back to the chamber under Rule 50 (4) of the Rules of Court.

JOINT SEPARATE OPINION OF JUDGES CREMONA AND BINDSCHEDLER-ROBERT

[1] Like the majority of our colleagues, we have come to the conclusion that there is in this case a violation of Article 6 (1) of the Convention, but on grounds different from those relied upon by them.
[2] The first question which in our view falls to be considered is this: what was in essence the object of the domestic proceedings in this case? It was to establish whether the applicants had conformed to the rules of professional conduct applicable to the medical profession in their country and in general designed to maintain and uphold the probity

and dignity of that profession. That in itself is not in our view the determination of a 'civil right' of the applicants within the meaning of Article 6 (1).
[3] But of course it would be both unrealistic and, we think, also wrong to divorce this from the sanctions eventually applicable under the relevant legislation on a finding of non-compliance with those rules, and the two aspects should in fact be considered ***25*** together as a whole. But even so, the fact that a possible sanction might eventually affect the applicants' continued exercise of their profession still does not in our view turn this into a determination of their 'civil rights' as such, so that we find ourselves unable to agree with the conclusion of the majority to this effect and must dissociate ourselves from the arguments and considerations leading up to it or flowing therefrom in the majority judgment.
[4] We have here clearly disciplinary proceedings (in the course of which the applicants were in effect charged, found guilty and punished) in respect of offences entailing sanctions which at their worst are undoubtedly of a certain importance. This fact already presents a certain penal connotation which calls for a careful examination as to whether we are not really here, in the circumstances of the case, in the presence of what was in effect a criminal charge within the scope of our decision in the Engel Case. [FN27] In this connection we would, with respect, add that this decision, undoubtedly pertinent, does not seem to have been given its due importance in the present case. Actually when the majority consider as the object of the proceedings in this case the right to continue to exercise the medical profession, what they are in fact doing is to give preponderant weight to the sanction aspect or rather the result of it.

FN27 (1976) 1 E.H.R.R. 647.
[5] In the Engel Case, [FN28] the Court said in substance that disciplinary proceedings (and those in question were undoubtedly so) in principle fall outside the scope of Article 6 (1), but that there are situations where under cover of a charge classified by national legislation as disciplinary there is actually concealed what is in effect a criminal charge. In this connection it was said that while in a given case the nature of the offence may warrant a State employing against the person concerned disciplinary law rather than criminal law, the supervision of the Court 'would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring'. [FN29] In that case, the Court had to consider, in the context of disciplinary law applicable to the armed forces, penalties amounting to deprivations of personal liberty and remarked that 'in a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental'. [FN30]

FN28 *Ibid.*

FN29 *Ibid.*, at para. 82.

FN30 *Ibid.*
[6] We are of the view that the same ought to apply to a case, like the present, where the penalty risked, even on appeal, was, amongst others, actual striking off the register, that is to say downright ***26*** total withdrawal of the applicants' right to practise their profession for the future, the severity of which surely does not need to be emphasised (*cf.* the criminal punishment known in some legislations as interdiction from the exercise of a trade or profession, which however is usually only temporary).
[7] In the light of the above we are of the view that we are here in the presence of what was in effect a criminal charge. Turning to the manner in which it was determined, we too find that in this case the requirements of Article 6 (1) were not met in every respect and that a violation of the said Article 6 (1) therefore ensues.

DISSENTING OPINION OF JUDGE LIESCH

[FN31]

FN31 Provisionally translated by the Court.
[1] To my regret, I am unable to agree with the conclusion of my learned colleagues that Article 6 (1) of the European Convention on Human Rights is applicable in the **Le Compte** case.
[2] The interpretation of the notion 'contestations' (disputes) over 'civil rights and obligations' has yielded a fairly abundant harvest; yet its meaning and scope are still not definitely settled.
[3] The Ringeisen judgment stated that 'the French expression "*contestations sur (des) droits et obligations de caractère civil*" covers all proceedings the result of which is decisive for private rights and obligations', and that 'the English text, "determination of ... civil rights and obligations", confirms this interpretation'. [FN32]

FN32 (1971) 1 E.H.R.R. 455, para. 94.
[4] The Golder judgment provided the Court with the occasion to hold that everyone is entitled to have any claim relating to his civil rights and obligations brought before a court or tribunal meeting the requirements of Article 6 (1). [FN33]

FN33 (1975) 1 E.H.R.R. 524, para. 36.
[5] Finally, in the König judgment, the Court recognised that the right to continue to exercise the medical profession and the right to run a clinic were 'civil'. [FN34]

FN34 (1978) 2 E.H.R.R. 170, paras. 91-93.
[6] It seems to me superfluous to set out again the arguments of Judge Matscher, with which I agree entirely as far as the applicability of Article 6 (1) is in issue.
[7] Slightly different considerations lead me to an identical conclusion.
[8] In the present case, the majority of the Court 'considers that a tenuous connection or remote consequences do not suffice for Article 6 (1) in either of its official versions ("*contestation sur*", "determination of"): civil rights and obligations must be the object--or one of the objects--of the "*contestation*" (dispute); ***27*** the result of the proceedings must be directly decisive for such a right'. [FN35]

FN35 *Supra,* para. 47.
[9] Henceforth, therefore, all disciplinary proceedings the result of which is decisive for private rights and obligations, whether they concern medical practitioners, notaries, judicial officials, lawyers or bailiffs, fall within the ambit of Article 6 (1), provided that the sanction imposed affects a private right and even if the sanction is no more than a fine. Conversely, disciplinary penalties in the shape of a warning or a reprimand, not coupled with a financial penalty, are apparently, in the opinion of the majority of the Court, not covered by the provisions of Article 6 (1), even though these sanctions may have an effect from a moral, and hence private, point of view.
[10] The object of the proceedings instituted against the applicants was to ascertain whether they had committed professional misconduct which, if proved, would render them liable to sanctions; the proceedings *related to* professional conduct, *to* an attitude which the disciplinary organs considered open to criticism.
[11] Accordingly, the object properly so called was limited to the establishment of an alleged violation of a rule of professional conduct laid down by law.
[12] Given that only the right at issue is relevant, [FN36] and that its civil character depends on the nature and object of the action, [FN37] it must be observed that the object of the disciplinary proceedings instituted against the applicants, unlike those taken against Dr. König which did directly concern private rights--the practice of medicine and the running of a private clinic--cannot be considered to be the determination of a civil right or obligation.

FN36 See König v. Germany (1978) 2 E.H.R.R. 170, para. 90 *in fine.*

FN37 *Ibid.* at paras. 88-90.
[13] In fact, the framework of any proceedings is set by the object of the litigation; it is for the court hearing the case to examine, in the light of all the aspects of this jurisdictional contract, the legal submissions of the parties. It cannot be denied that this legal relationship will engender rights and obligations for the benefit of or incumbent upon the parties. However, the origin of these rights and obligations in private matters is a direct origin, it is already there in embryo, whereas in disciplinary matters the civil character of the sanction, 'the result of the proceedings', will not be revealed until after a prior finding of professional misconduct, which is the object of the action and leads, if appropriate, to consequences of a private character.
[14] In the instant case, the obligation which was at first sight and directly in issue--the applicants' right to practise medicine was not under review--was the obligation to observe the rules of professional conduct, these being rules of a public character breach ***28*** whereof had indirect and accessory repercussions solely at a later stage, when it was a question of determining the sanction to be imposed.
[15] Contrary to the Court's opinion, [FN38] the proceedings in question were not to deprive these medical practitioners of the right to practise, given that the suspension complained of was not their direct and necessary effect; the outcome of the proceedings could have been quite different and could have amounted to no more than a warning. It therefore seems to me incorrect to state that the right to practise was directly in issue.

FN38 *Supra,* para. 47.
[16] I find the analogy with the König judgment shaky. The difference lies in the fact that in the **Le Compte** Case the suspension--of a private character-- was ordered *after* a finding of professional misconduct on the part of those concerned, whereas in the König Case the unfitness to practise medicine and to run a clinic, a veritable civil right akin to the right of property, gave rise, after the necessary investigations, to a total withdrawal of authorisations.
[17] In my opinion, it follows from the above that Article 6 (1) was not applicable in the present case.

PARTLY DISSENTING OPINION OF JUDGE MATSCHER

[FN39]

FN39 Provisionally translated by the Court.

**A**

1. For reasons similar to those set out in my separate opinion annexed to the König judgment, [FN40] I regret that I likewise cannot share the opinion of the majority of the Court in the present case, in so far as it concludes that there has been a violation of Article 6 (1) of the Convention.

FN40 (1978) 2 E.H.R.R. 170, 207.
It was, in fact, foreseeable that not long would elapse before the reasoning in the König judgment, which gave to the notion of 'contestations' (disputes) over 'civil rights and obligations' a meaning and scope which are not, as I understand it, those contemplated by Article 6 (1) of the Convention, placed ever-increasing difficulties in the way of a reasonable interpretation of that provision, that is to say an interpretation which is consonant with the text and meaning of the provision in question and, at the same time, capable of serving the particular interests of those involved in litigation and the general interests of the Convention as regards the rights which it is intended to protect. A first illustration of this is furnished by the present case. One might therefore have thought

that the case would have provided the Court with an opportunity of reconsidering the correctness of its understanding ***29*** of the notion of 'contestations' (disputes) over 'civil rights and obligations'. Yet the Court has not confined itself to confirming, in substance, that understanding; it has even broadened it and, in so doing, has laid foundations from which even greater problems will arise.

The present judgment, like the König judgment as well for that matter, is, of course, based on the worthy intention of affording to the individual protection against interferences by public, professional or social authorities in an especially important area like the exercise of a profession. The fact that the Convention is defective in this respect is a point that I myself have emphasised on numerous occasions. But, according to my view of the judicial role, it is no part of the functions of an international court to give recognition to rights which the authors of the Convention did not intend to include therein. This unsatisfactory situation cannot therefore be validly rectified by means of judicial interpretation, and this is all the more so because such an interpretation threatens to upset the Convention system in one of its most sensitive sectors; rectification can be effected only by the legislature, in other words by the Contracting States, who would take steps to amend the Convention.

I see no purpose in repeating here the arguments I set out in my above- mentioned separate opinion; the gist of those arguments applies also to the present case which has many features in common with the König Case, although the two are not identical.

2. It was stated in the König judgment [FN41] that the right to continue to exercise the medical profession was a civil right, within the meaning of Article 6 (1), on account, apparently, of the fact that a medical practitioner's activities were said to amount mainly (from the legal point of view) to the maintenance of private-law relationships with his patients. Hence, administrative proceedings leading to withdrawal of the authorisation to practise were said to concern a 'contestation' (dispute) over a 'civil right', the result of those proceedings being decisive for the right in question.

FN41 At paras. 91-93.

I do not wish to bring up once more the very debatable nature of a deduction of this kind and I will confine myself to referring to the arguments on this point set out in my Separate Opinion in König.

In the König judgment, [FN42] the Court was at least able to affirm that the withdrawal of the authorisation to practise had constituted *the object* (or one of the objects) of the administrative proceedings instituted against the applicant. Accordingly, to the extent that the right to exercise a certain profession, even one regulated by public law, can be deemed a civil right--a view which I question--proceedings ***30*** leading to the withdrawal of that right would them-selves have had a civil right as their real object.

FN42 At para. 95.

It was quite otherwise in the present case. In fact, the applicants' right to continue to practise medicine had been *neither the object nor one of the objects* of the proceedings before the organs of the *Ordre des médecins* or before the Court of Cassation. The exclusive object of those proceedings was to ascertain whether the applicants had broken the medical profession's rules of professional conduct and, if so, to impose on them the corresponding sanction, in the shape of suspension of the right to practise medicine. It is that sanction alone which affected their professional situation and which thereby had *an indirect effect* on the private-law relationships which the applicants might have maintained with their patients. Yet, as the Court itself correctly observes, 'remote consequences' which a measure taken in the course of proceedings may have on a civil right do not suffice to give those proceedings the character of (contentious) civil-law proceedings.

Since there was a question of a sanction for breach of the medical profession's rules of professional conduct, the case might, at the outside, be characterised as criminal. Moreover, the judgment itself seems to point to this interpretation when it speaks (in para. 45) of 'professional misconduct' of which the applicants were said to have been

'found guilty'. However, for other reasons, the judgment does not consider it necessary to follow this 'trail' (paras. 52 and 53).

3. Again, the judgment is also unable to provide a sufficiently clear and precise definition of the link that must exist between a civil right and a given set of proceedings before the latter may be considered to relate to a ' contestation' (dispute) over a 'civil right'. This is demonstrated by the vague and ambiguous language utilised by the judgment on this point: it must be shown that the *contestation* (dispute) 'related to' civil rights and obligations, that the result of the proceedings 'was decisive' for such a right (para. 46); civil rights and obligations must 'be the object--or one of the objects'--of the *contestation* (dispute); the result of the proceedings must be 'directly decisive' for such a right (para. 47); that right must be 'directly in issue' (para. 47); the suspension must constitute a 'direct and material interference' with the exercise of the right in question (para. 49); the *contestation* (dispute) must be regarded as 'relating' to civil rights and obligations (para. 50); etc.

Such language is not appropriate either to give to the Contracing States guidance on the adaptation of their law to the requirements of the Convention institutions, or to enlighten those involved in litigation on an application's prospects of success. In short, it makes no contribution to legal certainty, a principle which has often been invoked, and rightly so, in the Court's judgments.

***31*** 4. Was the fact that the applicants were medical practitioners in private practice really decisive for the classification of the right in question as 'private' (para. 48)? Would not the applicants have been in basically the same situation--as regards the rights for which they sought protection under the Convention--if they had been medical practitioners employed as civil servants in a public health service or medical practitioners employed in a private clinic? In fact, they did not claim to be victims of an interference with their right to establish contractual relationships with their patients; they complained exclusively of the fetter on precisely their right to exercise their profession. Can the position be any different as regards the right to exercise other professions, whether the individuals concerned are in private practice or not?

In addition, I also do not find it possible--short of relying on the doctrine of acquired rights, a doctrine which legal writers have for a long time recognised as not being of general application--to draw a distinction, for the purposes of the applicability of Article 6 (1), between the grant and the withdrawal of the right to exercise a profession. The König judgment (para. 91), on which the present judgment is based, did draw such a distinction (see the rebuttal of this proposition in my Separate Opinion).

It is a necessary consequence of the reasoning in the König judgment, which is now taken further by the present judgment, that the right to exercise any profession whatsoever, even to the extent that that right is regulated in its essential aspects by public law, would be a 'civil right' within the meaning of Article 6 (1). Accordingly, all proceedings, whether administrative or disciplinary, whose object or indirect effect was the grant or the withdrawal of the right to exercise a profession would relate to a 'contestation' (dispute) over a 'civil right' and so would have to satisfy, at least at the final instance stage, the requirements of Article 6 (1). The effect of this proposition, which appears to me an inescapable conclusion from the unreasoning in the König judgment and in the present judgment--notwithstanding all the reservations which both judgments hasten to express at various points--, is that in this respect the law of the majority of the Contracting States would be out of step with the Convention.

Again, a consequence of this kind does not appear acceptable to me, nor would the Contracting States find it understandable. For me, therefore, it has instead the value of an argument *ad absurdum*. In these circumstances, one has to go back to the causes of this unacceptable result. As far as I am concerned, they are to be found in the desire to force certain legal situations into a garment --Article 6 (1)--which was manifestly not tailored for them.

5. Of course, in order to avoid such consequences, the judgment endeavours to moderate the implications of its reasoning, that is ***32*** to say by envisaging the possibility of a waiver of the right to have the proceedings conducted in public. This is an expedient of

very little validity: when proceedings are organised so as to take place in public, a party generally does not have the option of waiving publicity, since provision therefor is made not in the exclusive interests of one of the parties but in interests going beyond those of the parties, namely the interests of the court in general; when, on the other hand, publicity is excluded--as is rightly done for disciplinary matters--a 'waiver' by a party would be quite pointless.
I would observe, in passing, that the reference (para. 59 of the present judgment) to the Deweer Case [FN43] does not seem relevant to me: waiving the right to have the merits of a dispute over a substantive right determined by a tribunal meeting the requirements of Article 6 (1)--by having recourse to an arrangement, a friendly settlement or arbitration--is quite a different matter; legal writers recognise that this right of waiver in no way implies that the parties are entitled to arrange proceedings, once they have been instituted by or against them (prohibition of 'agreed proceedings').

FN43 Deweer v. Belgium (1980) 2 E.H.R.R. 439, para. 49.
For my part, I do not believe that Article 6 (1) can be manipulated in this way. When a case is subject to that Article, it must be applied *in toto*; a finding that it would prove impossible or unreasonable to apply it in full proves, in my opinion, that it is not applicable to the given case or category of cases.
As a general point, I would like to indicate that I am strongly opposed to any attempts to apply the guarantees contained in Article 6 (1) selectively. In addition to being incompatible with both the letter and the spirit of this provision, such a course could prove extremely dangerous for the interests of those involved in litigation.
6. When all is said and done, the judgment concludes that Article 6 (1) has been violated on a point which, in the present case, is entirely secondary and marginal, namely the absence of publicity in disciplinary proceedings. It is quite true that the applicants did complain on this score as well, but their purpose was completely foreign to the purpose underlying the guarantee of publicity within the meaning of Article 6 (1). And to arrive at a result of such limited scope, the judgment has had to set out propositions which the Contracting States will find perplexing and which, in any event, will open the door to ever-increasing legal uncertainty in so sensitive an area as that of the judicial guarantees contemplated by the Convention. This is why, to my regret, I cannot concur with the judgment.

***33* B**

I agree entirely with the present judgment to the extent that it finds that there has been no interference with freedom of association within the meaning of Article 11 of the Convention.

DISSENTING OPINION OF JUDGE PINHEIRO FARINHA

[FN44]

FN44 Provisionally translated by the Court.
To my great regret, I cannot share the opinion which my colleagues forming the majority have expressed concerning the violation of Article 6 of the European Convention on Human Rights.
In point of fact:
1. I believe that in the exercise of the medical profession the spiritual element takes precedence over the material element, with the result that the suspension of the right to practise medicine put in issue a right which is public and not civil (this I have already said, *mutatis mutandis*, in my Separate Opinion in the König Case).
2. I agree with the majority when it states in paragraph 47 of the judgment that it considers 'that a tenuous connection or remote consequences do not suffice for Article 6 (1), in either of its official versions ("*contestation sur*", "determination of"): civil rights

and obligations must be the object--or one of the objects--of the "*contestation*" (dispute); the result of the proceedings must be directly decisive for such a right'.
However, in my view there was no discussion before the disciplinary organs of the *Ordre* regarding the effects of the actions of Dr. **Le Compte,** Dr. Van Leuven and Dr. De Meyere on the private-law relationships established with their clients.
The dispute before the disciplinary organs (Provincial and Appeals Councils) and then before the Court of Cassation bore solely on questions of professional conduct and this is a matter that falls outside the ambit of the civil law.
3. I accept the following statement of the majority in paragraph 42 of the judgment:
'Again, disciplinary proceedings do not normally lead to a *contestation* (dispute) over "civil rights and obligations" ... However, this does not mean that the position may not be different in certain circumstances'.
It follows that, as a general rule, disciplinary proceedings do not have to meet the requirements of Article 6 (1) of the Convention.
When is Article 6 (1) applicable to disciplinary proceedings?
In my opinion, it is not the outcome of the proceedings--the sanction which is imposed at the end of the day--which determines whether paragraph 1 of Article 6 is applicable or not.
***34** The applicability of paragraph 1 of Article 6 depends on the object of the proceedings, of which the *causa petendi* is one of the elements.
Litigation gives rise to a legal situation that is dynamic, [FN45] or, to be more precise, a situation that is constantly evolving in that there is a gradual progression towards the final result which the litigation is calculated to achieve; it is for this reason that one cannot await the decision in order to ascertain whether it determines a 'contestation' (dispute) over 'civil rights and obligations'.

FN45 Manuel Andrade, *Liçees de Processe Civil,* p. 363.
It does not seem to me that the question whether disciplinary proceedings must or must not comply with paragraph 1 of Article 6 should depend on whether there has been imposition of a suspension from the practice of medicine--in which case the paragraph would be held to be applicable--, or imposition of other disciplinary sanctions such as a warning, a censure or a reprimand following proceedings which might depart from the rules of the Convention. Such a solution would leave matters in a state of uncertainty until the final decision had been rendered.
Here, the applicants' case concerns solely the violation of the rules of professional conduct and it follows, in my judgment, that Article 6 (1) is inapplicable.
4. In conclusion, I consider that there has been no violation either of Article 6 (1) or of Article 11 of the Convention.

SEPARATE OPINION OF JUDGE PETTITI

[FN46]

FN46 Provisionally translated by the Court.
[1] I voted with the majority of the Court on the applicability of Article 6 (1). However, I find it necessary to indicate how I interpret this point as far as the public conduct of proceedings is concerned. The proceedings before the Court of Cassation were conducted in public, but in the context of the hearing of an appeal on a point of law which led to no more than a review of lawfulness.
[2] The question of the public conduct of proceedings, within the meaning of Article 6, arose insofar as Belgian law does not make provision for an appeal to a tribunal competent to determine all the aspects of the matter (*recours de plein contentieux*).
[3] The *plein contentieux* is, in fact, necessary in order to ensure that the professional body does not apply its powers for an improper purpose by, for example, imposing a sanction as a disciplinary measure for conduct akin to the adoption of a particular trade union or professional viewpoint; a review of this kind is the counterpart of the

jurisdictional prerogatives conferred on the professional bodies.
***35*** [4] If the procedure before professional bodies includes at the final instance a *recours de plein contentieux*, then the fact that the proceedings at that stage are conducted in public will provide a sufficient degree of compliance with the rule laid down in the Article.
[5] One must, in fact, not overlook the specific character of disciplinary proceedings nor the fact that they form part of a tradition which has to have regard for the basic aim of professions devoted to the function of providing public health-care or the function of administering justice. The principle of judgment by one's peers is an inherent necessity in order to protect professional secrecy, confidential information imparted by third parties and the reputation of members of professions.
[6] To conduct the hearings before the Council of the *Ordre* (Medical Association) and before the appeal body in public, when guilt had yet to be determined at final instance, would be prejudicial to the career of the person concerned if he were finally found to be innocent. It is not a sufficient safeguard to leave the choice between private and public proceedings to the person against whom they have been instituted. At the very outside, when looking for new solutions to be laid down in legislation or regulations, one might contemplate, in the absence of a *recours de plein contentieux*, holding the appeal stage of the proceedings in public, but in that case with access to the hearings being restricted to members of the profession only.
[7] However, the solution which best marries respect for the tradition of the professions and of professional tribunals with respect for the rules of a fair trial under the European Convention is, in my view, one which provides that, in proceedings that do include an ultimate *recours de plein contentieux*, this final stage alone shall be conducted in public.

DISSENTING OPINION OF JUDGE SIR VINCENT EVANS

1. I agree with the judgment of the Court that there was no violation of Article 11 of the Convention.
2. I regret, however, that I am unable to share the opinion of the majority of the Court that there has been a violation of Article 6 (1). In my view, Article 6 is not applicable in the present case, because the proceedings complained of by the applicants were not concerned with the determination of either civil rights or obligations or of a criminal charge within the meaning of that Article.
3. The concept of 'civil rights and obligations' in Article 6 has been taken by the Court as referring to rights of a private nature, ***36*** though the Court has left open the question whether the concept within the meaning of that provision extends beyond such rights. [FN47]

FN47 See Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455, para. 94; König v. Germany (1978) 2 E.H.R.R. 170, para. 95; and paras. 44 and 48 of the present judgment.
4. The interpretation of the words 'civil rights and obligations' as referring to private rights and obligations is consistent with the French text of Article 6 ('droits et obligations de caractère civil') and is borne out by the negotiating history of the Article which supports the view that a restrictive meaning should be put upon these words, particularly in regard to matters within the field of public, including administrative, law. I would also endorse the proposition that it is not enough for the dispute or the proceedings to have a tenuous connection with or remote consequences affecting civil rights or obligations, but such rights and obligations must be the object of the 'contestation' (dispute) and the result of the proceedings must be directly decisive for such a right (*cf.* para. 47 of the judgment). Where I disagree with the majority of the Court is in their conclusion that the determination of a private right was the object of the dispute or proceedings in the present case.
5. The proceedings in question were conducted under Royal Decrees regulating the *Ordre des médecins* in Belgium and for that purpose conferring disciplinary powers on organs of

the *Ordre* 'to ensure observance of the rules of professional conduct for medical practitioners and the upholding of the reputation, standards of discretion, probity and dignity of the members of the *Ordre*' (para. 24 of the judgment). The proceedings before the Provincial and Appeals Councils and those before the Court of Cassation were therefore concerned with matters of public law. Their object was disciplinary--to ensure the observance of rules of professional conduct--and not the determination of private rights. The fact that their outcome could incidentally affect rights of a private character did not, in my opinion, suffice to bring them within the scope of Article 6 (1).

6. The effect of the judgment is to extend the application of Article 6 (1) to proceedings of a kind to which, in my view, it was not intended to apply and to which its requirements, particularly as regards publicity, are not always appropriate. For instance, in disciplinary cases it may not always be necessary in the public interest or desirable in the interest of the individual concerned that the decision should be made public, particularly if he has been found not to be guilty of any misconduct. The application of Article 6 (1) to disciplinary cases may also give rise to undue difficulties as regards the composition of disciplinary organs of professional bodies and because such organs are not always 'established by law'.

***37** 7. It remains to consider whether the disciplinary proceedings in the present case involved the determination of any criminal charge against the applicants. In view of its finding that the proceedings in question concerned the determination of civil rights and obligations, the Court found it superfluous to decide the issue (para. 53 of the judgment). As noted by the Court, the Commission, when deciding on the admissibility of the applications, stated that the disciplinary organs of the *Ordre* had not been required to determine criminal charges (para. 52 of the judgment). I see no reason to disagree with the Commission. In the case of Engel and Others, [FN48] although the proceedings complained of were conducted under disciplinary law, the Court held that the charges against some of the applicants did come within the ' criminal' sphere since their aim was the imposition of serious punishments involving deprivation of liberty. [FN49] In the present case, neither the offences charged nor the sanctions applied by the disciplinary organs were of a criminal character. It is true that Dr. **Le Compte's** refusal to comply with the measures imposed by the *Ordre* led to his being charged subsequently with criminal offences and sentenced to terms of imprisonment and fines, but there was no complaint that the proceedings before the Belgian criminal courts failed to comply with the requirements of Article 6.

FN48 (1976) 1 E.H.R.R. 647.

FN49 At para. 85.

8. For these reasons I conclude that there was no violation of Article 6 of the Convention.

DISSENTING OPINION OF JUDGE THOR VILHJALMSSON

I agree with the dissenting opinion of Judge Sir Vincent Evans.



(1982) 4 E.H.R.R. 1

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**UNITED NATIONS**

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| | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 | Case No. | IT-01-47-PT |
| | | Date: | 12 November 2002 |
| | | Original: | English |

**IN THE TRIAL CHAMBER**

**Before:** **Judge Wolfgang Schomburg, Presiding**
**Judge Florence Ndpele Mwachande Mumba**
**Judge Carmel Agius**

**Registrar:** **Mr. Hans Holthuis**

**Decision of:** **12 November 2002**

**PROSECUTOR**

**v.**

**ENVER HADŽIHASANOVIĆ**
**MEHMED ALAGIĆ**
**AMIR KUBURA**

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# DECISION ON JOINT CHALLENGE TO JURISDICTION

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**The Office of the Prosecutor:**

Mr. Ekkehard Withopf

**Counsel for the Accused:**

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

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# I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "ICTY") is seized of the "Joint Challenge to Jurisdiction Arising from the Amended Indictment," filed on behalf of the three accused ("Accused") by their defence counsel ("Defence") on 21 February 2002 ("Joint Challenge" or "Motion"), in which the Defence raised three jurisdictional objections to the Amended Indictment ("Amended Indictment") filed by the Office of the Prosecutor ("Prosecution") on 11 January 2002. The three objections are: (1) International law at the relevant time did not provide for criminal responsibility of superiors in the context of a non-international armed conflict;[1] (2) Article 7(3) of the Statute of the International Tribunal ("Statute") does not provide for liability of a superior for crimes committed before the existence of a superior-subordinate relationship between the perpetrators and the superior; and (3) Article 7(3) of the Statute does not provide for liability of superiors for failure to prevent or punish the planning and preparation of offences.

2. The Defence submitted that the three issues need to be resolved before trial, as a decision in their favour would result in the dismissal of all charges in the Amended Indictment, and therefore, none of the Accused would have to face a trial.

3. The Prosecution filed its response to the Joint Challenge, "Prosecution's Response to Joint Challenge to Jurisdiction Arising from the Amended Indictment" on 27 February 2002, in which it agreed that "these issues should be resolved before the trial and that a timetable for the filing of detailed submissions is needed."

4. On 25 March 2002, the Trial Chamber issued a Scheduling Order in which it ordered that the parties file concurrently written submissions by 10 May 2002, written responses by 24 May 2002, and written replies by 31 May 2002 on the issues raised in the Joint Challenge. The parties submitted their filings accordingly.[2] The Trial Chamber granted leave to the Defence to file an

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[1] Throughout this Decision, the Trial Chamber uses the terms "non-international armed conflict" and "internal armed conflict" interchangeably. Likewise, the terms "command responsibility" and "superior responsibility" should be read as synonymous. Additionally, unless otherwise stated, whenever a gender-specific pronoun or term is used, it should be read to include the male or female equivalent.

[2] Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", 10 May 2002 ("Written Submissions of Prosecution"); Joint Challenge to Jurisdiction Arising from the Amended Indictment Written Submissions of Enver Hadžihasanović, 10 May 2002 ("Written Submissions of Hadžihasanović"); Written Submission of Amir Kubura on Defence Challenges to Jurisdiction, 10 May 2002 ("Written Submissions of Kubura"); Submissions of Mehmed Alagic Fsicğ on the Challenge to Jurisdiction Based on the Illegality of Applying Article 7(3) to Non-International Armed Conflict," dated 9 May 2002, and filed on 10 May 2002 ("Written Submissions of Alagić"); Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from

additional reply.[3] Additionally, the Prosecution filed a supplementary authority following a decision taken in another Trial Chamber.[4]

5. The Defence requested an oral hearing be held to assist the Trial Chamber in deciding the issues raised in the Joint Challenge. Due to the extensive pleadings submitted by the parties, the Trial Chamber determined that an oral hearing was unnecessary.[5]

6. The Trial Chamber notes that some of the issues raised in the Joint Challenge were previously raised by the Defence with regard to the initial Indictment of 6 July 2001 ("Initial Indictment").[6] In response to the Defence arguments raised on the Initial Indictment in relation to the status of the doctrine of command responsibility under customary international law for crimes committed in internal armed conflict under Article 3 of the Statute, the Trial Chamber issued a decision in which it held that the issue could be left for determination at trial.[7] It found that since the Initial Indictment included counts under Article 2 and Article 3 of the Statute, no prejudice to the Accused would be incurred if the issue were not determined before trial. Additionally, the Trial Chamber instructed the parties to provide detailed submissions on this issue in their pre-trial briefs.[8]

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the Amended Indictment, 24 May 2002 ("Prosecution Response"); Enver Hadžihasanović's Response to the Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", 24 May 2002 ("Hadžihasanović Response"); Response of Mehmed Alagic Fsicğ on the Challenge to Jurisdiction, 24 May 2002 ("Alagić Response"); Response of Amir Kubura to Prosecution's Brief on Defence Challenges to Jurisdiction of 10 May 2002, dated 23 May 2002, and filed on 24 May 2002 ("Kubura Response"); Prosecution's Reply to Defence Responses to the Prosecution's Brief Concerning Issues Raised in the Joint Challenge to Jurisdiction Arising from the Amended Indictment, 31 May 2002 ("Prosecution Reply"); Enver Hadžihasanović's Reply to the Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 31 May 2002 ("Hadžihasanović Reply"); Reply of Mehmed Alagic Fsicğ on the Challenge to Jurisdiction, 31 May 2002 ("Alagić Reply"); Reply of Amir Kubura to Prosecution's Response to Defence Written Submissions on Challenge to Jurisdiction, 31 May 2002 ("Kubura Reply"). The Trial Chamber advises that citations to one accused's submissions below should not be read as limiting or excluding arguments made by another accused on the same or a similar issue. See, Written Submissions of Hadžihasanović, para. 3, and Written Submissions of Alagić, para. 4, on the adoption of co-accused arguments.

[3] Additional Joint Defence Reply to Issues Raised by the Prosecution's Reply to the Defence Challenge to Jurisdiction, 17 June 2002 ("Additional Reply").

[4] Supplementary Authority to Prosecution's Reply to Defence Responses to the Prosecution's Brief Concerning Issues Raised in the Joint Challenge to Jurisdiction Arising from the Amended Indictment, filed on 27 June 2002. The Trial Chamber notes that the decision provided by the Prosecution, "Decision on Defence Preliminary Motion Challenging Jurisdiction," *Prosecutor v. Strugar et al.*, Case No. IT-01-42-PT, 7 June 2002, is currently on appeal.

[5] Status Conference, 18 July 2002, Transcript p. 149.

[6] Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 8 October 2001, paras 31-42. See subsequent filings on this motion: Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 22 October 2001; Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment, 29 October 2001 (the Reply was filed by counsel for Mehmed Alagi}; counsel for the other accused joined that Reply by filing the "Joint Reply to Prosecution Response to Preliminary Motion Alleging Defects in the Form of the Indictment" on 5 November 2001); Request for Leave to File Supplement to Prosecution's Response to the Joint Preliminary Motion Alleging Defects in the Form of the Indictment, 30 October 2001.

[7] Decision on Challenge to Jurisdiction, 7 December 2001, para. 7.

[8] Ibid, para.10: "The parties are to address the following question in their pre-trial briefs. Did international law at the time relevant to the present indictment provide for criminal responsibility of superiors who knew or had reason to know that their subordinates were about to commit violations of international humanitarian law, or had done so, and failed to

Once the Initial Indictment was amended and the Amended Indictment no longer included charges pursuant to Article 2 of the Statute, and following the filing of Joint Challenge, the Trial Chamber agreed that this issue should be addressed before the start of trial, as discussed above.

7. The Trial Chamber takes note of a decision issued by a bench of three judges of the Appeals Chamber in another case.[9] In this decision, the Appeals Chamber dismissed a request for leave to appeal a Trial Chamber decision which dismissed a challenge to jurisdiction in relation to Article 7(3) of the Statute, namely, that the criminal responsibility established by Article 7(3) of the Statute violates the principle *nullum crimen sine lege*, because the doctrine of command responsibility was not a norm of international customary law at the time of the alleged offence. The Appeals Chamber dismissed the challenge to jurisdiction on the ground that "it does not relate to any of the matters set out in 72(D) of the Rules."[10] Rule 72(D) of the Rules defines a motion challenging jurisdiction as referring "*exclusively* to a motion which challenges an indictment on the ground that it does not relate to: (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute; (ii) the territories indicated in Articles 1, 8 and 9 of the Statute; (iii) the period indicated in Articles 1, 8 and 9 of the Statute; (iv) *any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.*"[11] This Trial Chamber interprets the current Joint Challenge as one that negates jurisdiction under Article 7(3) *ex initio* and submits that the Amended Indictment cannot be based on a violation of Article 7(3) of the Statute (Rule 72(A) and Rule 72(D)(iv)).[12]

8. The Trial Chamber will now address the issues raised in the Joint Challenge and present its finding on each issue.

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take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof in the context of non-international conflicts?"

[9] *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-AR-72, Decision on Application for Leave to Appeal, 19 February 2002 ("*Stakić* Decision").

[10] *Stakić* Decision, p. 3.

[11] (emphasis added).

[12] See, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR72.2, Decision on Interlocutory Motion Challenging Jurisdiction, 25 May 2001. The Trial Chamber notes that this decision by the Appeals Chamber, which dismissed an appeal challenging the criminal responsibility established by Article 7(3) of the Statute on the grounds that it violated the principle *nullum crimen sine lege* because the doctrine of command responsibility was not an international custom at the time of the alleged offence, was based on the former version of Rule 72, which did not include section D(iv).

## II. ISSUE 1: COMMAND RESPONSIBILITY IN NON-INTERNATIONAL ARMED CONFLICTS

9. The first issue to be determined is whether international law at the time of the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 provided for criminal liability of superiors for omissions in the context of non-international armed conflict in general, thereby allowing for the prosecution of the Accused for their concrete acts allegedly committed between January 1993 and January 1994 under Article 7(3) of the Statute.[13]

10. The Amended Indictment alleges that "[a]t all times relevant to this indictment, an armed conflict existed on the territory of Bosnia and Herzegovina."[14] The events in the Amended Indictment are alleged to have occurred in central Bosnia, with the parties to the conflict being the Army of Bosnia and Herzegovina ("ABiH") and Croatian Defence Council ("HVO"). In the Initial Indictment, the Prosecution had alleged that "at all times relevant to this indictment, a state of international armed conflict and partial occupation existed in Bosnia and Herzegovina."[15]

11. In the Amended Indictment, Enver Hadžihasanović and Mehmed Alagić are charged with seven counts of violations of the laws or customs of war under Article 3 and Article 7(3) of the Statute. Amir Kubura is charged with six counts of violations of the laws or customs of war under Article 3 and Article 7(3) of the Statute. There are no charges in the Amended Indictment pursuant to Article 7(1).

12. Enver Hadžihasanović is alleged to have joined the Territorial Defence of Bosnia and Herzegovina after 8 April 1992. On 14 November 1992, it is alleged that he was made the Commander of the 3rd Corps of the ABiH, a position he retained until he allegedly was promoted to Chief of the Supreme Command Staff of the ABiH. In December 1993, it is alleged that he was promoted to Brigadier General, thereby making him a member of the Joint Command of the Army of the Federation of Bosnia and Herzegovina.[16]

13. Mehmed Alagić is alleged to have joined the 17th Krajina Brigade of the ABiH 3rd Corps on 13 January 1993 as a soldier and was appointed the Commander of the ABiH 3rd Corps Operational

[13] The Defence Joint Challenge 21 February 2002 includes *all* charges under Article 3 as not entailing individual criminal responsibility under Article 7(3) and submits that there is no distinction between charges under common Article 3 of the Geneva Conventions and other Article 3 charges, as made in the 7 December 2001 Decision. See Alagić Reply, para. 24 and Kubura Written Submissions, para. 13.
[14] Amended Indictment, para. 11.
[15] Initial Indictment, para. 46.

Group on 8 March 1993. On 1 November 1993, it is further alleged that he was named Commander of the ABiH 3rd Corps.[17]

14. Amir Kubura is alleged to have joined the ABiH in 1992 during its formation as the Deputy Commander of a detachment in Kakanj and was allegedly then assigned as the commander of an ABiH Mountain Battalion in the same area. On 11 December 1992, it is further alleged that he was posted as Assistant Chief of Staff for Operations and Instruction Matters of the ABiH 3rd Corps 7th Muslim Mountain Brigade, and allegedly became the Chief of Staff on 1 January 1993. From 1 April 1993 to 20 July 1993, Amir Kubura is alleged to have acted as the substitute for the Brigade Commander of the ABiH 3rd Corps 7th Muslim Mountain Brigade, and is alleged to have been appointed Commander on 21 July 1993.[18]

## A. Arguments of the Parties

### 1. The Defence

15. The Defence for the three Accused are largely in agreement in the presentation of their arguments. The primary argument is that international law – including both customary and conventional law – did not provide for criminal responsibility of superiors in a non-international armed conflict, as applied under Article 7(3) of the Statute of the International Tribunal, for violations of Article 3 (violations of the laws or customs of war) of the Statute at the time the alleged offences were committed. Therefore, all counts in the Amended Indictment fall outside of the jurisdiction of the International Tribunal, as defined by the Secretary-General and endorsed by the Security Council.

16. The Defence contend that there is no basis in customary or conventional law for the doctrine of command responsibility to be applied in an internal armed conflict,[19] and the application thereof violates the principle of legality. The Defence point out that in the Report of the Secretary-General, it is required that the International Tribunal apply rules of international humanitarian law that are "beyond any doubt" part of customary law.[20]

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[16] Amended Indictment, para. 3.
[17] Ibid, para. 6.
[18] Ibid, para. 9.
[19] The Defence for Alagić specifically argue that there must be both a conventional and customary basis for any rules of international humanitarian law applied by the International Tribunal. See Written Submission of Alagić, para. 30. See also, Hadžihasanović Reply, para.15, in support of this argument.
[20] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) ("Report of the Secretary-General"), 3 May 1993 (S/25704), para. 34.

17. The Defence do not challenge the applicability of the principle of command responsibility in international armed conflicts, citing both a conventional and customary basis for the norm in international armed conflicts.[21] The Defence examined the sources relied upon in the *Čelebići* Trial Chamber Judgement[22] for establishing that command responsibility was part of customary international law. The Defence contend that the *Čelebići* Trial Judgement "firmly based its interpretation" on Additional Protocol I, Articles 86 and 87,[23] applicable to international armed conflicts and which specifically provides for disciplinary or penal action when a commander has failed to prevent or punish his subordinates from committing crimes, whereas Additional Protocol II[24] is silent on the issue.[25]

18. Furthermore, the Defence argue that Additional Protocol I provides for "penal or disciplinary responsibility, as the case may be", whereby the "or" allows for other than criminal sanctions. The Defence contend that the omission of the doctrine of command responsibility from Additional Protocol II is a clear sign that "States never intended Command Responsibility to be applied in internal armed conflicts."[26] This, the Defence assert, is a "reflection of the concerns expressed by many States about expanding the application of international humanitarian law to conflicts involving their internal affairs."[27]

19. The Defence further submit that "the fact that a norm of customary international law is applicable in the context of an international armed conflict does not mean that such a norm is also applicable *ipso facto* in the context of a non-international armed conflict."[28]

20. The Defence find the conventional or treaty sources for the application of the doctrine of command responsibility in situations of internal armed conflict cited by the Prosecution to be "erroneous."[29]

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[21] The Defence cite Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 ("Additional Protocol I"), Articles 86 and 87, and post-World War II prosecutions at Nuremberg and Tokyo, as well as military commissions, as "ample precedent" for the doctrine to be applied in international armed conflicts. Written Submissions of Alagić, para. 65.
[22] *Prosecutor v. Zejnil Delalić, Zravko Mucić, Hazim Delić and Esad Landžo* ("*Čelebići*"), Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").
[23] Written Submissions of Kubura, para. 7.
[24] Protocol II Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 ("Additional Protocol II").
[25] See, e.g. Written Submissions of Kubura, paras 16-18.
[26] Written Submissions of Alagić, para. 49.
[27] Written Submissions of Kubura, para. 18, citing Official Records, vol. V, p. 142, 188 and vol. VI, p. 352.
[28] Written Submissions of Hadžihasanović, para. 46. (emphasis in original).
[29] Hadžihasanović Response, paras 16-19. Specifically, the Defence challenge the applicability of the Truxillo Convention of 1820 (cannot be considered to cover an internal armed conflict and does not impose condition that parties be placed under responsible command); Lieber Code of 1863 (recognises individual criminal responsibility for

21. The Defence contend that there is no case law from an international judicial organ addressing command responsibility in an internal armed conflict. The Defence find the precedents of the Nuremberg and Tokyo Tribunals and the *Yamashita* case to be "beside the point" since they were concerned with international armed conflicts.[30]

22. Additionally, the Defence find that there is no national precedent where superiors were tried for failing to prevent or punish war crimes in internal armed conflicts.[31] The Defence refute the post-World War II cases referred to by the Prosecution as having "no bearing on the application of the command responsibility doctrine during non-international armed conflicts."[32] The Defence assert that the Prosecution examples relate to international armed conflicts or cases of disciplinary, rather than criminal, sanctions.[33]

23. In assessing whether the doctrine of command responsibility is applicable in internal armed conflicts under customary international law, the Defence conducted a survey of national legislation, military manuals and jurisprudence on the national level to determine whether State practice exists for the application of the doctrine to internal armed conflicts. The Defence conclude that there is little to no evidence in any source of a consistent, extensive and representative State practice to apply the doctrine of command responsibility as applied by the International Tribunal in internal armed conflicts. The Defence do note, however, that many States recognise the duty of commanders to prevent or punish crimes committed by subordinates in the context of an international armed conflict, on the basis of Additional Protocol I.[34]

24. Furthermore, the Defence argue that military commanders could not have been held criminally liable for war crimes under the doctrine of command responsibility under national criminal laws. In 1993, only one country, Belgium, had such a law.[35] States that made changes after Additional Protocol I entered into force recognised the duty of commanders to prevent or punish in

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order or encourage, but does not impose a form of command responsibility); and 1900 Rules on Recognition of Belligerent Status of the Institute of International Law (related to recognition of belligerency).

[30] Written Submissions of Alagić, para. 62.

[31] Hadžihasanović Response, para. 10.

[32] Ibid, para. 27.

[33] Specifically, the Defence find that the cases cited by the Prosecution deal with direct participation of an accused in the commission of the crimes with which he is charged (*Santos*; *Kafr Qassen Case*); occurred during an international armed conflict (*Santos*; *A. Cruz*); relate to aiding and abetting (*A. Cruz*); relate to civil rather than criminal proceedings (US Alien Tort Claims Case *Ford*). See Hadžihasanović Response, paras 27-31. Additionally, the Defence cite the case of Captain Medina tried in the United States for the My Lai massacre, and the Kahan Commission in Israel which took disciplinary measures following the Sabra and Shatilla Palestinian refugee camps massacre in Lebanon. See Written Submissions of Hadžihasanović, para. 66.

[34] See Written Submissions of Hadžihasanović, para. 67, and paras 65-78 generally on State practice.

international armed conflicts, but few states have the necessary legislation to prosecute commanders for failure to prevent or punish in internal armed conflicts.[36] The Defence assert that when States are enacting legislation for the International Criminal Court ("ICC"), they often must make an exception or promulgate new legislation for Article 28 of the ICC Statute,[37] which provides for the responsibility of commanders and other superiors, since the principle did not previously exist in national law.[38]

25. The Defence submit that national laws do not provide for criminal liability of commanders "*as if they had committed the crimes themselves.*"[39] Punishment for dereliction of duty or a similar offence of omission is "beside the point", as they are substantively different than the doctrine of command responsibility under Article 7(3). For Article 7(3) liability, the duty to prevent and punish *and* failure to do so entailing criminal responsibility are required, the Defence contend.[40] Furthermore, the Defence argue that for situations in which the failure to prevent or punish, where such failure or omission is a form of complicity, aiding or abetting, or encouraging the commission of the crime, that act would be reflected in Article 7(1) of the Statute and not in Article 7(3).[41] In response to the Prosecution's submissions, the Defence reply that both the quantity and substance of the submissions are insufficient to find that the doctrine of command responsibility is applicable in internal armed conflicts under customary international law.[42]

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[35] Written Submissions of Kubura, para. 23; Written Submissions of Hadžihasanović, para. 67 (argues the Belgian law is limited to prosecutions of commanders for failure to punish).
[36] Written Submissions of Hadžihasanović, para. 67.
[37] Rome Statute of the International Criminal Court adopted at Rome on 17 July 1998, A/Conf.183/9, entered into force on 1 July 2002.
[38] Written Submissions of Hadžihasanović, para. 68 (citing the example of Canada); Written Submissions of Alagić, para. 63.
[39] Written Submissions of Alagić, para. 62. (emphasis in original).
[40] See generally, Written Submissions of Alagić, paras 14-23 and para. 62.
[41] See, e.g., Written Submissions of Alagić, para. 62(vi).
[42] Hadžihasanović Response, paras 35-39. The Defence argue that the 1982 French Code of Military Justice relates to superiors who "organised or tolerated" actions of their subordinates and is applicable in international armed conflicts; the 1931 Federal Penal Code of Mexico attaches criminal liability to those who commit, order or tolerate certain acts outside of the ambit of armed conflict, and it not specifically aimed at commanders or criminal liability for failure to prevent or punish; 1963 Penal Code of Congo is related to imputing all crimes committed in a rebellion to the leaders. See Hadžihasanović Response, paras 36-39. Alagić Response, para. 29, also cites the 2001 Swiss case of *Niyonteze v. Public Prosecutor*, and submits the Swiss Appellate Military Tribunal found that Art. 108(2) of the Swiss Military Penal Code could not be applied to internal armed conflicts.

The Trial Chamber notes that in relation to the application of the Swiss Military Penal Code in the case of *Niyonteze v. Public Prosecutor*, which covers offences committed after the time of the Amended Indictment, the Military Appeals Tribunal reversed all convictions for common crimes because of a lack of jurisdiction *ratione personae* over civilians under the Military Penal Code; the Military Cassation Tribunal, in response to the defendant's argument that the allegations could not be considered war crimes absent a close link to the armed conflict, held that in cases of an internal armed conflict, the class of perpetrators included "all individuals lawfully invested with authority and who are expected to further or participate in the war effort because of their capacity as officials or agents of the state, or as persons holding a position of responsibility or as de facto representatives of the government" and that the

26. The Defence argue that the Criminal Code of the Republic of Bosnia and Herzegovina in 1993 did not contain a provision to prosecute for war crimes "purely" on the basis of failing to prevent or punish such crimes. It was criminal to "order" or "commit" violations of international humanitarian law during "armed conflict", but the Criminal Code did not, however, have a specific provision on command responsibility, the Defence submit.[43]

27. The Defence further contend that national military manuals do not constitute laws of war, and even if they did provide a source of national practice,[44] they do not have provisions on command responsibility in internal armed conflicts that impute the liability of the subordinate to the superior.[45]

28. Additionally, the Defence cite a "Special Agreement" entered into by the various parties to the conflict in Bosnia and Herzegovina, pursuant to Article 3 common to the Geneva Conventions of 1949[46] ("Common Article 3") including one of 22 May 1992. In that Special Agreement, the parties agreed to apply certain provisions of the Geneva Conventions and Additional Protocol I related to international armed conflicts. The Defence contend that Articles 86 and 87 of Additional Protocol I were not invoked and therefore the parties were not bound by them.[47] The Special Agreement does not have a criminal responsibility provision, "only" a provision calling for "the necessary steps to put an end to the alleged violations or prevent their recurrence and punish those responsible in accordance with the law in force".[48]

29. In response to the Prosecution's arguments that conflict classification is not relevant for determining the applicability of the doctrine of command responsibility under the Statute, the Defence argue that "States have insisted on maintaining a clear difference between international and non-international armed conflicts as well as on ensuring that a marked difference exists in the law applicable in each case."[49] The Defence contend that the distinction was relevant at the time the Statute was adopted, drawing on the treaties and conventions in force at that time, and remains

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link between the offences and the armed conflict must not be "vague and undetermined", and that both conditions were met in that case. International Decision: *Niyonteze v. Public Prosecutor*, 27 April 2001, 96 Am. J. Int'l L. 231, 234-35.

[43] Written Submissions of Kubura, para. 25, citing Article 154 of the 1992 Bosnian Criminal Code.

[44] Written Submissions of Alagić, para. 53

[45] See generally, Written Submissions of Hadžihasanović, paras 67-77, on military manuals and national legislation.

[46] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287.

[47] Written Submissions of Hadžihasanović, paras 40-41.

[48] See Additional Reply, para.8, and paras 1-11, generally.

[49] Hadžihasanović Response, para. 1.

relevant today, as evinced by the manner in which the Statute for the ICC was drafted.[50] This, the Defence conclude, is due to the "express intention of States to maintain sufficient guarantees for the proper respect of national sovereignty and the application of the principle of non-interference with internal affairs."[51]

30. In terms of the "characteristics" of the doctrine of command responsibility, the Defence for Alagić argues that two aspects of the doctrine, as applied by the International Tribunal, make it unique, namely that the crime is a separate crime of omission and that the superior is held responsible for the underlying crime committed by the subordinates.[52] In doing so, the Defence seeks to distinguish liability under Article 7(3) from the various forms of – what it characterises as "intentional" – responsibility, and particularly accomplice liability, under Article 7(1) of the Statute. The Defence argues that "other forms" of command responsibility, including a commander being held responsible for (illegal) orders that he has given to his subordinates, a commander breaching his duty and receiving disciplinary rather than criminal sanctions, and a commander's criminal responsibility for failure to control his subordinates, where the commander is held guilty in such a case of a separate crime of dereliction of duty rather than of the underlying crime committed by his subordinates, are fundamentally different from the doctrine of command responsibility as applied by the International Tribunal and thus have "no bearing" on the issue before this Trial Chamber.[53]

31. The Defence further submit that there is no precedent at the International Tribunal on this point, arguing that no Chamber has expressly held that Article 7(3) applies in internal armed conflict.[54] The Defence find that no accused has been convicted "solely" on the basis of Article 7(3) for a non-international armed conflict. In the case of *Aleksovski*, the accused was convicted under Articles 7(1) and 7(3) for Article 3 violations in a case where an international armed conflict was alleged, although not proven at trial. Additionally, the Defence allege that his role was one of

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[50] Written Submissions of Hadžihasanović, para. 64.

[51] Hadžihasanović Response, para. 2. The Response of Hadžihasanović concedes that the distinction between international and internal armed conflict has blurred, beginning wit the Spanish Civil War in the 1930s and the advent of international human rights law, but the distinction is still in place, as, it asserts, the *Tadić* Jurisdiction Decision recognises. See *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision").

[52] Written Submissions of Alagić, paras 15-22.

[53] See, e.g., Written Submissions of Alagić, paras 25-26. The submissions of Alagić argue that the complicity of a superior in the crimes of his subordinates, including by omission, would be a "Article 7(1)-type liability" rather than Article 7(3) liability. The Alagić Response further argues that accomplice liability falls under Article 7(1) of the Statute, and not Article 7(3), paras 33-34. The Written Submissions of Hadžihasanović argue that the doctrine of command responsibility is "exceptional" in that a commander can be found guilty of a crime in which he did not participate in any way towards its commission and never intended the offence be committed, para. 16.

[54] Written Submissions of Kubura, para. 15.

direct participation and that he was therefore found responsible "primarily" under Article 7(1).[55] In response to the Prosecution, the Defence comment on additional cases before the International Tribunal. In *Krnojelac*, where the Trial Chamber found the accused guilty of two counts pursuant to Article 7(3) in relation to an "internal conflict",[56] the Defence comment that the Trial Chamber "did not address the issue whether 7(3) liability could be imposed in the context of a non-international conflict."[57] The Trial Chamber in *Krstić* found Krstić liable under both Article 7(1) and Article 7(3) in the context of an internal armed conflict. The Defence dismiss this judgement as irrelevant due to the factual context of that case being "long after the times relevant to the present Indictment."[58]

32. Additionally, the Defence submit cases in which Article 7(3) was applied to charges of genocide and crimes against humanity are distinct from this case where the charges are pursuant to Article 3 of the Statute. The Defence argue that the finding in the *Tadić* Jurisdiction Decision that Common Article 3 gives rise to individual criminal responsibility is a different issue than the one before the Trial Chamber. The Appeals Chamber was "entitled" to find that the prohibitions contained in Common Article 3 would be meaningless if they could not be enforced, thereby finding that individual criminal responsibility necessarily attaches to the prohibitions contained therein, the Defence contend; as the enforcement mechanism now clearly exists, it further argues, it is not necessary to extend individual criminal responsibility to the doctrine of command responsibility.[59]

33. The Defence refute the Prosecution argument that command responsibility is a "logical consequence" of the imposition of individual criminal responsibility for violations of international humanitarian law.[60] Further, the Defence refute the Prosecution assertion that command responsibility is the natural outgrowth of "responsible command", arguing that it is impermissible to extend the concept of "responsible command", which did not entail individual criminal responsibility, to "command responsibility". Responsible command does not encompass both duty and liability, as command responsibility does, pursuant to Additional Protocol I, Articles 87 and 86, respectively.[61] The Defence submit that responsible command has an entirely different role in

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[55] Written Submissions of Kubura, para. 15, referring to *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement").
[56] This Trial Chamber notes that the Trial Chamber did not explicitly find that the conflict in *Krnojelac* was an "internal armed conflict", finding that there was an "armed conflict" in the Republic of Bosnia and Herzegovina, a fact to which the parties agreed. See, *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-T, Judgment, 15 March 2002 ("*Krnojelac* Trial Judgement").
[57] Hadžihasanović Response, para. 33.
[58] Hadžihasanović Response, para. 32, referring to *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement").
[59] Written Submissions of Alagić, paras 50-52.
[60] Hadžihasanović Response, para. 4.
[61] See, e.g., Hadžihasanović Response, paras 11-15.

customary international law, namely to serve as a prerequisite for international humanitarian law to apply to an army and serves as the basis for reciprocity with other armies.[62]

34. While the Statute[63] of the International Criminal Tribunal for Rwanda[64] ("ICTR") provides for the application of the doctrine of command responsibility to the internal armed conflict in Rwanda under Article 6(3) of its Statute, the ICTR Statute was adopted after the relevant time period of the Amended Indictment and therefore is not relevant to this issue, the Defence submit.[65] Furthermore, the inclusion of command responsibility in the Statute of the ICTR is no indication of the status of the doctrine in internal armed conflicts under customary international law, as the Report of the Secretary-General on the ICTR states that the subject-matter jurisdiction of the ICTR was not limited to those international instruments which were considered part of customary international law or which customarily entailed individual criminal responsibility.[66] The Defence argue that the Statute cannot be considered a normative source with regard to command responsibility in internal armed conflicts. Additionally, the Defence point out, no one has been convicted solely under Article 6(3) at the ICTR.

35. Finally, the Defence submit that no leading or highly qualified publicists have addressed this question in detail.[67]

36. Having argued that customary international law did not provide for the application of the doctrine of command responsibility in non-international armed conflicts at the time the alleged crimes were committed, the Defence concludes that the principle of legality is violated. The Defence submit that the principle of legality – here *nullum crimen sine lege* – demands that no one shall be guilty of an offence on account of any act or omission which did not constitute a penal offence under international law at the time that the offence was allegedly committed.[68]

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[62] Alagić Response, paras 7-8; Hadžihasanović Response, paras 19-21.
[63] Statute for the International Criminal Tribunal for Rwanda, as adopted by the Security Council Resolution 955, 8 November 1994.
[64] International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations committed in the Territory of Neighbouring States between 1 January and 31 December 1994.
[65] Written Submissions of Alagić, para. 54.
[66] Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) ("Report of the Secretary-General on the ICTR"), S/1995/134, 13 February 1995, para. 12, as cited in Written Submissions of Alagić, para. 55.
[67] Written Submissions of Kubura, para. 15.
[68] Written Submissions of Hadžihasanović, paras 5-12; Written Submissions of Kubura, paras 4-11.

37. The Defence draw upon the jurisprudence of the International Tribunal[69] and the Statute for the ICC in detailing the characteristics of the principle of legality, namely the prohibition of the retroactive application of criminal law, the requirement that criminal offences be precisely defined and the prohibition on determining the existence of a criminal offence by analogy.[70] One accused argued that the prohibition on ambiguity requires that the law must be in written form, which would therefore exclude customary law as a source of incriminatory law.[71]

38. The Defence argue that the first instances where the doctrine of command responsibility in relation to internal armed conflicts was addressed, namely the United Nations International Law Commission ("ILC") Draft Statute for the ICC of 1994 and the 1996 ILC Draft Code on Crimes Against Peace and Security of Mankind, are after the time-period specified in the Amended Indictment and are therefore not reflective of customary law at the time the crimes were alleged to have been committed.[72] Additionally, the Defence argue that the inclusion of command responsibility in the ICC Statute is of no assistance since it was adopted after the time of the alleged crimes.[73]

39. The remedy sought by the Defence is to drop all charges pursuant to Article 3 that rely on Article 7(3) in an internal armed conflict, which would result in a full dismissal of the Amended Indictment against all Accused in this case.

2. The Prosecution

40. The Prosecution argues that the doctrine of command responsibility was part of customary international law before 1994, and at the latest, as of 1 January 1991.[74] The Prosecution cites the application of the doctrine during the "W.W.II war criminal trials", and its subsequent codification in the 1977 Additional Protocol I, the ICTY and ICTR Statutes, and the ICC Statute in 1998 to support this assertion.[75]

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[69] Written Submissions of Kubura, para. 4, citing *Tadić* Jurisdiction Decision, para. 143 and *Čelebići* Trial Judgement, paras 402-413.
[70] Written Submissions of Hadžihasanović, para. 9, citing ICC Statute, Art. 22.
[71] Written Submissions of Alagić, para. 8.
[72] Written Submissions of Hadžihasanović, paras 59-64.
[73] See, e.g. Written Submissions of Kubura, para. 10.
[74] Written Submissions of Prosecution, para. 4.
[75] Ibid, para. 7.

41. The Prosecution further contends that under the Report of the Secretary-General, if a basis exists for command responsibility in customary law, it is not required to have an additional conventional source.[76]

42. Individual criminal responsibility exists for serious violations of international humanitarian law for members of forces under "responsible command", the Prosecution asserts. Therefore, the Prosecution contends, the doctrine of command responsibility is a "logical consequence" of the imposition of such individual criminal responsibility. The Prosecution argues that the application of the doctrine of command responsibility is the "logical conclusion" of the *Tadić* Jurisdiction Decision, which recognises that customary international law imposes individual criminal responsibility for violations of international humanitarian law in internal armed conflicts.[77]

43. The Prosecution finds the origins of the "concept" of command responsibility in the 19th century for "internal civil wars" in Europe and "America".[78] The Prosecution offers examples from various treaties, codes or conventions to trace the evolution of the concept of "responsible command."[79] The Prosecution cites the Lieber Code of 1863, adopted by the United States during its Civil War, to argue that "a form" of command responsibility was imposed for certain war crimes.[80]

44. The Prosecution asserts that command responsibility cannot exist without responsible command. It traces the link between responsible command and command responsibility to Nuremberg and other post-World War II prosecutions, in finding a basis for individual criminal liability.[81] The Prosecution also cites Additional Protocol II, Art. 1 as indicating "the importance of organized groups being under responsible command."[82] The Prosecution equates responsible command with the "effective control" test in the *Čelebići* Appeal Judgement.[83]

45. The Prosecution further relies on the ICRC Commentary on Article 86 of Additional Protocol I to make the link between "responsible command" and "command responsibility": "The

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[76] Prosecution Response, paras 12-15.
[77] Written Submissions of Prosecution, para. 5.
[78] Ibid, para. 9.
[79] The Prosecution cites the Truxillo Convention of 1820 for the conflict between Spanish armed forces and Colombian rebels, which it asserts was an internal armed conflict; Brussels Protocol of 1874; Regulations to the Hague Conventions of 1899 and 1907, Art. 1. Written Submissions of Prosecution, paras 10-12.
[80] The Prosecution cites Article 71, which, it submits, "made punishable by death the crime of encouraging or ordering the killing of, or infliction of additional wounding on, an already disabled enemy." Written Submissions of Prosecution, para. 11.
[81] Written Submissions of Prosecution, paras 22-25. Specifically, the Prosecution cite the case of *In re Yamashita*, 327 US 1, 14-16 (1946) and *U.S. v. Pohl.*
[82] Ibid, para. 17.
[83] Ibid, para. 31.

London Agreement of 8 August 1945, which was designed to serve as the basis for the prosecutions instituted after the Second World War, particularly for breaches of the law of armed conflict, does not refer to breaches consisting of omissions. *Nevertheless ... people were convicted for omissions, in particular on the basis of Article 1 of the 1907 Hague Regulations* which provides that members of the armed forces must 'be commanded by a person responsible for his subordinates'."[84]

46. The Prosecution asserts that the International Tribunal case law supports the link between responsible command and command responsibility. In the *Blaškić* Trial Judgement, according to the Prosecution, the Trial Chamber "emphasised the importance of Article 43(1) of Additional Protocol I to the doctrine of command responsibility".[85]

47. Conflict classification is not relevant for command responsibility, according to the Prosecution. Command responsibility applies *whenever* international humanitarian law applies, as armed conflicts can be internal and the doctrine is recognised under customary international law. The Prosecution argues that there is a trend in international law showing that the distinction between internal and international armed conflict is lessening. It cites the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the 1984 Torture Convention both of which either provide for or "allude" to command responsibility, in support of this assertion.[86] The Prosecution contends that command responsibility is an area of international humanitarian law where conflict classification is "irrelevant."[87]

48. The Prosecution notes that the Statute of the International Tribunal includes a provision on command responsibility and grants this Tribunal jurisdiction over war crimes, crimes against humanity and genocide.[88] The Prosecution finds that the case law of the ICTY supports liability under the doctrine of command responsibility "irrespective of the classification of the conflict."[89] Specifically, the Prosecution cites the case of *Aleksovski*, where the Trial Chamber found the conflict to be non-international and Article 7(3) liability attached, a finding which was not

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[84] Ibid, para. 21 (emphasis in original), citing International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz *et al.* eds., 1987) ("Commentary on the Additional Protocols"), para. 3531.

[85] The Prosecution quoted the *Blaškić* Trial Judgement, para. 327: "Fltğ considers fundamental the provision enshrined in Article 43(1) of Additional Protocol I according to which the armed forces are to be placed "under a command responsible F...ğ for the conduct of its subordinates"." See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement").

[86] Written Submissions of Prosecution, paras 45-46.

[87] The Prosecution cites commentators to support their assertion, Written Submissions of the Prosecution, para. 29. These commentators seem to suggest that it is "reasonable" to recognise the duty for superiors to ensure lawful conduct of subordinates in cases of internal armed conflict, as is required in cases of international armed conflict. *See* Morris & Scharf, *The International Criminal Tribunal for Rwanda* (1998), p. 261.

[88] Written Submissions of Prosecution, para. 47.

[89] Ibid, para. 39.

questioned on appeal, and *Kunarac* and *Krnojelac* where, according to the Prosecution, liability was found under Article 7(3) in cases of "armed conflict".[90]

49. While arguing that conflict classification is not relevant, the Prosecution provides examples of the application of the doctrine of command responsibility in internal armed conflicts. The Prosecution contend that national case law exists that applied the doctrine of command responsibility in internal armed conflicts. Specifically, the Prosecution relies on the US-Philippines "anti-colonial" cases of *Santos* and *Cruz*,[91] and the Israeli case of *Kafr Qassem*.[92] The Prosecution also cites a US Alien Tort Claims Act case in which command responsibility served as the basis for tort liability in El Salvador.[93]

50. The Prosecution contends that various national laws include "command responsibility". Specifically, the Prosecution cites certain military manuals and criminal codes,[94] including post-1993 laws.[95] The Prosecution refute the Defence argument that national laws which use terms such as "tolerate" or "complicity" are reflected solely in Article 7(1) of the Statute rather than Article 7(3), citing the *Čelebići* Trial Judgement's use of laws including the terms "tolerated" and "accomplices" as examples of "state legislative recognition of command responsibility."[96]

51. The Statute of the ICTR, adopted in November 1994, indicates *opinio juris* of the Security Council, the Prosecution submits. Furthermore, there have been numerous convictions under the theory of command responsibility in internal armed conflict for genocide and crimes against humanity at the ICTR, the Prosecution notes.[97]

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[90] Written Submissions of Prosecution, para. 39. The Trial Chamber notes, however, that the Trial Chamber in the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac* Trial Judgement"), para. 629, did not find Dragoljub Kunarac guilty for any offences pursuant to Article 7(3). See infra, fn. 250.

[91] Written Submissions of Prosecution, paras 33-35. *See Santos* G.O. 130, 19 June 1901, Hq. Div. Phil . and *Cruz* G.O. 264, 9 September 1901, Hq. Div. Phil.

[92] Written Submissions of Prosecution, paras 36-37. In the *Kafr Qassem* case, the accused appeared to have participated in the actual commission of the crimes, having given the order to fire at the victims.

[93] Written Submissions of Prosecution, para. 38, citing *Ford v. Garcia*, 289 F.3d 1283 (30 April 2002).

[94] Written Submissions of Prosecution, paras 40-43 (France (superiors charged as accomplices); Congo (crimes committed during a rebellion will be imputed to commander); Mexico (1931)(during non-hostilities, those who order or tolerate murder or inflict suffering will be equally responsible)). The Prosecution also cites the 1991 Torture Victim Protection Act of the United States, which provides a civil remedy for violations of international humanitarian law. See, Written Submissions of Prosecution, para. 44.

[95] Written Submissions of Prosecution, paras 55-57 (Belgium, Sweden and Belarus).

[96] Prosecution Reply, para. 18, citing *Čelebići* Trial Judgement, para. 336.

[97] Written Submissions of Prosecution, paras 47-48.

52. The Prosecution cites the Statutes of the Sierra Leone and East Timor Tribunals, which are applicable to internal armed conflicts and contain specific provisions for command responsibility.[98] The Prosecution argues that these post-1994 developments show that the international community recognised that command responsibility formed part of customary international law predating the temporal jurisdiction of the ICTY Statute in 1991 and that these Statutes are later enactments of a existing prior customary norm. The Prosecution also cites the UN ILC commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind in this regard.[99]

53. In its Reply, the Prosecution cites "Special Agreements" entered into between the parties, which, it argues, indicates that they did not consider conflict classification a bar to applying grave breaches and certain aspects of Additional Protocol I.[100]

54. In the Prosecution's opinion, a finding against the Prosecution will not end the case as conflict classification is "irrelevant" to the Amended Indictment.[101]

### B. General Principles

55. In deciding upon the present issue, namely whether international law at the relevant time did or did not provide for criminal responsibility of superiors for omissions as foreseen in Article 7(3), pursuant to the doctrine of command responsibility, in the context of non-international armed conflict, and therefore, whether charges to that effect fall within the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the Trial Chamber is duty-bound to fully respect the principle of *nullum crimen sine lege* in this broader context. The Trial Chamber observes that the question before it is limited *de facto* to superiors serving in armed forces and who are held responsible in this capacity. The Defence in their submissions rely on this principle and argue that this principle stands in the way of holding the Accused in this case responsible under command responsibility for violations of humanitarian law as the conflict in this case is characterised as an "armed conflict", and not as an international armed conflict.

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[98] Written Submissions of Prosecution, paras 49-50; Prosecution Reply, para. 9 (submitting that the Sierra Leone argued unsuccessfully for the jurisdiction of the Special Court to begin in 1991).
[99] Written Submissions of Prosecution, para. 26, citing UN ILC Commentary on Article 6 (responsibility of superiors).
[100] Prosecution Reply, para. 3.
[101] Prosecution Response, para. 10.

56. The principle of *nullum crimen sine lege* is a fundamental principle in criminal law and in international human rights law.[102] This principle is enshrined in numerous international conventions including *inter alia*:

- Article 11(2) of the Universal Declaration of Human Rights of 10 December 1948[103];
- Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 4 November 1950; [104]
- Article 15 of the International Covenant on Civil and Political Rights ("ICCPR") of 16 December 1966; [105]
- Article 9 of the American Convention on Human Rights of 22 November 1969;[106]
- Article 6(2)(c) of Additional Protocol II to the Geneva Conventions of 8 June 1977;[107]
- and Article 10 of the Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind of 1991.[108]

No doubt the same principle is reflected in nearly all national jurisdictions on a global level. In some jurisdictions, the principle of *nullum crimen sine lege* is even enshrined in the constitution.[109]

57. While the Statute of the International Tribunal does not contain a specific article stating this general principle of law, the Trial Chamber observes that the Secretary-General's Report states that:

> Figt is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.[110]

Furthermore, the jurisdictional requirement contained in Article 1 indirectly reflects it:

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[102] Notably, no derogation is permitted from the principle of *nullum crimen sine lege* in times of war or other public emergency in the ECHR, Art. 15.
[103] G.A. Res 217A (III), U.N. Doc. A/811 (1948).
[104] 213 U.N.T.S. 221; European Treaty Series ("ETS") 005.
[105] 993 U.N.T.S. 171.
[106] 1114 U.N.T.S. 123.
[107] 1977 U.N.J.Y.B. 135.
[108] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).
[109] See, e.g., Basic Law (*Grundgesetz*) for the Federal Republic of Germany, which enshrines the principle of *nullum crimen sine lege* in Art. 103 Abs. II GG: "Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde" ("An act may be punished only if it was defined by a law as a criminal offense

> The International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* F...ğ.

In commentaries on the draft Statute of this Tribunal, the principle of *nullum crimen sine lege* was discussed in reference to the substantive offences being considered for inclusion in the Statute, and the amount of specificity required in the Statute.[111] The Secretary-General's Report explicitly comments on this issue:

> in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[112]

Specifically on the principle of *nullum crimen sine lege*, the Secretary-General said in his report:

> the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to the specific conventions does not arise.[113]

58. Under the jurisprudence of the European Court of Human Rights ("ECtHR"), Article 7 of the ECHR[114] allows for the "gradual clarification" of the rules of criminal liability through judicial interpretation.[115] It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided.[116] In the case of *S.W. v. U.K.*, in relation to the principle of *nullum crimen sine lege*, the European Court of Human Rights held:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, *there is an inevitable element of judicial interpretation.* There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances ... Ftğhe progressive development of the criminal law through judicial law-making is a *well entrenched and necessary*

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before the act was committed."). See also, Constitution of the United States of America, Art. 1, Sect. (9)(3): "No Bill of Attainder or *ex post facto* law shall be passed."

[110] Secretary-General's Report, para. 106. (emphasis added).

[111] See, e.g. S/25504, p.16.

[112] Secretary-General's Report, para. 29.

[113] Ibid, para. 34.

[114] Article 7(1) of the ECHR provides, in part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed." See also, the Statute for the ICC, Art. 22, which provides: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[115] ECtHR, *S.W. v. UK* (1995). The fundamental principles reflected in *S.W. v. UK* has been applied consistently by the European Court. See *Case of Streletz, Kessler and Krenz v. Germany* (2001), para. 49.

[116] ECtHR, *S.W. v. UK* (1995), para. 35, citing *Kokkinakis v. Greece* (1993), para. 52: "an offence must be clearly defined in law ... Fandğ this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." See also, *Handyside v. UK* (1974).

> *part of legal tradition. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence if the offence and could be reasonably foreseen.*[117]

The European Court of Human Rights found that the term "law" in Article 7(1) of the ECHR includes both written and unwritten law, and "implies qualitative requirements, notably those of accessibility and foreseeability."[118]

59. Article 7(2) of the ECHR states that:

> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[119]

60. The Trial Chamber in the *Čelebići* case discussed the principle of *nullum crimen sine lege* in detail. From this analysis, the following observations are particularly relevant:

> 402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.
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> 403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.
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> 404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
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> 405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the *obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.* To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.
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[117] ECtHR, *S.W. v. UK* (1995), para. 36. (emphasis added).
[118] Ibid, para. 35.
[119] According to Harris, O'Boyle and Warbrick, this provision implies that: "Fiğf there is no treaty binding upon the parties to a dispute and if no rule of customary international law based upon state practice applies, recourse may be had to 'general principles of law recognised by civilised nations', i.e. by the states members of the international community, to fill the gap." David J. Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (London: Butterworths 1995) p. 282.

> 412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. *The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.*[120]

61. The Appeals Chamber, in the *Aleksovski* Appeal Judgement, found that the principle of legality requires "that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission."[121] It further stated that the "principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[122]

62. This Trial Chamber understands the principle of *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute:

> A person shall not be criminally responsible under this Statute unless *the conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[123]

This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised under those jurisdictions.[124] The Trial Chamber is fully aware of the different contexts in which these two

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[120] *Čelebići* Trial Judgement, relevant parts from paras 402-412. (emphasis added).
[121] *Aleksovski* Appeal Judgement, para. 126.
[122] Ibid, para. 127.
[123] ICC Statute, Art. 22(1). (emphasis added).
[124] See, e.g., *Gesetz über die internationale Rechtshilfe in Strafsachen vom 23. Dezember 1982*, § 3 Abs. 2 (German Law on International Cooperation in Criminal Matters of 23 December 1982, Section 3, Para. 2): "Die Auslieferung zur Verfolgung ist nur zulässig, wenn die Tat nach deutschem Recht im Höchstmaß mit Freiheitsstrafe von mindestens einem Jahr bedroht ist oder wenn sie bei sinngemäßer Umstellung des Sachverhalts nach deutschem Recht mit einer solchen Strafe bedroht wäre." ("Extradition for the purpose of prosecution shall be granted only if the act is punishable under German law by a maximum of at least one year of imprisonment or if, *after analogous conversion of the facts*, the act would, under German law, be punishable by such a penalty.") Emphasis added. See Otto Lagodny in Wolfgang

principles are applied. However, the Trial Chamber observes the similarity of the underlying problem and legal guarantee. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.[125]

63. Apart from the obligation to respect the principle of *nullum crimen sine lege*, the Trial Chamber is bound to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

> in good faith, in accordance with the *ordinary meaning of the terms* in their context and in the light of its *object and purpose*. [126]

In order to do so, the Trial Chamber must take into account first the language of the Statute and second the object and purpose of this Statute, as becomes clear from *inter alia* the intention of the drafters of the Statute and of the Security Council. It is for this reason that the Trial Chamber will provide below a detailed overview of the different proposals that formed the basis for the Statute, the report of the Secretary-General, the relevant provisions of the Statute and the discussions in the Security Council at the moment of adoption of the Statute.

64. And as, according to Article 1 of the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law, the Trial Chamber must consider as well the principles and purposes of this part of international law.

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Schomburg and Otto Lagodny, *Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters*, Third Edition (Munich: C. H. Beck, 1998), § 3 Abs. 2, Rdn. 25-29; "Einleitung", Rdn. 64.

[125] While the principle of *nullum crimen sine lege* "appears to have the force of an interpretative presumption in common-law systems", civil law systems generally accord it greater significance. Susan Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 740. See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 91. In Germany, as already mentioned, the principle of *nullum crimen sine lege praevia* is elevated to constitutional rank (Article 103 Abs. II GG). For an authoritative discussion, see Eberhard Schmidt-Aßmann in Theodor Maunz et al., *Grundgesetz: Kommentar* (Munich: C. H. Beck, 1992), Art. 103 Abs. II GG, Rdn. 163-256. For a discussion of the principle of legality in international criminal law, see, for example, Bassiouni, *Crimes Against Humanity in International Criminal Law*, pp. 87-146; and Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," pp. 733-766. On the principle of legality in American law, see, for example, Paul H. Robinson, *Fundamentals of Criminal Law*, Second Edition (Boston: Little, Brown, 1995), pp. 117-141. On the principle of legality in English law, frequently rendered in terms of "the rule of law," see, for example, Andrew Ashworth, *Principles of Criminal Law*, Third Edition (Oxford: Oxford University Press, 1999), esp. pp. 70-87. On the principle of *nullum crimen sine lege* in German criminal law, see also Claus Roxin, *Strafrecht: Allgemeiner Teil, Band I: Grundlagen, Der Aufbau der Verbrechenslehre*, Third Edition (Munich: C. H. Beck, 1997), § 5 I Rdn. 3; and Hans-Heinrich Jeschek and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Fifth Edition (Berlin: Duncker und Humblot, 1996), § 15 IV.

International humanitarian law has, as its primary purpose, to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm. As the Trial Chamber held in *Furundžija* the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law.[127] While international humanitarian law is largely derived from treaties and conventions, it also consists of a number of principles that have not been explicitly laid down in legal instruments, but are still considered fundamental to this body of law. Of fundamental importance in this respect is the so-called Martens clause, which can be found in numerous conventions in the field of international humanitarian law, ranging from the Hague Regulations to the Additional Protocols to the Geneva Conventions. According to this clause:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result form the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[128]

Although this formulation was first used in the context of a convention applicable to international armed conflicts, this clause has since been considered generally applicable to all types of armed conflicts. As such, it can also be found in the preamble to Additional Protocol II.

65. One of these fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law. Although such responsibility is not always explicitly laid down in international humanitarian conventional instruments, it has been applied by national and international judicial organs in the course of the last century. Other fundamental principles, as will be discussed below, are the principle of responsible command and the principle of command responsibility. Both principles have sometimes been included in conventional instruments, but not always.

66. Finally, the purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organisational

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[126] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. (emphasis added).
[127] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 183: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."
[128] This is the text taken from the Hague Regulations, 7th preambular paragraph.

structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.

### C. Developments in Relation to the Principle of Command Responsibility

67. In order to assess the arguments of the parties, the Trial Chamber finds it necessary to describe first the development of the doctrine of command responsibility in a chronological order. It will first focus on the development of the concept prior to the establishment of this Tribunal. Then, the Trial Chamber will describe the place this doctrine has in the Statute of the International Tribunal and in its case law. Respecting the principle of *nullum crimen sine lege*, the Trial Chamber will draw preliminary findings regarding the status of the principle of command responsibility in internal armed conflicts under customary international law since 1991, and therefore at the time the offences charged in the Amended Indictment were allegedly committed, namely between 1 January 1993 and 31 January 1994, after each section. The Trial Chamber reserves, however, its final decision on this issue pending the discussion below. Additionally, it will briefly examine subsequent developments related to command responsibility, as far as these may be considered relevant to the issue in dispute. The Trial Chamber emphasises that discussion of subsequent developments related to command responsibility is not for the purpose of determining the issue before it, but rather for completeness of the discussion.

#### 1. Developments prior to the creation of the International Tribunal

68. The question of where command responsibility may be considered to find its roots is not always answered in the same way. The Prosecution asserts that it finds its origins in the Lieber Code, promulgated by the Union government during the United States Civil War in 1863.[129] The Trial Chamber in the *Čelebići* case refers instead to the Hague Conventions of 1907.[130] Although different terminology is employed, the principles detailed therein foreshadow the current construction of the doctrine of command responsibility. Article 3 of Hague Convention IV of 1907 stipulates:

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[129] Instruction for the Government of the Armies of the United States in the Filed, Promulgated as General Orders No. 100 (24 April 1963) ("Lieber Code"). Art. 71 provides: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."

[130] *Čelebići* Trial Judgement, para. 335. See, e.g., William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 11 (1973): "Hague Convention Four, it is submitted, is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander."

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 1 of the Annex to this Convention ("Hague Regulations") provides that:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> F...ğ
>
> 4. To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army".

Furthermore, Article 43 of the Regulations requires a person in authority

> take all the measures in his power to restore, and ensure, as far as possible, public order and safetyF...ğ.

69. During the Preliminary Peace Conference in 1919, the report of the International Commission on the Responsibility of the Authors of War and on Enforcement of Penalties may have been the first explicit expression of individual criminal responsibility for failure to take the necessary measures to prevent or repress breaches of the law of armed conflict. It recommended that a tribunal be established for the prosecution of all those who

> ordered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.[131]

As is well known, however, this tribunal was never realised and the doctrine of command responsibility for failure to act was not elaborated upon further until the Second World War.[132]

70. The Nuremberg and Tokyo Tribunals and subsequent judicial bodies applied the doctrine of command responsibility in a number of judgements. The Nuremberg Charter contained a provision

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[131] Commission on the Responsibility of the Authors of War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, as quoted by Burnett, "Command Responsibility and Case Study of the Criminal Responsibility of Israel Military Commanders for the Pogrom at Shatila and Sabra" 107 Mil. L. Rev. 77 (1985).

[132] The Trial Chamber in the *Čelebi}i* case referred to the national legislation of two countries, France (1944) and China (1946), in which it found the principle of command responsibility was recognised. See *Čelebići* Trial Judgement, paras 336-337.

for criminal responsibility upon which the case law related to command responsibility was based.[133] The Tokyo Tribunal Indictment included a charge under command responsibility:

> The Defendants ... being by virtue of their respective offices responsible for securing the observance of the said Conventions and assurances and the Laws and Customs of War in respect of the armed forces in the countries hereinafter named and in respect of many thousands of prisoners of war and civilians then in the power of Japan ... deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.[134]

In *In re Yamashita*, the Supreme Court of the United States gave an affirmative answer to the question:

> whether the law of war imposed on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war ... and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[135]

This answer was largely based on the argument that a commander is duty-bound to exercise responsible command over his troops.[136] The Court found that this responsibility stemmed from a number of statutory provisions, such as Articles 1 and 43 of the Hague Regulations, Article 19 of the Ninth Hague Convention concerning Bombardment by Naval Forces in Time of War, and Article 26 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[137]

71. The Supreme Court further stated that the purpose of the laws of war was

> to protect civilian populations and prisoners of war from brutality and Fthat purposeğ would be defeated if the commander of an invading army could with immunity neglect to take reasonable measures for their protection. *Hence the law of war presupposes that its violation is to be avoided through the control of operations of war by commanders who are to some extent responsible for their subordinates.*[138]

The Trial Chamber notes that Tomoyuki Yamashita, formerly General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was convicted by a United States

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[133] Article 6 of the Charter of the International Military Tribunal (8 August 1945) states, in part: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."
[134] Tokyo Tribunal Indictment, para. 56.
[135] *In re Yamashita*, 327 US 1, 15 (1946).
[136] See, e.g., William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1, 14 (1982): "Control includes as a minimum a duty to interfere if they Ftroopsğ behave improperly. This duty also encompasses a requirement to supervise, a duty to find out what is transpiring. There is no room in the concept of command for a "stick your head in the sand" approach."
[137] *In re Yamashita*, 327 US 1, 15-16 (1946). Additionally, the Court cited two internal provisions that recognise the duty of a commanding officer and that breach of such duty is penalised by US military Tribunals. See fn. 3, Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901 and Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901.
[138] *In re Yamashita*, 327 US 1, 15 (1946). (emphasis added).

Military Commission in 1945 for unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. General Yamashita was charged with 64 separate allegations for the concrete acts committed by his subordinates, namely:

> (1) Starvation, execution, or massacre without trial and maladministration generally of civilian internees and prisoners of war;
>
> (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction of explosives;
>
> (3) Burning and Demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions.

On 7 December 1945, the United States Military Commission found General Yamashita guilty as charged.[139]

72. The United States Military Tribunal at Nuremberg held in *Brandt and others* that:

> Ftğhe law of war imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war.[140]

And in *Wilhelm List and others*, the Tribunal held that:

> Fağ corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about.[141]

73. Notwithstanding the fact that in the criminal cases just described a number of persons had been held criminally responsible on the basis of the principle of command responsibility, no

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[139] Trial of General Tomoyuki Yamashita, Case No. 21 (8 November-7 December 1945), *Law Reports of Trials of War Criminals, Vol. IV* (London: His Majesty's Stationary Office for the United Nations War Crimes Commission, 1948), pp. 4, 35.

[140] *United States v. Karl Brandt and others* ("*Medical Case*"), vol. II, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, 186, 212. While the doctrine of command responsibility was first applied in an international context by the Tokyo and Nuremberg Tribunals, it did not originate with the Tribunals, see William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 77 (1973): "While the custom – an imposition of responsibility upon a commander for illegal acts of his subordinates – existed prior to World War II, it was the action of commanders and national leaders during that conflict which so shocked the conscience of the world as to demand a strict accounting for the commencement and conduct of those hostilities. F...ğ The law of war, and as part thereof the law of command responsibility, witnessed great progression through definition and delineation, perhaps reaching a high water mark as international jurists concentrated their efforts on the subject."

[141] *United States v. Wilhelm List and others* ("*Hostage Case*") vol. XI, 1230, 1303. For other cases, see, e.g., U.S. *v. Wilhelm von Leeb et al.* ("*High Command Case*"), TWC vol. X and XI; *Tokyo War Crimes Trial*, Judgement, vol. 20; *US v. Toyoda*; *US v. Milch*, LRTWC, vol. VII; *US v. Pohl et al.*, TWC, Case No. 4, vol. V; *Roechling et al. Case*, (French zone) TWC, vol. XIV, Appendix B p. 1061 (see p. 1106). See for an overview of such cases the *Čelebići* Trial Judgement, paras 338-39. The present Trial Chamber would fully concur with the analysis presented in that judgement and considers it superfluous to quote again the case law presented there.

reference to this principle was included in the Geneva Conventions adopted in 1949. The Geneva Conventions do, however, include a number of penal provisions. For example, Article 146 of the Fourth Geneva Convention establishes an obligation for States to enact legislation necessary to provide effective penal sanctions for the commission of any of the grave breaches of the Convention.[142] Article 147 further elaborates on these grave breaches. The Commentary to this Convention notes that several cases were tried in the Allied courts involving "responsibility which might be incurred by persons who do not intervene to prevent or to put an end to a breach of the Conventions" and concludes that "Fiğn view of the Convention's silence on this point, it will have to be determined under municipal law either by the enactment of special provisions or by the application of the general clauses which may occur in the penal codes."[143] All that can be concluded from these provisions in the Conventions and the commentaries thereto is that only some of the violations of the Geneva Conventions amounted to grave breaches and that only in relation to such grave breaches, were States *obliged* to enact appropriate legislation in order to provide for penal sanctions for persons committing or ordering the commission of such breaches. The Conventions as such left it entirely to the discretion of States to provide for penal sanctions for other violations of the Conventions and to provide for penal sanctions for the principle of command responsibility in relation to the grave breaches or any other violations of the Conventions. This conclusion, as will be seen below, may impact on the interpretation and relevance of Additional Protocol II for the legal question with which this Chamber is confronted.

74. The "Affirmation of the Principles of International Law Recognised by the Charter of Nuremberg" ("Affirmation") adopted by the General Assembly in 1946, affirmed the principles of international law recognised by the Charter "and the judgement of the Tribunal".[144] This can be read as recognising the doctrine of command responsibility as a form of individual criminal responsibility to be a principle of international law. As the Affirmation called for the "progressive development of international law and its codification", the newly-established ILC set out the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal" in 1950.[145]

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[142] Article 146, in part: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons *committing or ordering to be committed*, any of the grave breaches of the present Convention F...ğ Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. F...ğ"

[143] Jean Pictet (ed.) – Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958) – 1994 reprint edition ("ICRC Commentary on Fourth Geneva Convention"), p. 592.

[144] U.N. G.A. Res. 95, 1st Sess., 1144, U.N. Doc. A/236, 11 December 1946.

[145] Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, Adopted by the ILC, U.N. Doc. A/1316, 2 Y.B.I.L.C. 374, 2 August 1950. See generally, Principle I, Principle III and Principle VII.

75. The ILC began work on the Draft Code of Offences against the Peace and Security of Mankind ("Draft Code of Offences") in 1950, pursuant to a request for such a document by the General Assembly. In 1950, the ILC recommended that the principle of superior responsibility be included in the Draft Code of Offences. In doing so, it first looked at the responsibility of a State under international law and found that persons vested with public authority – both military and civilian – would be the "parallel" to the State: "As a State is internationally responsible for unlawful acts and omissions of its organs, so would its organs be *criminally responsible* for the same acts and omissions."[146] It then surveyed national laws finding numerous sources for holding superiors responsible for tolerating commission of crimes by their subordinates,[147] and cited both the Tokyo Tribunal and cases from military tribunals established after the Second World War as precedent for the principle of superior responsibility.[148] The ILC recommended that "in view of the above practice" the following principle be adopted in the Draft:

> Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and liable to punishment.[149]

The "acts under the draft code" included genocide, which can be committed in the absence of an armed conflict, and "violations of the laws or customs of war", as to which the ILC commented "in our view *any* violation of the laws and customs of war should be considered as a crime under international law",[150] which thus, would include those committed in an international or internal armed conflict.

76. The 1954 Draft Code of Offences only included four Articles.[151] While it included a provision for individual criminal responsibility (Article 1), it did not include a provision on superior responsibility.

77. Since the early 1950's developments in the field of international humanitarian law were rather limited, both on the international and national levels. This applies equally to developments

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[146] Report by J. Spiropoulous, Special Rapp., A/CN.4/25, 26 April 1950, para. 88. (emphasis added).
[147] Report by J. Spiropoulous, Special Rapp., A/CN.4/25, 26 April 1950, paras 88b-93, citing French, Chinese, Dutch, and Greek laws, and the Luxembourg Law on suppression of war crimes. The Trial Chamber notes that some of these laws refer to "accomplices" which the *Čelebici* Trial Chamber appears to have equated with, or seen as, a form of command responsibility. *Čelebici* Trial Judgement, paras 336-337.
[148] Ibid, paras 94-99. The Australian War Crimes Act of 1945 provided that "war crimes" included a violation of the laws and usages of war "*committed in any place whatsoever, whether within or beyond Australia during any war.*" para. 75. (emphasis added).
[149] Ibid, para. 100.
[150] Ibid, paras 57-82, with cites from para. 68.
[151] Report of the ILC covering the work of its sixth session, 3 June-28 July 1954, U.N. Doc. A/2693, 2 Y.B.I.L.C. 140, 151 (1954).

relating to the doctrine of command responsibility. No international judicial organ had applied this doctrine, until the International Tribunal was established. On the national level, however, some military manuals were adopted or amended which included provisions for command responsibility.

78. In a number of national military manuals, reference is made to the principle that a superior is responsible for violations of the laws of war committed by his subordinates. Significantly, the manual of the Yugoslav People's Army ("JNA") in the Socialist Federal Republic of Yugoslavia ("SRFY"), contained the following provision:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorised to charge them, and he did not report them to the authorised military commander, *he would also be personally responsible.*
>
> A military commander is responsible as a participant or instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units to continue to commit attacks.[152]

79. The United States Army Field Manual on the Law of Warfare of 1956 (with amendments in 1976) states in paragraph 501, entitled "Responsibility for Acts of Subordinates":

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

Furthermore, paragraph 507 of this Manual, entitled "Universality of Jurisdiction", provides, in part:

> F...ğ
>
> b. Persons Charged With War Crimes. The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will

[152] SRFY Federal Secretariat for National Defence, Regulations Concerning the Application of International Law to the Armed Forces of SFRY (1988), Art. 21, reprinted in Bassiouni, The Law of the ICTY, p. 661. (emphasis added). The Trial Chamber notes that Article 6 of the Regulations ("International law of war and the sources upon which this instruction is based") refers to "armed conflict". See also, Criminal Code of SFRY, Art. 22 (complicity): "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."

> be prosecuted under such law (...). Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

80. The British Manual of Military Law of 1958, in its paragraph 631, reproduces the text of paragraph 501 of the US Army Field Manual on the Law of Warfare of 1956 quoted above, save for the last line.

81. In Germany, the Humanitarian Law in Armed Conflicts Manual, edited by the Federal Ministry of Defence, states in paragraph 138:

> The superior has to ensure that his subordinates are aware of their duties and rights under international law. He is obliged to prevent and, where necessary, to suppress or to report to competent authorities breaches of international law (Article 87 Additional Protocol I). He is supported in these tasks by the Legal Adviser (Article 82 Additional Protocol I).[153]

82. Although these manuals will normally have been elaborated in order to regulate the functioning of the army in the context of an international armed conflict, the US Army Field Manual of 1956 explicitly provides that:

> Ftğhe customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents[154]

83. On the international level, a number of conventional developments are relevant to this issue. In this context, the Trial Chamber refers first to Article 2 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[155] according to which criminal responsibility also exists for those who "tolerate" the commission of war crimes and crimes against humanity.[156]

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[153] Manual of Humanitarian Law in Armed Conflicts, Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992. For a commentary on this article, see Christopher Greenwood, "Geschichtliche Entwicklung und Rechtsgrundlagen," in Dieter Fleck ed., *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* (Munich: C. H. Beck, 1994), p. 29 or Christopher Greenwood, "Historical Development and Legal Basis," in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995), p. 35.

[154] Paragraph 11a of the Manual of 1956. Further in this context, reference can be made to paragraph 499 of this Manual that states that "every violation of the law of war is a war crime". The British Military Manual of 1958 provides in paragraph 624, that "war crimes include all violations of the law of war".

[155] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (entered into force 11 November 1970; the former Yugoslavia ratified the Convention on 9 June 1970). Article 2 states: "If any of the crimes mentioned in Article 1 Fwar crimes and crimes against humanity, including apartheid and genocideğ is committed, the provisions of this Convention shall apply to representatives if the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and *to representatives of the State authority who tolerate their commission.*" Article 3 places an obligation on State Parties to "undertake to adopt all necessary measures, legislative or otherwise, with a view to making possible the extradition" of persons referred to in Article 2.

[156] See Commentary on the Additional Protocols, para. 3526 (on Art. 86): "It is not for the first time that international treaty law provides for criminal responsibility of those who have failed in their duty to act. In this context, we would

84. Discussions started in the course of the 1970s on the need to develop Additional Protocols to the Geneva Conventions. In those discussions, significantly, at first no provision was suggested relating to the duty of commanders.[157] However, in the end the principle of command responsibility was codified, only in Additional Protocol I. Article 86 and 87 of Additional Protocol I state:

Article 86: Failure to Act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87: Duty of Commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, and prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of the obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

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refer to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity F...ğ."

[157] Commentary on the Additional Protocols, para. 3551. Article 87 was first introduced in May 1976 by the United States, in the middle of the Third Session of the Diplomatic Conference. CDDH/I/SR.50, para. 64. In explaining the reason behind the new article, the delegate from the United States explained: "By and large, implementation of Protocol I and of the Geneva Conventions depended on commanders. Without their conscientious supervision, general legal requirements were unlikely to be effective." The article was "designed to provide commanders with clear notice of their responsibilities both in the prevention and repression of breaches during the actual conduct of military operations and in the prevention and repression of breaches through the establishment of the appropriate training measures required at all times." Finally, the reference to "commanders" was "intended to refer to all those persons who had command responsibility, from commanders at the highest level to leaders with only a few men under their command." CDDH/I/SR.50, paras 68-70. Notably, the delegate from Italy said, in expressing his country's support for the new article that it would "strengthen and improve not only the system for the repression of grave breaches, established by the Geneva Conventions of 1949 and Protocol I, *but also the system for the repression of simple breaches.*" CDDH/I/SR.51, para. 5. (emphasis added).

85. According to the Commentary on the Additional Protocols, with regard to Article 86, "Ftğhe importance of this provision cannot be doubted."[158] At the same time however, the Commentary made it clear that the principle as such was by no means new:

> The recognition of the responsibility of superiors who, without any excuse, fail to prevent their subordinates from committing breaches of the law of armed conflict is therefore by no means new in treaty law. However, this principle was not specifically governed by provisions imposing penal sanctions.[159]

Quite to the contrary, the Commentary observes that the notion of a breach of international law consisting of an omission is "uncontested" and follows from State practice, case law and legal literature.[160] The Commentary found the basis for the post-Second World War convictions to rest "only on national legislation, either on explicit provisions, or on the application of general principles found in criminal codes."[161] Also in the course of the negotiations at the Diplomatic Conference, a number of delegations commented that the provisions of what was finally included in Article 87 were already found in the military codes of all countries.[162] The Canadian delegate questioned whether an article on "failure to act" was necessary, as the existing law on this subject was clear: "In the Canadian military code, for instance, direct responsibility rested with any superior, whatever his rank."[163] Similarly, the delegate from the Philippines questioned whether the "duty of commanders" article was necessary as "in any military organization, a commander was under an obligation to prevent his men from committing acts of a criminal nature, otherwise he could be charged with criminal negligence."[164] Notably, the delegate from Yugoslavia had a similar comment on this article, stating that it "consisted of provisions which were already in the military codes of all countries" but that his country had voted for it "in view of the interest expressed in the item by some delegations."[165]

86. Thus, the inclusion of Article 87 was not intended to create new law nor to fill a gap in existing law, but rather to merely "ensurFeğ that they Fprovisions related to duties of commandersğ are explicitly applicable with respect to the provisions of the Conventions and the Protocol."[166] Article 87 is intended to apply to "all persons who had command responsibility" and "Ftğhere is no

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[158] Commentary on the Additional Protocols, para. 3529.
[159] Ibid, para. 3540.
[160] Ibid, para. 3529.
[161] Ibid, para. 3525.
[162] Ibid, para. 3562.
[163] CDDH/I/SR.50, para. 47.
[164] CDDH/I/SR.51, para. 9.
[165] CDDH/I/SR.71, para. 2.
[166] Commentary on the Additional Protocols, para. 3562: "The object of these texts is to ensure that military commanders at every level exercise the power vested in them, both with regard to the provitions Fsicğ of the Conventions and Protocol, and with regard to other rules of the army to which they belong. Such powers exist in all armies."

member of the armed forces exercising command who is not obliged to ensure the proper application of the Conventions and the Protocol."[167]

87. As observed by both parties, Additional Protocol II, applicable to armed conflicts of a non-international character, does not include provisions similar to Articles 86 and 87 of Additional Protocol I. However, this Protocol does touch upon the position of a commander, albeit in a more general way than in Additional Protocol I. Article 1 of Additional Protocol II makes explicit reference to the concept of responsible command, a concept which was also included in various previous instruments, as described above:

> This Protocol (...) shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, *under responsible command*, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[168]

The Commentary on this point states:

> Ftghe existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. *It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations,* and on the other, *of imposing discipline in the name of a de facto authority.*[169]

88. Furthermore, the Trial Chamber refers to the "penal prosecutions" provisions, laid down in Article 6 of Additional Protocol II. The aim of this provision was primarily to provide guarantees that if a person was charged with violations of international humanitarian law in internal armed conflicts, he or she would receive a fair trial.[170] While it does not – and was not intended to – clarify or supplement the basis for individual criminal responsibility, it affirms that the drafters of Additional Protocol II envisioned that prosecutions could be held for those who committed violations of international humanitarian law in internal armed conflicts.

89. Beginning in 1980, the ILC started working again on the Draft Code of Offences, following renewed interest by the General Assembly in preparing a code of crimes. In 1986, the ILC produced updated "Draft Articles".[171] This draft included a specific provision on superior responsibility

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[167] Commentary on the Additional Protocols, para. 3553.
[168] Article 1, paragraph 1 of Additional Protocol II. (emphasis added).
[169] Commentary on the Additional Protocols, para. 4463. (emphasis added).
[170] Art. 6 of Additional Protocol II is largely based on Art. 14 of the ICCPR and is comparable to Art. 75 of Additional Protocol I.
[171] Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398, 11 March 1986, Part V, para. 260.

included in the "General Principles" section of the draft. Article 9, entitled "responsibility of the superior", read:

> The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.[172]

The commentary on this article states that the

> Commission may also leave the hypothesis in question to be covered by the general theory of complicity. It should be remembered, however, that these are offences committed within the framework of a hierarchy, which therefore almost always involve the power of command. It may therefore be useful to provide a separate basis and an independent written source to cover the responsibility of the leader.[173]

The offences listed under the title "Offences against the Peace and Security of Mankind", included crimes against peace, crimes against humanity, including genocide, and war crimes. Notably, the term "war crimes" applies to serious violations of the laws or customs of war in both international and non-international armed conflicts.

90. The new ILC draft re-ordered the articles, moving "responsibility of the superior" to Article 10 in 1987.[174] In its commentary on this article, the ILC refers to superior responsibility as "a specific case of the theory of complicity."[175] It describes the "complicity" as either:

> the consequence of an order given by an individual who has the authority to give commands, or a deliberate omission on the part of such an individual in an instance where he had the power to prevent the offence. It can also result from negligence, since in principle all military leaders must keep themselves informed of the situation of the units under their command and of the acts committed or planned by them.[176]

The *Yamashita* and *Hostage* cases are cited in support of recognition of the duty imposed on commanders and the subsequent criminal responsibility imposed on superiors who fail to prevent the commission of crimes by their subordinates. The commentary finds that there is one difficulty that arises from this provision, and notably it is "not a substantive problem, but rather a methodological one."[177] The question was whether to include this specific article or whether "the general theory of complicity should be allowed to cover cases falling within this category."[178] In

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[172] Ibid.
[173] Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/398, 11 March 1986, Part V, para. 260, p. 83.
[174] Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/404, 17 March 1987, Part V.
[175] Ibid, Art. 10, Commentary (1).
[176] Ibid.
[177] Ibid, Art. 10, Commentary (4).
[178] Ibid.

noting that Additional Protocol I devoted two articles to this subject, and that there are "consistent judicial decision and treaty provisions on the subject," as well as the fact that the offences in the draft are "committed in the context of a hierarchy",[179] the ILC opted to maintain a separate article on superior responsibility.

91. In 1988, the ILC presented a slightly altered version of Article 10.[180] It reads:

> Responsibility of the superior:
>
> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

92. This is the same wording as that adopted by the ILC in the 1991 Draft Code of Crimes in Article 12, in the section of the document entitled "General Principles".[181] The commentary on this article stated that the principle of the responsibility of the superior for crimes committed by his subordinates has origins in both international judicial decisions and post-World War II international criminal law, citing Additional Protocol I as an example. The commentary elaborates on the elements of the principle, finding that the superior incurs criminal responsibility "even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions."[182] The Trial Chamber notes that the crimes included in the 1991 Draft Code of Crimes are quite far-reaching including international terrorism, illicit traffic in narcotic drugs, and wilful and severe damage to the environment, as well as genocide and "exceptionally serious war crimes" committed in an armed conflict.

93. Based on the foregoing, the Trial Chamber makes the following preliminary findings with regard to the doctrine of command responsibility prior to the time when the jurisdiction of the International Tribunal takes effect:

(i) the doctrine has its roots in *inter alia* the principle of "responsible command" and fundamental tenets of military law;

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[179] Ibid, Art. 10, Commentary (6).

[180] Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), A/43/10 ("Report on the 40th Session"), p. 70-71.

[181] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).

[182] Report on the 40th Session, p. 71, Art. 10, Commentary (4). The Commission also commented on the "feasible measures" aspect of the article, suggesting that "for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures." Report on the 40th Session, p. 71, Art. 10, Commentary (5).

(ii) the doctrine has been applied in a manner whereby commanders or superiors have incurred individual criminal responsibility based on their failure to carry out their duty to either prevent their subordinates from committing violations of international law or for punishing them thereafter;

(iii) the doctrine has been recognised as forming part of customary international law and a general principle of international criminal law;

(iv) the primary purpose of the doctrine is to ensure compliance with the laws and customs or war and international humanitarian law generally;

(v) the doctrine has been recognised as applying to offences committed either within or in the absence of an armed conflict; and

(vi) the doctrine has been recognised as applying to offences committed either in an international or an internal armed conflict.

With regard to points (v) and (vi), the Trial Chamber takes note of the fact that neither finding has been explicitly codified in an international agreement or treaty, with the exception of Additional Protocol I in relation to international armed conflicts, and that neither finding has been ruled on explicitly by an international judicial body, again with the exception of instances of international armed conflicts.

## 2. The creation of the International Tribunal

94. Article 1 of the Statute lays down the competence of the International Tribunal

> Ftğo prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

95. Individual criminal responsibility is defined in Article 7 of the Statute, which states, in part:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

F...ğ

96. The Trial Chamber conducted a survey of official reports and preparatory documents for the Statute to assist it in interpreting the provisions contained therein, and specifically the intended scope of individual criminal responsibility and the doctrine of command responsibility.

97. The Security Council has adopted over forty resolutions on the conflict in the former Yugoslavia. In a number of them, the violations of international humanitarian law formed the major issue. Many of these resolutions have been adopted under Chapter VII of the Charter of the United Nations. In resolution 764 (13 July 1992), the Security Council reaffirmed that all parties are bound to comply with the obligations under international humanitarian law, and that:

> Fpğersons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches F...ğ.

In resolution 771 (13 Aug. 1992), the Security Council dealt specifically with continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and "especially in Bosnia and Herzegovina", strongly condemned "any violations of international humanitarian law" and demanded that "all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina" shall "immediately cease and desist from *all* breaches of international humanitarian law".[183] In resolution 780, on 6 October 1992, the Security Council called for the creation of a Commission of Experts to examine and analyse information regarding violations of humanitarian law, including grave breaches of the Geneva Conventions, committed in the territory of the former Yugoslavia. On 16 November 1992, the Council adopted resolution 787, in which it condemned all violations of international humanitarian law and

> reaffirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts F...ğ.

Also in a number of subsequent resolutions, reference was made to violations of international humanitarian law. Reference was sometimes also made to the practice of ethnic cleansing or the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities.[184] The Interim Report of the Commission of Experts stated that the

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[183] (emphasis added).

[184] See *inter alia* resolution 819 of 16 April 1993, resolution 824 of 6 May 1993, resolution 844 of 18 June 1993 and resolution 859 of 24 August 1993.

establishment of an *ad hoc* international tribunal in relation to events in the territory of the former Yugoslavia "would be consistent with the direction of its work".[185]

98. In resolution 808 of 22 February 1993, the Security Council decided that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law. The Security Council cited the reports of "widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia" and found that the situation constituted a threat to international peace and security. It further expressed its determination to put an end "to such crimes and to take effective measures to bring to justice the persons who are responsible for them."[186]

99. When subjecting these resolutions to a closer scrutiny, a number of relevant aspects become apparent. First, the Council does at no point in time express itself on the character of the armed conflict. It almost always refers to "violations of international humanitarian law" without further specifying which norms are meant. In some instances, reference is made to the grave breaches, but there, like in resolution 780, the phrase used is "violations of humanitarian law, including grave breaches". From the use of these various formula, the Trial Chamber concludes that the Security Council has deliberately not expressed itself on the character of the armed conflict and also deliberately left open the possibility of the application of norms relating to internal armed conflicts. This finding is consistent with that of the Appeals Chamber in the *Tadić* Appeals Decision on Jurisdiction:

> On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.[187]

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[185] "Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council" Annex, Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992) ("Interim Report"), U.N. Doc. S/25274, 10 February 1993, para. 74.

[186] See also, General Assembly resolution 46/242 of 25 August 1992, which condemned the widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and "especially in Bosnia and Herzegovina and resolution 47/121of the General Assembly of 18 December 1992, in which the Assembly urged the Security Council "to consider recommending the establishment of an *ad hoc* international war crimes tribunal to try and punish those who have committed war crimes in the Republic of Bosnia and Herzegovina F...ğ". See also, Security Council resolution 820 of 17 April 1993, in which the Council reaffirmed its decision that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and all violations of international humanitarian law and that "all those who commit or have committed or ordered or have ordered the commission of such acts will be held individually responsible in respect of such acts".

[187] *Tadić* Jurisdiction Decision, para. 77.

The Trial Chamber notes that the Security Council often cited specifically the armed conflict in Bosnia and Herzegovina, and there again did not seek to limit the reach of international humanitarian law *vis-à-vis* individual responsibility in the event that the armed conflict could be termed an "internal armed conflict" within Bosnia and Herzegovina.

100. Second, the choice of words in the various resolutions was always such that it expressed its intention "to bring to justice the persons responsible" for violations of international humanitarian law. No distinction was made between those who commit violations in an internal armed conflict and those who commit violations in an international armed conflict. Furthermore, no distinction was made between the various theories of individual criminal responsibility. In a number of instances the Council made explicit reference to "those who commit or order" such crimes, but these formulations were a further elaboration of the idea that all persons who violated international humanitarian law were to be held responsible for such acts, whether omissions or commissions.

101. Finally, the Trial Chamber observes that most of the relevant resolutions were adopted under Chapter VII of the Charter of the United Nations, and thereby became binding on all parties and all persons involved in the conflict. In other words, each and every person involved in the conflict, whether in a superior or subordinate position and whether involved in a conflict of an international or internal nature, was bound to observe the resolutions of the Security Council.

102. A similar approach can be found in the report of the Commission of Experts. In a letter from the Secretary-General to the President of the Security Council of 9 February 1993, the Secretary-General annexed the "Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)".[188] The Commission of Experts listed the international agreements and laws relevant to the conflict in the former Yugoslavia. The Commission declined, however, to make a finding of the nature of the conflict and opined that the law applicable to international armed conflicts should apply in its entirety to the situation in the former Yugoslavia. It stated in this respect:

> The Commission is of the opinion, however, that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.[189]

103. The Trial Chamber notes that in the "Special Agreement" entered into between the parties to the conflict in Bosnia and Herzegovina on 22 May 1992, under the auspices of the International

[188] Interim Report.

Committee of the Red Cross, the parties "reiteratFeğ their commitment to respect and *ensure respect for the rules of International Humanitarian law.*" The Trial Chamber further notes that each party, *inter alia*,

> undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence *and to punish those responsible in accordance with the law in force.*[190]

104. The Commission of Experts also addressed the issue of command responsibility in its Report:

> Superiors are moreover individually responsible for a war crime or a crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.[191]

On military commanders, the Commission of Experts observed:

> Military commanders are under a special obligation, with respect to members of armed forces under their command or other persons under their control, to prevent, and where necessary, to suppress such acts and to report them to competent authorities.[192]

On the issue of the object and purpose of the doctrine of command responsibility, it observed in its Final Report:

> The doctrine of command responsibility is directed primarily at military commanders because such persons have a personal obligation to ensure the maintenance of discipline among troops under their command. Most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused. Political leaders and political officials have also been held liable under the doctrine in certain circumstances.[193]

Thus, it is clear that the Commission of Experts considered that the doctrine of command responsibility should be applicable to any war crime or crime against humanity committed in the former Yugoslavia.

105. After the Security Council had taken the decision that an international tribunal should be established, a number of States submitted draft proposals to the Secretary-General of the United Nations, in preparation of the draft Statute for the Tribunal. In a number of these proposals, specific comments were made on the doctrine of command responsibility, supporting not only the inclusion

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[189] Ibid, para. 45.
[190] (emphasis added).
[191] Interim Report, para. 52.
[192] Ibid, para. 53.
[193] Final Report of 27 May 1994, UN Doc. S/1994/674, para. 57.

of this doctrine in the Statute but also a broad application. The Trial Chamber observes that such official pronouncements of States may serve as a guide to the status of customary rules or general principles of law.

106. The Government of Italy submitted a draft statute for the International Tribunal and comments.[194] The draft statute included a provision for superior responsibility under the title "Principles of criminal liability" which stated:

> Ftğhe fact that one of the crimes referred to in article 4[195] is committed by a subordinate does not exclude the hierarchical superiors from criminal liability, if they knew, or were in possession of information which would have enabled them to conclude, in the circumstances of the moment, that the subordinate was committing, or was about to commit, the crime or if they had failed to take every possible measure to prevent its commission.[196]

107. The Government of the United States of America issued a letter to the Secretary-General, which contained a draft "charter" for the International Tribunal. In its introduction to the draft, the United States maintains that the "Tribunal should apply substantive and procedural law that is internationally accepted."[197] The United States includes the doctrine of command responsibility in its draft charter, which evinces the belief on the part of the United States that command responsibility is "internationally accepted." In its draft, Article 11 states that "Ftğhere shall be individual responsibility for the violations set forth in article 10."[198] Article 11 (b) reads:

> An accused person with military or political authority or responsibility is individually responsible if violations described in article 10 were committed in pursuance of his or her order, directive or policy. An accused person is *also individually responsible* if he or she had actual knowledge, or had reason to know, through reports to the accused person or through other means, that troops or other persons subject to his or her control were about to commit or had committed such violations, and the accused person failed to take necessary and reasonable steps to prevent such violations or to punish those committing such violations.[199]

108. The Government of Canada issued a letter with comments on the draft statute in response to Security Council Resolution 808 on 13 April 1993 to the Secretary-General. Canada stated that it is

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[194] Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, S/25300, 17 February 1993.
[195] Article 4 referred to the following crimes: (a) war crimes, such as violations of the Geneva Conventions and of the Additional Protocols, "as well as any other war crime as defined by international customary law or by international treaties"; (b) crimes of genocide; (c) crimes against humanity consisting of systematic or repeated violations of human rights; and (d) acts of torture.
[196] Letter of Italy, Art. 5(3).
[197] Letter of 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Secretary-General, S/25575, 12 April 1993, p. 2.
[198] Article 10 referred to the following crimes: (a) Violations of the laws or customs of war, including the regulations annexed to the Hague Convention IV of 1907 and grave breaches of the Geneva Conventions of 12 August 1949. For this purpose, the conflict in the former Yugoslavia on or after 25 June 1991 shall be deemed to be of an international character; (b)(i) Acts of murder, torture, extrajudicial and summary execution, illegal detention and rape that are part of a campaign or attack against any civilian population in the former Yugoslavia on national, racial, ethnic or religious grounds; (ii) Acts that violate the Convention on the Prevention and Punishment of the Crime of Genocide.
[199] Letter of 5 April 1993, S/25575, p. 7.

"essential" that the principles of *nullum crimen sine lege* and *nulla poena sine lege* be applied. Canada stated that "the conduct prohibited and the required accompanying mental state should be expressly stated."[200] Regarding the inclusion of the doctrine of command responsibility,

> Canada supports the position that the principles governing criminal liability which hold superiors accountable for the crimes of their subordinates.[201]

While the letter does not comment on the scope of this principle, Canada's interpretation of "serious violations of international humanitarian law" is helpful. It found the jurisdiction to include violations of the laws or customs of war, "including" grave breaches of the Geneva Conventions and Additional Protocol I, crimes against humanity under customary or conventional law, and acts which violate the Genocide Convention and the Convention against Torture.[202]

109. Finally, the Government of the Netherlands also submitted "observations" on the establishment of international ad hoc tribunal to the Secretary-General. It suggested the inclusion of a provision in the Statute according to which persons should be prosecuted for

> Ftğhe fact of having ordered, authorised or permitted the commission of war crimes and/or crimes against humanity and the fact of being in a position to influence the general standard of behaviour and having culpably neglected to take action against crimes of that kind. This is the case if the persons concerned should have known of the relevant acts, and could have prevented, terminated, or repressed the commission of those acts, and were duty-bound thereto but failed to do so.[203]

The Netherlands addressed the responsibility of the government *vis-à-vis* crimes against humanity and the commission of offences:

> Fağs part of the deliberate, systematic persecution of a particular group of people and/or are designed systematically to deprive that group of people of their rights, *and if the government, which under national law is bound to prevent and suppress such crimes, tolerates or even assists the commission of such crimes against that group of people.* Acts of this kind undermine the norms and principles of the international community. *In such cases, therefore, the international community has the right to deal with these offences and to undertake to prosecute and try those who commit them.*[204]

The Trial Chamber interprets these observations by the Netherlands as a support for the prosecution of all government officials or persons in positions of authority who failed to prevent or suppress

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[200] Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Secretary-General, S/25594, 14 April 1993, paras 7-8.
[201] Ibid, para. 12.
[202] Ibid, para. 9.
[203] Letter dated 4 May 1993 from the Permanent Representative of the Netherlands to the United Nations Secretary-General, S/25716, 4 May 1993, p. 4.
[204] Letter of the Netherlands, S/25716, p. 4. (emphasis added).

violations of international humanitarian law. The Trial Chamber further notes that in the observations, no distinction is made between internal or international armed conflicts.[205]

110. Next, the Trial Chamber considers that the Report of the Secretary-General on the draft Statute of the International Tribunal as providing guidance for the interpretation of the Statute. In his Report, the Secretary-General recalls many of the Security Council resolutions related to the object and purpose of the International Tribunal, and particularly reaffirms that "those who commit or have committed or order or have ordered the commission of acts will be held individually responsible in respect of such acts."[206]

111. In terms of the substance of the Statute, the Secretary-General confirms that:

> Ftghe formulations are based upon provisions found in existing international instruments, particularly with regard to competence *ratione materiae* of the International Tribunal.[207]

112. As to the temporal jurisdiction of the International Tribunal, the Statute deliberately reflects the date of 1 January 1991. According to the Secretary-General, this date was chosen as it

> is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.[208]

As the *Tadić* Appeals Chamber recounts, the Security Council was aware of – and drafted the Statute to reflect – the mixed character of the conflicts in the former Yugoslavia.[209]

113. On the issue of individual criminal responsibility, the Secretary-General observes that practically all suggestions submitted by States on the Statute include a comment on the need to provide for criminal responsibility for heads of State, government officials and persons acting in an official capacity. He states his belief that "all" persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia "contribute to the commission of the violation and are, therefore, individually responsible."[210]

114. The Report of the Secretary-General states the importance of imputing individual criminal responsibility on superiors:

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[205] In addition, see *e.g.* the suggestions contained in the letter of the Permanent Representative of Russia in which no specific provision on command responsibility is included. Included, however, is a provision stating that ones official position cannot be used as a defence to prosecution. Letter dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, S/25537, 6 April 1993, Art. 14.
[206] Report of the Secretary-General, para. 11.
[207] Ibid para. 17.
[208] Ibid, para. 62.
[209] *Tadić* Appeals Decision on Jurisdiction, paras 73-74.
[210] Report of the Secretary-General, paras 55 and 54.

> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. *But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.*[211]

At no point in his report does the Secretary-General elude to the possible relevance of conflict classification for the scope of individual criminal responsibility laid down in the Statute.

115. The Statute of the International Tribunal was adopted unanimously by the Security Council on 25 May 1993, as Security Council Resolution 827 (1993).[212] In this resolution, the Council expressed its

> Fgğrave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina F...ğ.

The Security Council stated its determination

> Ftğo put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.

The Trial Chamber observes that the formulation chosen - "to bring to justice the persons responsible" – in the resolution by which the Statute of this Tribunal was adopted, does not put any limitations on the individual criminal liability of persons depending on the nature of the conflict.

116. Upon the adoption of the Statute, a number of States commented upon the substance of the text of the Statute. The representative of the United States, for example, commented:

> The crimes being committed, even as we meet today, are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, military commanders, and disciplined artillerymen and foot soldiers. *The men and women behind these crimes are individually responsible for the crimes of those they purport to control; the fact that their power is often self-proclaimed does not lessen their culpability.*[213]

The United States also commented on its understanding of Article 7 of the Statute:

> With respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of a conspiracy to commit a crime referred to in Articles 2 through 5, *or the failure of a superior – whether political or military – to take reasonable steps to prevent or punish such crimes by persons under his or her authority.*[214]

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[211] Ibid, para. 56. (emphasis added).
[212] Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, S/PV.3217, p. 6.
[213] Ibid, p. 13. (emphasis added).
[214] Ibid, p. 16. (emphasis added).

The Trial Chamber concludes that the United States did not consider that the principle of command responsibility should be limited to situations of international armed conflict. Quite to the contrary, the reference in the first quotation here to the "men and women behind these crimes" with power which "is often self-proclaimed" would rather justify the conclusion that command responsibility should certainly also apply to superiors in the context of an internal armed conflict.

117. During the same meeting, the representative from the United Kingdom stated that:

> Fiğt is essential that those who commit such acts be in no doubt that they will be held individually responsible. It is essential that these atrocities be investigated and the perpetrators called to account, *whoever and wherever they may be.*[215]

Furthermore,

> Ftğhe Statute does not, of course, create new law, but reflects existing international law in this field... The establishment of the Tribunal sends a clear message to all in the former Yugoslavia that they must stop immediately violations of international humanitarian law or face the consequences.[216]

118. Finally, the representative from Hungary stated that:

> Fwğe also note the importance of the fact that the jurisdiction of the Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of former Yugoslavia. The Statute of the Tribunal allows the prosecutions of all persons – not communities – charged with crimes where the crime was committed in the territory of former Yugoslavia and without regard to their ethnic affiliation. We note also that the official status of the individual brought to court, whatever it might be, does not immunize him from his criminal liability.[217]

119. On the basis of the drafting history of the Statute of this Tribunal, the Trial Chamber observes that the intention of the drafters was to establish a system by which "all" persons responsible for violations of international humanitarian law could be held responsible. The Security Council resolutions on the conflict in the former Yugoslavia, the suggestions by various States, the report of the Secretary-General and the discussion in the Security Council during the adoption of the Statute all clearly point in that direction. From these sources, one can not conclude that individual criminal responsibility for superiors would not apply if the armed conflict might be considered of a non-international character. As noted above, the report of the Secretary-General does mention at times the character of the armed conflict as a relevant factor, but those observations

[215] Ibid, p. 17-18. (emphasis added).
[216] Ibid, p.19.
[217] S/PV.3217, p. 20-21.

relate to the jurisdictional requirements for the substantive crimes in the Statute, not to the different theories of individual criminal responsibility.[218]

120. This observation is furthermore supported by a textual analysis of Article 7(3) of the Statute. The text of this paragraph refers to *any* of the acts referred to in Articles 2 to 5. Only Article 2, according to the case law of this Tribunal, is limited to cases of international armed conflicts. The crimes listed in Article 3, violations of the laws or customs of war, and Article 5, crimes against humanity, are applicable in either internal or international armed conflicts. Genocide (Article 4) does not require any nexus with an armed conflict.

### 3. Jurisprudence of the International Tribunal

121. The Trial Chamber will now conduct an overview of the jurisprudence to assess how the International Tribunal has interpreted and applied Article 7(3) to the cases before it. There have been a number of cases where individual criminal responsibility pursuant to Article 7(3) of the Statute has been established. In these cases, the elements of the doctrine and the status of the accused as a military versus civilian commander have been the focus of much discussion. The nature of the conflict *vis-à-vis* command responsibility has *never* been discussed, challenged or commented upon by the Prosecution, Defence, Trial Chamber or Appeals Chamber.

122. The first case before the International Tribunal to find individual criminal responsibility pursuant to Article 7(3) was *Čelebići*. In this case, one accused, Zdravko Mucić, was found to be commander of a prison-camp during an international armed conflict. The Trial Chamber found him guilty under both Article 7(1) and Article 7(3), with his position under Article 7(3) being that of a non-military superior, for violations contained in Article 2 (grave breaches) and Article 3 (violations of the laws or customs of war).

123. Before deciding upon this issue, however, the Trial Chamber undertook extensive research into the origins and application of the doctrine of command responsibility. As to the status of this doctrine, it entered into an analysis of various precedents, including the Hague Conventions, and post-World War I developments and post-World War II cases. In addition it made reference to Articles 86 and 87 of Additional Protocol I and to various military manuals. On the basis of this analysis, the Trial Chamber held:

> That military commanders *and other persons occupying positions of superior authority* may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law.[219]

[218] Report of the Secretary-General, paras 37, 47 and 53-54.

The Appeals Chamber upheld this finding and affirmed that the principle is "well-established in conventional and customary law."[220]

124. The Trial Chamber in *Čelebići* observed that the doctrine of command responsibility had not been applied by any international judicial organ since the post-World War II cases. It found, however, that the lack of application of the doctrine did not impinge upon its firm standing as a norm of customary international law: "there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law."[221]

125. On the rationale behind the doctrine, the Trial Chamber found that "criminal responsibility for omissions is incurred *only where there exists a legal obligation to act.*"[222] The Trial Chamber cited Additional Protocol I as one of its sources for determining that the doctrine of command responsibility is "a well-established norm of customary and conventional international law". But it also used Additional Protocol I as an *example* of international law imposing an "affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law".[223] The Trial Chamber further found that "it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute."[224]

126. In terms of the constituent elements of command responsibility, the Trial Chamber found the following to be the "essential elements" of command responsibility for failure to act:

(a) the existence of a superior-subordinate relationship;

(b) the superior knew or had reason to know that the criminal act was about to be or had been committed; and

(c) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[225]

127. In relation to the first element, the Trial Chamber held that:

> It is important to emphasise that at the very root of the concept of command responsibility, with the exercise of corresponding authority, is the existence of a superior-subordinate relationship.[226]

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[219] *Čelebići* Trial Judgement, para. 333. (emphasis added).
[220] *Prosecutor v. Zejnil Delalić, Zravko Mucić, Hazim Delić and Esad Landžo* ("*Čelebići*"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 195.
[221] *Čelebići* Trial Judgement, para. 340.
[222] Ibid para. 334, citing the ILC Draft Code of 1996. (emphasis added).
[223] Ibid, para. 334.
[224] Ibid, para. 334.
[225] Ibid, para. 346.

As to this relationship and in assessing the term "command" the Trial Chamber found that "formal status alone" is not the only factor to look at, but rather, "the actual possession, or non-possession, of powers of control over the actions of subordinates."[227] The Trial Chamber defined "effective control" over subordinates as "having the material ability to prevent and punish the commission of these offences."[228] On this issue, the Trial Chamber further held that:

> Fpğersons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus the Trial Chamber accepts the Prosecution's proposition that individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.[229]

The Appeals Chamber upheld the findings of the Trial Chamber in relation to *de facto* authority as the basis for command or superior authority, finding that a commander or superior is

> Ftğhus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after it is committed.[230]

It also upheld the finding that "political leaders and other civilian superiors in positions of authority" are covered by the term "superior".[231]

128. As to the second element, the "had reason to know" standard, the Appeals Chamber held that this was not imposing a "general duty to know" on superiors, but rather that:

> Fağ superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[232]

This, in the view of the Appeals Chamber, is consistent with the customary law standard of *mens rea* as existing at the time of the offences, i.e. 1992.

129. In relation to the third element, the "duty" arising from the command position, the Trial Chamber found that the

> legal duty which rests upon *all* individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof.[233]

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[226] *Čelebići* Trial Judgement, para. 734.
[227] Ibid, para. 370.
[228] Ibid, para. 378.
[229] Ibid, paras 354.
[230] *Čelebići* Appeal Judgement, para. 192.
[231] Ibid, para. 195.
[232] Ibid, para. 241.

Furthermore, it held that:

> a superior may only be held criminally responsible for failing to take such measures that are within his powers.[234]

What those measures are in any particular case would depend on the facts and circumstances surrounding that commander or superior. Also here, the Appeals Chamber followed this approach, and added:

> As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[235]

130. There is nothing on the face of the elements that would suggest that command responsibility is limited to a specific type of armed conflict or that it has any jurisdictional pre-requisites. The manner in which these elements have been applied would rather indicate that the nature of the conflict – or even the existence of an armed conflict – is not a relevant factor. This conclusion could be drawn on the one hand from the fact that the elements described are considered applicable not only to military but also to civilian superiors. The conclusion could further be drawn from the way references are made to situations defined as "armed conflicts". This Trial Chamber refers to the observation of the Appeals Chamber in *Čelebići* that:

> In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.[236]

The Appeals Chamber thus found that the principle of command responsibility could be applicable to *de facto* armies and paramilitary groups, a finding which would strongly suggest applicability of the principle of command responsibility in non-international armed conflicts.

131. The second case before the International Tribunal relating to the interpretation and application of Article 7(3), the *Aleksovski* case, dealt with the case of a prison warden who was considered responsible under both Article 7(1) and Article 7(3) for a number of serious crimes committed in the prison institution. The Trial Chamber was confronted with the interpretation of

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[233] *Čelebići* Trial Judgement, para. 394. (emphasis added).
[234] Ibid, para. 395.
[235] *Čelebići* Appeal Judgement, para. 198.
[236] Ibid, para. 193.

the term "superior" in Article 7(3). It held that superior responsibility is "not reserved for official authorities" and that "Fağny person acting *de facto* as a superior may be held responsible under Article 7(3)."[237] The Trial Chamber further found that the "decisive criterion" for determining who is a superior under customary international law is not simply formal legal status "but also his ability, as demonstrated by his duties and competence, to exercise control."[238]

132. The Trial Chamber also found that liability under Article 7(3) should not be seen as responsibility for the act of another person, but rather, "derives directly from the failure of the person against whom the complaint is directed to honour an obligation."[239] The obligation to act is prompted by the fact that the person is a superior to the perpetrator *and* "knew or had reason to know that a crime was about to be committed or had been committed".[240] The Trial Chamber found that "Fhğierarchical power constitutes the very foundation of responsibility" under Article 7(3).[241]

133. The Trial Chamber had to pronounce on the character of the armed conflict between Bosnian Croats and Bosnian Muslims in *Aleksovski*. The Trial Chamber concluded that the conflict was not of an international character. Nonetheless, the Chamber concluded that the acts of the accused

> constitutes an outrage upon personal dignity and, in particular, degrading or humiliating treatment within the meaning of Common Article 3 of the FGenevağ Conventions and therefore constitutes a violation of the laws or customs of war within the meaning of Article 3 of the Statute for which the accused must be held responsible under Articles 7(1) and 7(3) of the Tribunal's Statute.[242]

The Trial Chamber therefore did not find any legal impediment in applying Article 7(3) to a non-international armed conflict for violations pursuant to Article 3 of the Statute.

134. The accused appealed against the application of Article 7(3) to the facts in the case, and as such, the appeal was factual in nature. In affirming the Trial Chamber's finding, the Appeals Chamber held that it did not matter whether the accused was a civilian or military superior, but rather that "he had the powers to prevent or to punish in terms of Article 7(3)."[243]

135. The Prosecution appealed against the characterisation of the armed conflict as a non-international one. The Appeals Chamber found that the Trial Chamber had applied the wrong test in relation to Article 2 charges, and found the conflict to be international. None of the parties appealed against the application by the Trial Chamber of Article 7(3) to a non-international armed conflict.

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[237] Ibid, para. 76. (emphasis added).
[238] Ibid, para. 76.
[239] Ibid, para. 72.
[240] Ibid, para. 72.
[241] *Aleksovski* Trial Judgement, para. 78.
[242] Ibid, para. 228.
[243] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, ("*Aleksovski* Appeal Judgement"), para. 76.

136. In the case of *Blaškić*, the Trial Chamber found the accused, a military commander, guilty for Article 2 and Article 3 violations under both 7(1) and 7(3) in the context of an international armed conflict. The Trial Chamber relied upon, and elaborated on, the elements of command responsibility as defined in *Čelebići*. For the purposes of the present decision, two aspects of this case warrant mention. Firstly, the Trial Chamber in this case further reflected on the position of the superior and the responsibilities arising from that position. In this context, it held that:

> Fağ commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.[244]

It added to this that:

> Fağ commander need not have any legal authority to prevent or punish acts of his subordinates[245]

and that the superior

> has the material ability to prevent or punish crimes committed by others F...ğ.[246]

137. The Trial Chamber also elaborated on the mental element of command responsibility, i.e. the requirement that the commander knew or had reason to know that the criminal act was about to be or had been committed. In this context, the Trial Chamber researched the origins of command responsibility in customary international law, including that of "responsible command", and its codification in Additional Protocol I. The Chamber held here:

> The Trial Chamber will interpret Article 86(2) in accordance with Article 31 of the Vienna Convention, that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". *In this respect, the Trial Chamber considers fundamental the provision enshrined in Article 43(1) of Additional Protocol I according to which the armed forces are to be placed "under a command responsible F...ğ for the conduct of its subordinates.*[247]

138. In the case of *Kordić and Čerkez*, the Trial Chamber found Mario Čerkez, a Brigade commander, guilty under Articles 7(1) and 7(3) for Article 2, Article 3 and Article 5 charges, in the context of an international armed conflict. In its analysis of Article 7(3), the Trial Chamber in this case relied on the Appeals Judgement in *Čelebići*. The Trial Chamber concurred that command responsibility does not only depend on *de jure* authority but also *de facto* authority:

> Actual authority however will not be determined by looking at formal positions only. Whether *de jure* or *de facto*, military or civilian, the existence of a position of authority *will have to be based upon an assessment of*

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[244] *Blaškić* Trial Judgement, para. 301.
[245] Ibid, para. 302.
[246] Ibid, para. 335.
[247] Ibid, para. 327, citing 1907 Hague Regulations, Art.1, and Geneva Convention III, Art. 4(a)(2), in the footnote. (empahsis added).

*the reality of the authority of the accused* F...ğ A formal position of authority may be determined by reference to official appointment or formal grant of authority.[248]

139. In *Krstić,* in the context of an "armed conflict" in Bosnia, the Trial Chamber found that the elements for Article 7(3) were met for General Krstić. Due to the fact that the responsibility under Article 7(1) already expressed the crime and the criminal behaviour manifested by the alleged perpetrator's conduct exhaustively, it entered a conviction only under Article 7(1) for violations of Articles 3, 4 and 5[249], consuming the Article 7(3) liability. However, before coming to this final result, the Trial Chamber did a straight-forward application of the facts to the elements of command responsibility, as well, and found that they were satisfied.

140. In three cases before the International Tribunal, Trial Chambers examined the liability of non-military accused in the context of an "armed conflict" in Bosnia and Herzegovina for violations of Articles 3 and 5 pursuant to Articles 7(1) and 7(3).[250] For purposes of the present decision, it is of importance to take into account that the Trial Chambers in these three cases did not elaborate on the

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[248] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić* Trial Judgement"), para. 418-19. (emphasis added).

[249] *Krstić* Trial Judgement, para. 605: "The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of a crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates." See para. 652. (emphasis in original).

[250] In the *Kunarac* case, the Trial Chamber had to determine whether one of the accused was in a position of "effective control" over soldiers who committed the offences charged in the Indictment "at the time they committed the offences". As the Trial Chamber found that he was not in effective control at the relevant time, he was not found liable under Article 7(3). *Kunarac* Trial Judgement, para. 628. In the *Kvočka* case, four of the accused were charged for violations of Article 3 and 5 of the Statute under both forms of criminal responsibility laid down in Article 7(1) and 7(3). *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Zigić and Dragoljub Prcać,* Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"). The Trial Chamber held that none of the accused could be held responsible under Article 7(3), based entirely on a factual assessment of whether the accused exercised effective control over the persons who had committed crimes. The Trial Chamber notes that with regard to the liability of one accused, Mlado Radić, while the Trial Chamber found that it was "not entirely clear" whether that accused exercised effective control over the perpetrators of the crimes, it "declined" to find Radić incurred superior responsibility, particularly as he had been found to have participated in a joint criminal enterprise: "there is some doubt as to whether, within the context of a joint criminal enterprise, a co-perpetrator or aider or abettor who is held responsible for the totality of crimes committed during his tenure on the basis of a criminal enterprise theory can be found separately responsible for part of those crimes on an Article 7(3) superior responsibility theory." *Kvočka* Trial Judgement, para. 570. Finally, in *Krnojelac*, a non-military warden of a detention centre was found guilty for violations of Article 3 and Article 5 under Article 7(1) and 7(3), in the context of "an armed conflict in Bosnia and Herzegovina", during the period April 1992 to August 1993. The Trial Chamber applied the facts to the elements as elaborated in *Čelebići*, finding that the elements of 7(3) individual criminal responsibility "have been firmly established by the jurisprudence of the Tribunal." *Krnojelac* Trial Judgement, para. 92. For certain counts, the Trial Chamber found that sufficient evidence had been adduced to satisfy the elements under both Article 7(1) and 7(3). In particular, it held that the accused had "failed in his duty as warden to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders". *Krnojelac* Trial Judgement, para. 318. The Trial Chamber found, however, that "it is inappropriate to convict under both heads of responsibility for the same count based on the same acts." *Krnojelac* Trial Judgement, para. 173. It exercised its discretion to determine which "head" of individual criminal responsibility more accurately reflected the culpability of the accused, and thus convicted under either Article 7(1) or 7(3) for each count. *Krnojelac* Trial Judgement, see paras 173, 316 and 493-98 When it convicted the accused under Article 7(1), it took his position as a superior into account as an aggravating factor. *Krnojelac* Trial Judgement, para. 173.

character of the "armed conflict". The fact that no explicit determination had to be made that the conflict was international or not in these cases did not lead to any discussion as to the possible impact on the criminal responsibility of the accused under either Article 7(1) or Article 7(3). It appears, however, that the character of the conflict was not considered as any obstacle to the application of Article 7(3) by these Trial Chambers.

141. Based on the foregoing overview of the jurisprudence of the International Tribunal, this Trial Chamber concludes that in order to apply the principle of command responsibility as a basis for individual criminal responsibility for crimes contained in the Statute, a Trial Chamber must satisfy itself of certain criteria related to the superior-subordinate relationship, the duty that arises from that relationship to prevent or punish offences of a subordinate, and that a superior knew or had reason to know about the acts of his subordinate in relation to the commission of offences. For the purposes of the question before this Trial Chamber, namely whether the application of the doctrine of command responsibility to Article 3 violations in the context of a non-international armed conflict falls within the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, it does not find in its jurisprudence any impediment, but rather a confirmation for the existing jurisdiction of this Tribunal.

4. Developments since the adoption of the Statute of the International Tribunal

142. In a number of instruments adopted after the establishment of the International Tribunal by the Security Council in 1993, the doctrine of command responsibility has been included. The Trial Chamber observes that in each of these instruments, no distinction has been made as to the relevance of the doctrine to international armed conflicts and non-international armed conflicts.

143. In referencing these developments, the Trial Chamber is cognisant of the fact that subsequent developments cannot be used to determine whether the principle of command responsibility was, under customary international law, applicable to internal armed conflicts at the time the alleged offences were committed; it mentions these developments rather to illustrate that core elements of the principle have been subsequently codified in largely the same manner as in the Statute and jurisprudence of the International Tribunal.

144. The first instrument of relevance is the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations committed in the Territory of Neighbouring States between

1 January and 31 December 1994 ("ICTR"), adopted by the Security Council on 8 November 1994. This Statute contains a provision, Article 6, for individual criminal responsibility nearly identical to that of Article 7 of the ICTY Statute.[251]

145. The Trial Chamber has studied the Report of the Secretary-General on the Statute of the ICTR.[252] The ICTR was established to prosecute crimes committed within the territory of Rwanda and in the circumstances of a non-international armed conflict. The Statute of the ICTR is described as "an adaptation" of the Statute of the ICTY.[253] As the Defence also observes, this report makes it clear that:

> Ftğhe Secretary-General has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime.[254]

The Trial Chamber notes that this comment is related to the scope of the subject matter jurisdiction of this Tribunal and more specifically to the fact that, because violations had taken place in an internal armed conflict, norms applicable to such conflicts were to be applied by the ICTR, i.e. violations of Common Article 3 "as more fully elaborated in Article 4 of the Additional Protocol II."[255] The issue of whether criminal liability under the doctrine of command responsibility attached to such crimes under customary international law was not the subject of this comment by the Secretary-General.

146. The ICTR has discussed the interpretation and application of Article 6(3) in a number of cases.[256] In this case law it was not questioned, and rather, it has been confirmed, that the principle of command responsibility applies to the situation in Rwanda. This principle has therefore been applied to substantive norms applicable during an internal armed conflict and to the crime of genocide. Numerous convictions pursuant to both guilty pleas and judgements on the merits have

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[251] Article 6(3) of the ICTR Statute provides: The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
[252] Report of the Secretary-General on the ICTR.
[253] Ibid, para. 9.
[254] Ibid, para. 12.
[255] Ibid, para. 11.
[256] See, e.g., *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, (*Akayesu* Trial Judgement"); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema* Trial Judgement"); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, ("*Musema* Trial Judgement");

been returned pursuant to Article 6(3).[257] Discussions on Article 6(3) traced the origins of the doctrine of command responsibility to the same sources cited by ICTY Trial and Appeals Chambers.[258] The Appeals Chamber has upheld each conviction,[259] and in the case of *Kayishema,* the Appeals Chamber discussed Article 6(3) in detail.[260] The Appeals Chamber relied on the Appeal Judgement in *Čelebići*, endorsing its findings with regards to the liability of *de facto* commanders and similarly focused on "effective control" as the key element for command/superior responsibility. Notably, "effective control" was established, in part, by the domestic legislation of Rwanda which established the governmental hierarchy.[261] From this case law it is obvious that, as far as the scope of the principle was challenged, it was done so in order to determine whether the principle should apply to persons in a civilian capacity. The ICTR answered this question in the affirmative.[262]

147. The second instrument of relevance is the Draft Code of Crimes against the Peace and Security of Mankind, adopted by the ILC upon second reading in 1996.[263] Article 6 of the Draft Code refers to the responsibility of the superior and reads:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

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[257] See, e.g., *Kayishema and Ruzindana* Trial Judgement, paras 210-222 and 513 (the "inherent purpose of Article 6(3) is to ensure that a morally culpable individual is held responsible for those heinous acts committed under his command", para. 516); *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998; *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentence, 5 February 1999; *Musema* Trial Judgement. There has also been one acquittal, based on the factual findings of the Trial Chamber which was upheld on Appeal, *Prosecutor v. Ignace Bagilishema,* Case No. ICTR-95-1A-T, Judgement, 7 June 2001. The acquittal was upheld by the ICTR Appeals Chamber at an oral hearing in Arusha on 3 July 2002. Moreover, in one case, the Trial Chamber declined to find liability pursuant to Article 6(3) due to vagueness in the Indictment. *Akayesu* Trial Judgement, para. 691.

[258] See, e.g., *Akayesu* Trial Judgement, para. 471; *Kayishema* Trial Judgement, paras 215, 220 and 492; *Musema* Trial Judgement, paras 128-148.

[259] See, e.g., *Alfred Musema c/ Le Procureur,* Affaire N°: ICTR-96-13-A, Arret, 16 November 2001; *Jean Kambanda v. The Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000.

[260] *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema* Appeal Judgement"), paras 280-304.

[261] *Kayishema* Appeal Judgement, para. 299, citing *Kayishema* Trial Judgement, para. 481.

[262] It may be observed that the ICTR Trial Chambers have tended to apply command responsibility somewhat differently than at the ICTY. The existence of a superior-subordinate relationship is the key feature for finding individual criminal responsibility under Article 7(3) of the ICTY Statute or Article 6(3) of the ICTR Statute. At the ICTY, the actions of a commander or superior, when relating to "ordering" or "aiding or abetting" are considered to come under Article 7(1) of this Statute, as seen in *Krstić* and *Krnojelac* cited above. The ICTR Trial Chambers, however, have found that such orders or forms of participation served as the basis for satisfying the mental element of command responsibility ("knew or had reason to know") since the accused was himself participating or present. These convictions under Article 6(3) have been upheld on appeal (*Musema* and *Kayishema*). While this somewhat different of application of the doctrine does not directly touch the issue before the present Trial Chamber, it may help to address some of the Defence concerns about military manuals or national legislation using terms that could arguably also fit under 7(1) (i.e. "tolerated" or "encouraged").

[263] Draft Code of Crimes Against the Peace and Security of Mankind, ILC (1996) (A/48/10).

The Trial Chamber observes that, although the text differs slightly from the draft provision on the responsibility of the superior, contained in the 1991 Draft Code,[264] in substance the provision describes the same principle.[265] The ILC Commentary on Article 6 states:

> Military commanders are responsible for the conduct of members of the armed forces under their command and other persons under their control. This principle of command responsibility was recognised in the 1907 Hague Convention and reaffirmed in subsequent legal instruments. It requires that members of the armed forces be placed under the command of a superior who is responsible for their conduct. A military commander may be held criminally liable for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime.

The Commentary on the ILC 1996 Draft Code found the principle of command responsibility to be recognised in the 1907 Hague Convention and "reaffirmed" in subsequent instruments *including* Additional Protocol II, Art. 1.[266] Thus, the ILC provided a conventional basis – and significantly, a pre-1992 basis – for the principle of command responsibility in non-international armed conflicts.

148. The third instrument of relevance is the Rome Statute of the International Criminal Court ("ICC"). In the Statute of the ICC, the doctrine of command responsibility is enshrined in Article 28. Notably, this Article applies to all crimes within the jurisdiction of the ICC, including crimes committed in an internal armed conflict, as well as crimes committed in the absence of an armed conflict. The Trial Chamber observes that the discussions on the drafting of this provision focused almost entirely on the question as to whether the principle should equally apply to military and non-military superiors. During the debates on the draft Statute at least already in 1996, it was clear that a very large majority of States favoured the extension of the principle to include civilian superiors as well. The primary reason behind this approach was the desire to codify an effective principle of command responsibility, not only applicable to the more traditional military commander in regular armed forces, but also to commanders of *de facto* forces and to civilian superiors. After this issue

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[264] See supra, para. 92. The differences between the two texts relate first to the formulation "if they knew or had information enabling them to conclude" which in 1996 is replaced by the formulation "if they knew or had reason to know". The second difference lies in the fact that the 1991 Draft Code referred to the fact that the superior should take "all feasible measures", whereas the 1996 Draft Code uses the formula "all necessary measures".

[265] In 1994, comments from the Special Rapporteur and a few countries were included on Article 12 on superior responsibility. The Special Rapporteur found that Article 12 established "a presumption of responsibility" on the part of superiors for crimes committed by their subordinates. This presumption of responsibility is due to "negligence, failure to supervise or tacit consent." Twelfth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/460, 15 April 1994, para. 127.

See also, *Čelebići* Trial Judgement, para. 342: "The validity of the principle of superior responsibility for failure to act was further *reaffirmed* in the ILC's 1996 Draft Code of Crimes Against the Peace and Security of Mankind, which contains a formulation of the doctrine very similar to that found in Article 7(3)." (emphasis added).

[266] ILC Commentary para.1 and fn. 44. Additionally, the ILC cited Additional Protocol I, Art. 43.

was resolved, the discussions focused primarily on the degree of control and the degree of knowledge required from the superior.[267]

149. The Statute, in force since 1 July 2002, provides for two different standards. Article 28 (a) determines the position of the "military commander or person effectively acting as a military commander", while Article 28 (b) contains the provision relating to the non-military commander.[268] The Trial Chamber observes that the language of both provisions contain some differences, but largely contain the same elements for finding responsibility for a superior for the crimes committed by persons subordinated to them. These elements, in turn, largely reflect and confirm the concept of command responsibility as applied by this Tribunal.[269]

### D. Discussion

150. With these general principles outlined above in mind, the Trial Chamber will now examine, the status and application of the principle of command responsibility under international law. This examination has to focus on the period prior to the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and thereby on the question of jurisdiction for the crimes alleged in the Amended Indictment before it, namely the crimes allegedly committed from January 1993 onwards. The Trial Chamber further examines the establishment of the Statute and the case law developed on its basis.

151. The Trial Chamber's assessment is the following. Based *inter alia* on the provisions relating to responsible command laid down in the various instruments adopted during the Second Hague

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[267] Per Saland, International Criminal Law Principles, in Roy Lee (ed), *The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer 1999, 189 et seq, especially 202-204.

[268] Article 28(a) provides: A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. Article 28(b) provides: With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. The Trial Chamber notes that the difference between the two provisions lies primarily in the description of the superior-subordinate relationship and the level of knowledge required by the superior over the acts of the subordinates.

[269] See supra, para. 126.

Peace Conference in 1907, the first attempt to organise trials against commanders on the basis of command responsibility was made after the First World War. After the Second World War, such attempts, still largely based on the same or similar provisions, proved to be more successful. As described above, various persons were held criminally responsible for the acts of their subordinates when they, as commanders, knew or had reason to know that crimes were committed or were about to be committed by subordinates and failed to take appropriate measures that they were duty-bound to take. As the conflicts in relation to which the various international judicial bodies had been established were of an international character, obviously the principle of command responsibility was only used against persons who had acted in such international armed conflicts.

152. The Trial Chamber rejects the argument of the Defence that the precedents of Nuremberg and Tokyo and the *Yamashita* case are "beside the point" because these cases were related to international armed conflicts only. The Trial Chamber is not prepared to follow this argument. In agreement with the Defence that such case law can not automatically be applied in the context of armed conflicts not of an international character, this Trial Chamber is convinced that this case law is of relevance as far as it reflects developments in the elaboration of the principle of responsible command and the principle of command responsibility, and the elaboration of a relationship between these two. These aspects are of general importance. No firm conclusions on the applicability or non-applicability of these principles to non-international armed conflicts can be drawn from this case law alone. The elements elaborated on in the case law focused on the duty of commanders, the relationship to the subordinates, and the commanders failure to prevent or punish – none of which include expressly or implicitly any kind of jurisdictional requirement, let alone relevance to the nature of the conflict – and thus, to apply the doctrine developed in relation to international armed conflict to an internal conflict does not disrupt in any way the integrity of the *maxime* of command responsibility.

153. The Geneva Conventions of 1949 did not include a provision on command responsibility. These Conventions were, with the exception of common Article 3, applicable to armed conflicts of an international character. The issue was largely left to national law; the Geneva Conventions did not oblige States Parties to establish such a principle under national law.

154. As discussed above, the various proposals by the ILC for the Draft Code of Offences in the early 1950s included a provision for "responsibility of the superior" that was applicable to offences committed beyond the context of an international armed conflict.[270] While the provision was not

[270] See supra, paras 75-76 and 89-92.

included in the 1954 Draft Code of Offences, this was due not to a rejection of the principle as a general principle of criminal law, but rather to the production of an abbreviated Draft, pending a resolution on the crime of aggression.

155. From the 1950s until the 1970s, developments in the field of international humanitarian law were rather scarce. No major new instruments were developed. The discussions on the Draft Code of Crimes against the Peace and Security of Mankind and on the establishment of a permanent international criminal court had come to a stand-still. No new international or national judicial decisions on this issue were taken.[271] An important factor responsible for this situation was the Cold War between East and West.

156. However, it would be misleading to draw conclusions from such a near stand-still situation on the international level. The most important development during this period was the adoption of a number of national military manuals, which, as described above, did regularly include provisions relating to the responsibilities of the superior, and often, the ensuing criminal responsibility for failure to execute these responsibilities vis-à-vis a subordinate. It does not matter whether the punishability of the conduct of a superior was based on specific norms related to an omission in his specific capacity. The omission to prevent or punish and thereby the omission to obey the obligations laid down in the aforementioned manuals was always regarded as a secondary form of participation if not even as (co) perpetratorship by omission.

157. In 1977, the two Additional Protocols to the Geneva Conventions were adopted. As described, Additional Protocol I includes two provisions, Articles 86 and 87, relevant to the principle of command responsibility. Although this was the first time that a convention was to include an explicit reference to this principle, the Commentary to these provisions enlightens that the principle as such was by no means new and constitutive, but rather the declaration of customary international law only. Additional Protocol II did not include such a provision. It did, however, include a reference to the principle of responsible command.

158. The Defence attach great importance to this difference between the two Additional Protocols, as described above. The Trial Chamber does not agree with this argument. A clear difference between the two Additional Protocols in this respect exist can not be ignored. It would, however, be misleading to jump too easily to conclusions and *a contrario* reasonings as to the relevance of the principle of command responsibility for international and non-international armed

[271] *Čelebići* Trial Judgement, para. 340.

conflicts. A more careful analysis of the differences between the two instruments needs to be undertaken and a number of factors need to be addressed.

159. First, the Trial Chamber observes that the structure and substance of the two Protocols are fundamentally different. As the Commentary to Additional Protocol II makes clear "Fiğt was apparently felt that the regulation of non-international armed conflicts was too recent a matter for State practice to have sufficiently developed in this field."[272] In other words, where the Geneva Conventions and Additional Protocol I can be considered a reflection of a long development of humanitarian norms in relation to international armed conflicts, States were generally reluctant to lay down or develop such norms in relation to internal armed conflicts. Fear of possible international attention for what was largely considered internal matters and fear of international recognition of armed groups which were preferred by States themselves to be considered "rebels" or "terrorists" added to a reluctance to reflect norms applicable to internal armed conflicts in a legally binding instrument. Consequently, the elaboration of Additional Protocol II would, by definition, lead to a much less developed and detailed set of norms than those included in Additional Protocol I. Illustrative of this fear is the inclusion in Additional Protocol II of Article 3, which reads:

> 1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> 2. Nothing in this Protocol shall be invoked as a justification for intervening, directly, or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.[273]

160. Second, the Trial Chamber observes, one should take into account the character of this Protocol, as is explained in the Commentary to it. It is stated that this Protocol constitutes "a body of *minimum* rules developed and accepted by the international community as a whole."[274] In this context, one should note the last preambular paragraph of Additional Protocol II, which is based on the Martens clause, discussed already above. According to this paragraph

> Fiğn cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.

The Commentary on the Additional Protocols on this provision states:

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[272] Commentary on the Additional Protocols, para. 4435.

[273] The fact that such a fear still exists today may be inferred from the fact that in Article 8 of the ICC Statute, because of the inclusion of norms applicable to internal armed conflicts, paragraph 3, based on Article 3(1) of Additional Protocol II, was included and reads: "Nothing in paragraphs 2(c) and (e) shall affect the responsibility of a Government

> If a case is "not covered by the law in force", whether this is because of a gap in the law or because the parties do not consider themselves to be bound by common Article 3, or are not bound by Protocol II, *this does not mean that anything is permitted.* "The human person remains under the protection of the principles of humanity and the dictates of the public conscience": this clarification prevents an *a contrario* interpretation.[275]

The Commentary then goes on by stating that

> Feğven though customary practices are traditionally only recognized as playing a role in international relations, the existence of customary norms in internal armed conflicts should not be totally denied.[276]

The Commentary then uses the example of the Lieber Code, which itself drew on the existing principles of the laws of war, and then was used as model for the 1899 and 1907 Hague Conventions.[277]

161. Third, the fact that the principle reflected in Articles 86 and 87 of Additional Protocol I is not expressly applicable to internal armed conflicts as such does not mean that commanders in cases of internal armed conflict are not under a duty to oversee and control their subordinates. This is a fundamental tenet of military law.[278] As the ICRC Commentary on Common Article 3 states, when discussing the criteria for an "armed conflict" (to distinguish an armed conflict from acts of banditry or an "unorganized and short-lived insurrection"), the Party in revolt against the *de jure* government "possesses an organized military force, an authority responsible for its acts, acting

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to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."

[274] Commentary on the Additional Protocols, para. 4418. (emphasis added).

[275] Ibid, para. 4434. (emphasis added). This provision is also included in Additional Protocol I, Art. 1, para. 2, the Commentary to which states: "despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment". Commentary on the Additional Protocols, para. 55.

[276] Commentary on the Additional Protocols, para. 4435.

[277] Ibid.

[278] See, generally, Int'l Rev. of the Red Cross, No. 202, "The Law of War and the Armed Forces," F. de Mulinen, February 1978, pp. 20-45; William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 77: "Acceptance of command clearly imposes upon the commander a duty to supervise and control the conduct of his subordinates in accordance with existing principles of the law of war."; Leslie C. Green, "War Crimes, Crimes Against Humanity and Command Responsibility," in Essays on the Modern Law of War, p. 283 (1999); William G. Eckhardt, "Command Criminal Responsibility: A Plea for a Workable Standard," 97 Mil. L. Rev. 1, 8 (1982): "There are four distinguishing characteristics of a combatant: (1) commanded by a person responsible for his subordinates; (2) has a fixed distinctive sign (be uniformed); (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war. A responsible commander heads that list."

The Trial Chamber notes that the issue of command responsibility in an internal armed conflict has not been extensively discussed in any of the works of highly qualified publicists on this subject. See, however, the ICRC "Fact Sheet" on "National Enforcement of International Humanitarian Law: Command responsibility and omission" states, with regard to non-international armed conflicts: "International criminal law recognizes the principle of command responsibility also for acts committed during a non-international armed conflict. For instance, the Statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda *expressly affirm* command responsibility, inter alia through omission, for crimes committed by the commander's subordinates." Ref. LG 1999-004c-ENG, p. 2. (emphasis added).
See also, 10 U.S.C.A §162(a) (Combatant commands: assigned forces; chain of command); 10 U.S.C.A. § 164, (Commanders of combatant commands: assignment; powers and duties).

within a determinate territory and having the means of respecting and ensuring respect for the Convention."[279] In Additional Protocol II itself, as already discussed, explicit reference to responsible command is made in Article 1. As the Commentary states, responsible command means an organisation that is both capable of planning and carrying out sustained and concerted military operations, *and* imposing discipline in the name of the *de facto* force or government.[280]

162. Finally, the Trial Chamber would like to briefly refer to the "penal prosecutions" provisions, laid down in Article 6 of Additional Protocol II. The primary aim of this provision is to provide guarantees that a person who is charged with violations of international humanitarian law in internal armed conflicts will receive a fair trial and not be sentenced without such a fair trial.[281] It is clear therefore that this section was not drafted for the purpose of clarifying or supplementing the basis for individual criminal responsibility.[282] The omission of such a provision from Additional Protocol II did not, however, in any way question the existence of such individual criminal responsibility under international law. As the ICRC Commentary states "Fjğust like common Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict".[283]

163. The Trial Chamber therefore observes that, in relation to the norms laid down in Additional Protocol I and Additional Protocol II, in general the norms reflected in the former are much more elaborate and precise than in the latter. This applies also for the issue at hand, the criminal responsibility of a superior for a failure to act when under a duty to do so. Articles 86 and 87 of Additional Protocol I explicitly prescribe individual criminal responsibility for those who have a duty to act and fail to act. Additional Protocol II in this respect is only reluctant to create a similar obligation upon States to "take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."[284] However, the fact that Additional Protocol II does place a duty of responsible command upon a superior confirms that a sound basis for such measures already exists under international law.

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[279] ICRC Commentary to Fourth Geneva Convention, p. 35. Additionally, the Commentary states that "the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory."

[280] Commentary on the Additional Protocols, para. 4463. (emphasis added).

[281] Art. 6 of Additional Protocol II is largely based on Art. 14 of the ICCPR (1966) and is comparable to Art. 75 of Additional Protocol I.

[282] Commentary on the Additional Protocols, para. 4597-4618. Article 6(2)(b) which provides "no one shall be convicted of an offence except on the basis of individual penal responsibility" was drafted for the purposes of prohibiting collective penal responsibility for acts committed by members of a group, rather than to fully elaborate on the concept of individual criminal responsibility. Commentary on the Additional Protocols, para. 4603.

[283] Commentary on the Additional Protocols, para. 4597.

[284] Additional Protocol I, Art. 86(1).

164. As the Commentary observes, the negotiations on this Protocol sought to balance the "inviolability of the national sovereignty of States" with ensuring that the very object and purpose of international humanitarian law, namely the protection of victims of armed conflict, was achieved.[285] The balance found at that time was to create a number of mandatory minimum norms applicable in internal armed conflicts. Again, the Protocol also included a reference to the Martens clause in its preamble. The Protocol did not expressly provide for the principle of command responsibility, but did include the principle of responsible command. The latter principle has in the past served as a basis for international judicial organs to hold commanders criminally responsible for the crimes of the subordinates due to their omissions where they had a duty to act and failed to act, as discussed above. Nothing in this Protocol or the Commentary would induce the Trial Chamber to come to an opposite conclusion as the ones drawn and applied by previous international judicial organs and the jurisprudence of this Tribunal.

165. The Defence furthermore refer to the fact that there is practically no national legislation or military manual touching upon command responsibility in the context of internal armed conflicts. The Trial Chamber would agree with this factual observation. But what conclusion can be drawn from this? The specific context of the character of internal armed conflicts needs to be taken into account. The reluctance or fear of States to elaborate specific norms relating to internal armed conflicts on the international level has equally led States not to legislate easily on this issue in their own national legal systems, but rather, limit themselves to criminal law provisions in general or provisions specifically dealing with criminal organisations, treason, terrorism or the like. In the view of this Chamber, however, the principle of *nullum crimen sine lege* is satisfied if the underlying criminal conduct as such was punishable, regardless of how the concrete charges in a specific law would have been formulated. The International Tribunal is in a different position than States and can apply all principles of international criminal law to achieve the purposes of international humanitarian law.

166. The Trial Chamber observes that all ILC drafts since 1950 which included command responsibility did not limit the scope of its application to international armed conflicts. Rather, it expressed its clear intention that the principle of command responsibility apply to all crimes committed during both internal and international armed conflicts, as well as in the absence of an armed conflict.

[285] Commentary on the Additional Protocols, para. 4436. See also, para. 4437

167. It is not always easy to identify precisely at what point in time a norm forms part of customary international law or whether it is still in a process of development. This Trial Chamber concludes, however, that in relation to the question before it, certainly by and since 1991 command responsibility as a theory of individual criminal responsibility clearly formed part of customary international law. Answering in the affirmative the specific question raised in this challenge to jurisdiction, namely whether the principle of command responsibility formed part of customary international law in relation to violations under Article 3 in the context of internal armed conflicts, does not in any way attack or challenge the integrity of the principle of *nullum crimen sine lege* related to the doctrine of command responsibility, including its elements, object and purpose, and acceptance as a general principle of international criminal law and a part of customary international law.

168. Taking into account the status of the principles of responsible command and command responsibility under international law, it needs now to be examined what the drafters of the Statute had in mind when establishing the jurisdiction of the International Tribunal and what interpretation and application has been provided by the International Tribunal since to these principles.

169. Any interpretation of the object and purpose of the Statute should of course start with an examination of the language of the Statute. As the Trial Chamber in the ^*elebići* case held,

> Ftğhe cornerstone of the theory and practice of statutory interpretation is to ensure the accurate interpretation of the words used in the statute as the intention of the legislation in question.[286]

Article 1 sets out the competence of the International Tribunal and states that the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute. No limitation as to the character of the conflict in the context of which crimes may have been committed are included.

170. Article 7(3) of the Statute reflects the principle of command responsibility and starts with the phrase that "Ftğhe fact that *any* of the acts referred to in articles 2 to 5 of the present Statute was committed F...ğ." Article 3 and Article 5 refer to offences which can occur in either an internal or an international armed conflict. Article 4 refers to genocide, which can occur in the absence of an armed conflict. A plain-language reading of the relevant provisions of the Statute would consequently lead to the conclusion that any superior can be held individually criminally responsible under the doctrine of command responsibility in relation to any type of armed conflict.

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[286] ^*elebići* Trial Judgement, para. 160.

171. This interpretation is supported by the report of the Secretary-General and the discussions that took place within the Security Council when it adopted the Statute. It was made abundantly clear that the Security Council was to fully respect the principle of *nullum crimen sine lege* and to include only such norms that formed part of customary international law. In this respect the Trial Chamber again refers to the report of the Secretary-General that states in paragraph 34 that the Tribunal "should apply rules of international humanitarian law which are beyond any doubt part of customary law." The inclusion of Article 7, paragraph 3, should be read as a reflection of the reasonable and well-supported views of the Security Council and the Secretary-General that this norm formed part of customary international law at the time covered by the mandate of the International Tribunal.[287]

172. As to the scope of the various provisions included in the Statute, the discussion on the establishment of the International Tribunal above,[288] make it clear that *all* persons considered responsible for the violations of international humanitarian law should be held criminally responsible. Furthermore, the temporal jurisdiction of the International Tribunal was defined as such that it encompasses all such violations, regardless of the character of the conflict in which they might have occurred. The Trial Chamber observes that when the Security Council believed it necessary to comment on the classification of the conflict in relationship to specific provisions in the Statute, it did so, as is the case with crimes against humanity.[289] In relation to the doctrine of command responsibility the Council decided not to require any limitation. Rather, the Security Council evinced its intention that command responsibility be applicable to "any" of the acts referred to in the subject-matter of the International Tribunal.

173. The Trial Chamber therefore concludes that the Security Council, acting under Chapter VII of the Charter of the United Nations, was clearly focused on establishing a Tribunal to address all serious violations of international humanitarian law recognised under customary international law, with the purpose of assisting to restore peace and security in the former Yugoslavia by all available tools of criminal law. The International Tribunal should be able to prosecute any person for any violation of international humanitarian law, regardless of the character of the conflict in which the particular violation took place and regardless of the status of the accused as a military or non-

[287] In expanding on the purpose of the International Tribunal, the delegate from Venezuela stated that "Fiğt is being established in an attempt to bring to trial and punish anyone who proves to be guilty of the horrible crimes that have been committed in the former Yugoslavia". S/PV.3217, p. 8. The representative from Morocco stated: "We are convinced that the International Tribunal will promote the justice to which we all aspire and will strengthen the rule of law in international relations. The tribunal must seek to punish serious violations of humanitarian law in the broadest sense as crimes against international peace and security." S/PV.3217, p. 13.
[288] See supra, paras 96-120.

military or as a superior or subordinate. A last quotation from the Appeals Chamber in the *Tadić* Jurisdiction Decision may suffice here. When confronted with the question as to whether, apart from Article 2 on the grave breaches, other provisions relating to the subject matter jurisdiction of the Tribunal should also be interpreted as requiring a nexus to an international armed conflict, the Appeals Chamber stated:

> Fiğt would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, *such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict.* F...ğ However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.[290]

174. Recalling that the doctrine of command responsibility clearly formed part of customary international law at the period of time covered by the mandate of the International Tribunal, the Trial Chamber will now examine the elements that must be satisfied in order to make this form of individual criminal responsibility operative. The elements that must be satisfied by a Trial Chamber at trial are: the existence of a superior-subordinate relationship; the superior knew of had reason to know that the criminal act was about to be or had been committed; the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof. In doing so, the Trial Chamber emphasises that the purpose of command responsibility is to ensure that persons vested with *responsibility over others* fulfil their *duty* to ensure that their subordinates do not commit criminal acts. The absence of an express limitation – or an additional element or jurisdictional requirement – in the language of Article 7(3) was deemed as evidence that under customary law the doctrine of command responsibility could be applied to non-military superiors. Likewise, this Trial Chamber observes, the absence of any express limitation, or conversely, any requirement of an international armed conflict – or even armed conflict – on the applicability of the doctrine of command responsibility would indicate that the doctrine applies regardless of the nature of the conflict. Where the Statute on occasion has included certain jurisdictional requirements in relation to the definition of the crimes, no such requirements have been included in relation to the principle of command responsibility.

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[289] As was pointed out in the *Tadić* Jurisdiction Decision, the inclusion of the reference to international or internal armed conflict was to "reintroduce" the nexus between crimes against humanity and armed conflict. See para. 78.
[290] *Tadić* Jurisdiction Decision, para. 78. (emphasis added).

175. As noted above, whether the application of this provision should depend on the character of the armed conflict was not in discussion in *Čelebići*. The following quotation from this case is significant to this discussion:

> The requirement of the existence of a "superior-subordinate" relationship which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures, may be ambiguous and ill-defined. It is the Trial Chamber's conclusion F...ğ Fthatğ persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. [291]

The Trial Chamber finds that from this quotation it becomes obvious that the application of this provision to non-international armed conflicts was presumed. If the Trial Chamber would have considered the principle of command responsibility only applicable to international armed conflict, the reference to the breaking down of structures would have made no sense.

176. This wide approach taken by the Trial Chamber in *Čelebići*, and supported by the Appeals Chamber, has been followed in other cases as well. As the overview of the case law above has clearly shown, in a number of cases accused have been held criminally responsible under Article 7(3) in the context of an "armed conflict" for violations of the laws and customs of war, where such violations were based on norms developed in the context of non-international armed conflicts, in particular common Article 3. The Trial Chamber for that reason is unable to agree with the statement of the Defence that there is no precedent in the ICTY case law making Article 7(3) applicable to internal armed conflict.

177. The overview of developments that have taken place after the establishment of the Tribunal confirm the direction that has been taken by the International Tribunal in the interpretation and application of Article 7(3). The ICTR has followed the approach according to which persons were held individually criminally responsible, as a superior, for violations of humanitarian law, notwithstanding the fact that the crimes were committed in an internal armed conflict. In general, the Trial Chamber would agree with the Defence that one should be extremely careful to make use of subsequent developments in order to determine the status and content of a norm at a moment prior to such developments. In the present case, however, the Trial Chamber considers the practice of the ICTR relevant in that both the inclusion of command responsibility in Article 6(3) of the ICTR Statute and the case law of the ICTR reconfirm the interpretation followed by this Tribunal. Similar conclusions can be drawn from Article 6 of the Draft Code of Crimes against the Peace and

Security of Mankind and Article 28 of the ICC Statute. In the view of the Trial Chamber these instruments, elaborated in 1996 and 1998, have to be considered as confirming the interpretation of the principle of command responsibility, as applied by this Tribunal.

178. As already indicated above, the Trial Chamber in the *Čelebići* case held in relation to the principle of legality that this principle in international criminal law has the

> obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order.[292]

In the present case, the Trial Chamber observes that such a balance is clearly found by interpreting Article 7(3) in the way it has already been done by this Tribunal in a number of earlier cases. This means that the Accused are subject to the jurisdiction of this Tribunal. They may be held criminally responsible for the allegations contained in the Amended Indictment under the principle of command responsibility if it can be proved that they, in the context of an armed conflict, were superiors who knew or had reason to know that subordinates, over whom they had effective control, were about to or had committed criminal acts falling under the jurisdiction of this Tribunal and they failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof. That is a question for the Trial Chamber that ultimately hears this case to ask and answer; this Trial Chamber finds that it is within the jurisdiction of the International Tribunal, and therefore possible for a subsequent Trial Chamber to consider the question on the merits.

## E. Conclusion

179. For the foregoing reasons, the Trial Chamber finds that the doctrine of command responsibility already in – and since - 1991 was applicable in the context of an internal armed conflict under customary international law. Article 7(3) constitutes a declaration of existing law under customary international law and does not constitute new law. Therefore, there was no obstacle to vesting jurisdiction also over this doctrine regardless of the character of the armed conflict to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. Accordingly, the Trial Chamber comes to the conclusion that the offences alleged in the Amended Indictment fall within the jurisdiction of this Tribunal. As a result, this part of the motion fails.

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[291] *Čelebići* Trial Judgement, para. 354.
[292] Ibid, para. 405.

# III. ISSUE 2: COMMAND RESPONSIBILITY FOR CRIMES COMMITTED BEFORE SUPERIOR-SUBORDINATE RELATIONSHIP EXISTS

180. The Amended Indictment alleges that Amir Kubura took up his position on 1 April 1993. Counts 1, 2, 5 and 6 all reference crimes that were alleged to have been committed in January 1993.[293] Paragraph 58 of the Amended Indictment states that Kubura is responsible under the doctrine of command responsibility because "after he assumed command, he was under a duty to punish the perpetrators."

## A. Arguments of the Parties

### 1. The Defence

181. The Defence contend that there is no basis in customary or conventional law for holding a superior liable for a crime like murder that was allegedly committed by subordinates before the accused Kubura became commander.[294]

182. The Defence argue that the express terms of Article 7(3) require that an accused be the superior when the subordinate commits the offence, citing the words "the fact that any of the acts referred to in articles 2 to 5 of the present Statute was *committed by a subordinate does not relieve his superior* of criminal responsibility". The Defence further contend that Article 7(3) "does not permit superiors to be held responsible for perpetrators who "*subsequently*" become their subordinates" and that if such liability were envisioned, it would be specifically provided for in the Article.[295] If there is any question as to the interpretation of a provision in the Statute or Rules, the Defence submit, it must be interpreted in the light most favourable to the accused.[296]

183. The Defence submit that the provisions of Additional Protocol I do not provide for liability for offences committed before command was assumed.[297] The Defence contend that a plain-language reading of Article 86(2) leads to this conclusion. Additionally, it submits, the Commentary on the Additional Protocols emphasises co-incidence of the superior-subordinate relationship and the commission of the offence, thereby illustrating that the doctrine is only

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[293] Amended Indictment, para. 59(a).
[294] Written Submissions of Kubura, para. 29.
[295] Ibid, para. 30. (emphasis in original).
[296] Ibid, para. 31.
[297] Ibid, para. 33. The Defence further argue that Article 1 of the Regulations annexed to the 1907 Hague Convention, which it cites as the origin of the doctrine of command responsibility, also indicated co-incidence of the superior-subordinate relationship for responsible command ("commanded by a person responsible for his subordinates"). See Written Submissions of Hadžihasanović, para. 86.

concerned with the superior who had personal responsibility for the perpetrator at the time of the commission of the offence, as the perpetrator was under his control.[298]

184. The Defence submit that the jurisprudence of the International Tribunal supports its position. Specifically, the Defence cite the *Čelebići* Trial Judgement, which interpreted Article 86 of Additional Protocol I to mean that a

> superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. ... It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences *were being committed* or *about to be committed* by his subordinates.[299]

185. The Defence argue that Article 7(3) may apply when the superior learns after the event of the offence, but that the superior-subordinate relationship must exist at the time of the offence. Citing the *Čelebići* Trial Judgement, the Defence focus on the concept of "effective control", which, in its opinion, must exist at the time the offences were committed:

> it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of the offences.[300]

The Defence characterise the material issue for command responsibility as the "existence of a superior to subordinate relationship between commander and perpetrator at the time the offence was committed" and not the existence of that relationship *when* the commander became aware of the alleged commission of the offences.[301] The Defence describe the aim of command responsibility to ensure that commanders will guarantee that troops over whom they have effective control will conduct operations in accordance with the law, thereby *preventing* crimes from being committed, and argue that this aim is achieved by holding those commanders who are in a position to prevent the commission of crimes liable.[302]

186. The Defence further submit that there is no reported case before either an international or national tribunal in which a superior has been found guilty for offences committed by subordinates before he took command, in any type of armed conflict, citing the post World War II cases as

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[298] Written Submissions of Kubura, para. 34, citing para. 3544 of the Commentary on the Additional Protocols: "we are only concerned with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control."
[299] Written Submissions of Kubura, para. 35, citing *Čelebići* Trial Judgement, para. 393. (emphasis added by Defence).
[300] Written Submissions of Hadžihasanović, citing *Čelebići* Trial Judgement, para. 378.
[301] Kubura Response, para. 9. See also, Kubura Reply, para. 22; Hadžihasanović Response, para. 48.
[302] Hadžihasanović Response, para. 48.

examples of the co-incidence of the superior-subordinate relationship.[303] The Defence specifically cite the *High Command Case*, which it argues illustrates that the court made "a clear distinction between each period of command" and assessed liability based on the specific command responsibilities during each separate time period.[304] The Defence find that the factors relied upon in the *High Command Case*, including that the accused was actually commander of the perpetrators and that the events occurred over a "wide period of time", supported the conclusion in that case that he "approved" the offences. In contrast, the Defence argue that Kubura is charged with failing to punish particular violations, namely "an isolated incident in Dusina," which occurred months before he assumed command.[305]

187. While the Defence do not rely upon the 1998 ICC Statute as a source for determining customary international law in 1992, they submit that the ICC Statute does "not alter" the scope of the doctrine, which it argues is limited in the ICC Statute to the time when the offences were committed ("circumstances at the time") and not to past crimes ("were committing or about to commit such crimes").[306]

188. The Defence for Hadžihasanović concede that the Trial Chamber in *Kordić* was "partly right" in stating that a commander cannot turn a blind eye to crimes committed by a subordinate before he assumed command.[307] The Defence submit that if the commander fails to punish this subordinate he may be individually responsible for "an" offence, but not pursuant to the doctrine of command responsibility, as he had no responsibility towards the perpetrator when the offence was committed.[308]

189. Additionally, the Defence argue that there are no provisions in national legislation or military codes that hold a superior in non-international armed conflicts criminally responsible for offences committed by persons who subsequently came under a superior's command.[309]

190. Finally, the Defence argue, as a matter of policy, that there would be "no limits" on prosecutions that could be "launched" against subsequent commanders if any subsequent superior who had effective control over the perpetrator of an offence could be criminally liable under

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[303] Written Submissions of Kubura, para. 39-42.
[304] Ibid, paras 41-45.
[305] Ibid, para. 45.
[306] Ibid, para. 38.
[307] As the Defence highlight when it characterises this statement as "*obiter*", the *Kordić* case did not deal with the scenario of a subsequent commander.
[308] Hadžihasanović Response, para. 49.
[309] Written Submissions of Kubura, para. 47.

international law.[310] The Defence argue that the proper person to prosecute is the commander who had effective control over the perpetrator at the time the offences were committed and failed to either prevent or punish those offences.[311] The Defence further point out that command is generally not vested in one person, and if the immediate commander is no longer available for prosecution after failing to prevent or punish a superior, then a person higher in the chain of command could be held liable.[312]

2. The Prosecution

191. The Prosecution argues that a commander who takes command after the commission of a crime and subsequently knew or had reason that such crimes were committed and fails to punish the subordinate can be held individually criminally liable.[313] The Prosecution submits that the key issue is not who the commander is at the time of the commission of the offences, but rather, who the commander is when sufficient notice of the offences having been committed is communicated, and whether that commander fails in his duty to punish the subordinate-perpetrator.[314]

192. The Prosecution relies on jurisprudence of the International Tribunal to support its argument. The Trial Chamber in *Kordić* stated:

> The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.[315]

The Prosecution argues that confining command responsibility to the "temporal commander" would relieve subsequent commanders of any responsibility to punish "irrespective of when the crime was committed or reported."[316]

193. The Prosecution argues that the material issue for command responsibility is the existence of a superior-subordinate relationship *when* the commander became aware of the crimes allegedly committed by subordinates and failed to take reasonable and necessary measures to punish.[317] Additionally, the Prosecution submits that criminal liability is incurred when a commander either

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[310] Ibid, paras 48-49.
[311] Hadžihasanović Response, para. 48.
[312] Kubura Response, para. 12; Kubura Reply, para. 20.
[313] Written Submissions of Prosecution, para. 60.
[314] Prosecution's Response, para. 17.
[315] *Kordić* Trial Judgement, para. 446.
[316] Written Submissions of Prosecution, para. 62.
[317] Ibid, para. 63.

fails to prevent a crime *or* punish a crime; the Prosecution do not find that the duty to punish is dependent on a prior failure to punish.[318]

194. The Prosecution argues that if the Defence position prevails, the result could be a failure to punish any commander. The Prosecution submits that if a commander is replaced after the commission of offences and with the perpetrators not being punished, then no one could be held accountable for failure to punish and Article 7(3) would be rendered meaningless.[319]

195. In response to the Defence argument that there would be no end to prosecutions of subsequent commanders, the Prosecution submits that a prosecutor would exercise his or her discretion to prosecute a subsequent commander, making the determination after looking at factors including the time elapsed between the alleged commission of the offences and the appointment of a new commander. Additionally, a prosecutor may look at whether subordinates have a history of unpunished criminality that continues into the new command, although the Prosecution submissions are not clear whether it would be necessary for the criminality to continue or the lack of punishment to continue into the new command. The Prosecution submits that this case is an example of unpunished and ongoing crimes for which a subsequent commander, namely Kubura, should be held criminally liable under the doctrine of command responsibility.[320]

196. The Prosecution submits that whether Kubura lacked the material ability to punish perpetrators in April 1992 for crimes committed in January 1992 is a factual issue to be determined at trial.[321]

### B. Discussion

197. As discussed above, the purpose of the doctrine of command responsibility is to require commanders to fulfil their duty to ensure that their subordinates comply with the principles of international humanitarian law by holding commanders individually criminally responsible for crimes committed by their subordinates when the commander knew or had reason to know that the subordinate was about to commit an offence, or had done so, and the commander failed to take the necessary and reasonable measures to prevent the commission of an offence or failed to punish the perpetrators thereof.

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[318] Prosecution Reply, para. 20.
[319] Prosecution Response, paras 18-19.
[320] Ibid, paras 21- 22.
[321] Ibid, para. 17.

198. Article 7(3) of the Statute posits two scenarios for the attachment of individual criminal liability to a superior: (a) if he knew or had reason to know that a subordinate was about to commit such acts Fthose referred to in articles 2 to 5 of the Statuteğ and the superior failed to take the necessary and reasonable measures to prevent such acts *or* (b) if he knew or had reason to know that a subordinate was had committed such acts Fthose referred to in articles 2 to 5 of the Statuteğ and failed to punish the perpetrators thereof. Thus, the Trial Chamber finds Article 7(3) to mean that (a) when a superior knew of had reason to know that a subordinate was about to commit such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to prevent such acts, the commander is individually criminal liable; OR (b) when a superior knew of had reason to know that a subordinate had committed such acts as those in Article 2 to 5 of the Statute AND the superior failed to take the necessary and reasonable measures to punish the perpetrators thereof, the commander is individually criminal liable.

199. In the Final Report of the Commission of Experts,[322] the Commission comments on the requisite mental state for a commander to be held criminally liable. "It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein." The Commission then provided a list of indicia to consider whether a commander "must have known" about the acts of his subordinates. This list includes: (a) number of illegal acts; (b) type of illegal acts; (c) scope of illegal acts; (d) the time during which the illegal acts occurred; (e) number and type of troops involved; (f) logistics involved, if any; (g) geographical location of the acts: (h) widespread occurrence of the acts; (i) tactical tempo of operations; (j) *modus operandi* of similar illegal acts; (k) officers and staff involved; and (l) location of the commander *at the time*.[323]

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[322] S/1994/674, para. 58.

[323] S/1994/674, para. 58. See, also, *Aleksovski* Trial Judgment, para. 80: "The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed." On the issue of "responsibility of superiors" in Article 86 of Additional Protocol I, the Commentary on the Additional Protocols states that "Feğvery case must be assessed in the light of the situation of the superior concerned at the time in question, in particular distinguishing the time that the information was available and the time at which the breach was committed, also taking into account other circumstances which claimed his attention at that point, etc." Commentary on the Additional Protocols, para. 3545.

200. The Trial Chamber finds that the object and purpose of the doctrine of command responsibility under international criminal law is satisfied by holding subsequent commanders who meet the elements of command responsibility liable for the crimes of their subordinates. The Trial Chamber, however, deems the length of time between the actual commission of the crimes and the time that the superior assumed command over the subordinate in question as a factor to be examined in assessing whether the elements have been satisfied at trial.

201. Whether the elements for command responsibility can be met in this case is an issue to be determined at trial. While Kubura, according to the Amended Indictment, was not the superior at the time the crimes in the named counts were alleged to have been committed, it is only when the Trial Chamber hears the evidence related to Kubura's ability to exercise effective control over the alleged subordinates who allegedly committed the crime that it will be able to determine if he had the material ability to punish them for crimes committed approximately three months prior to his taking over command, as the Amended Indictment charges. Additionally, when Kubura was in a position to "know or had reason to know" information regarding the alleged commission of the offences is a factual issue to be determined at trial. That information is necessary to determine what impact the time difference between the actual commission of the crimes and his being in a position to exercise effective control over these subordinates may have on finding him liable under the principle of command responsibility.

### C. Conclusion

202. The Trial Chamber finds that in principle a commander can be liable under the doctrine of command responsibility for crimes committed prior to the moment that the commander assumed command. The Trial Chamber finds, however, that the question of whether the principle may also apply to the present case depends on whether the elements of command responsibility are met, which is a factual issue to be determined at trial. Accordingly, the Trial Chamber also denies this part of the Defence motion.

# IV. ISSUE 3: LIABILITY OF SUPERIORS FOR FAILURE TO PREVENT OR PUNISH *PLANNING AND PREPARATION* OF OFFENCES

203. Paragraphs 61 and 66 of the Amended Indictment state, in relation to the three accused, that they "knew of had reason to know that the following ABiH forces under their command and control *were about to plan, prepare or* execute" certain acts.

## A. Arguments of the Parties

### 1. The Defence

204. The Defence argue that Article 7(3) of the Statute does not impose liability on a superior for failing to prevent or punish the *planning* or *preparation* of an offence but only the *commission* of the offence.[324] The Defence submit that in "many" of the cases before the International Tribunal, unless the violation was actually committed, no liability was found under Article 7(3).[325] It recognises that the duty to prevent necessarily exists before the commission of an offence, but that liability of a superior only arises if the offence was actually committed. To allow for liability when no crime was committed would amount to a form of "attempt", and attempt is not included in the Statute.[326]

205. The Defence further contend that liability for planning or preparing an offence, as well as for instigating and aiding and abetting an offence, can only be charged under Article 7(1) of the Statute. Therefore, it contends, paragraphs 61 and 66 in their present form are *ultra vires*.[327]

206. The Defence request that the Prosecution be ordered to remove the references to "planning" and "preparation" from the Amended Indictment.[328]

### 2. The Prosecution

207. The Prosecution submits that under the jurisprudence of the International Tribunal, "planning" and "preparation" can be included in the Amended Indictment.[329] The Prosecution

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[324] Joint Challenge, para. 17; Written Submissions of Hadžihasanović, para. 90-91; Written Submissions of Kubura, para. 50.
[325] Written Submissions of Hadžihasanović, para. 91, citing *Blaškić* Trial Judgement and *Kordić* Trial Judgement; Kubura Response, paras 14-16.
[326] Hadžihasanović Response, para. 50; Kubura Response, para. 16.
[327] Written Submissions of Hadžihasanović, para. 92; Written Submissions of Kubura, para. 51.
[328] Written Submissions of Hadžihasanović, para. 93; Written Submissions of Kubura, para. 51.
[329] Written Submissions of Prosecution, para. 65, citing *Kordić* Trial Judgement, para. 445: "The duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires

disagrees with the Defence proposition that paragraphs 61 and 66 reflect liability under 7(1).[330] Further, the Prosecution states that it is not seeking to introduce liability for attempt in these paragraphs.[331]

208. The Prosecution further contends that knowledge of the "planning and preparation" of criminal acts provides the basis for liability to prevent an offence. It describes the inclusion of "planning and preparation" for the purpose of providing a possible ingredient of the superior's knowledge.[332]

### B. Discussion

209. The Trial Chamber does not find that through the words "planning" and "preparation" the Prosecution is seeking to attach any liability for attempted crimes by subordinates. Article 7(3) is clear in its wording and intent: "the fact that any of the acts referred to in articles 2 to 5 of the present Statute *was committed* by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was *about to commit such acts* or had done so *and* the superior failed to take the necessary and reasonable measures *to prevent such acts* or to punish the perpetrators thereof." Criminal liability under the Statute cannot attach because subordinates "were about to plan, prepare" crimes within the jurisdiction of the Statute.

210. Evidence of acts of planning or preparation may be relevant for a Trial Chamber to make its finding of whether a superior "knew or should have known" that a subordinate was "about to commit such acts" and "failed to prevent such acts". The Trial Chamber finds that the inclusion of the words "were about to", "plan", and "prepare" before "execute" in paragraphs 61 and 66 of the Amended Indictment are related to the superior's knowledge that subordinates were allegedly "about to commit such acts" and therefore falls within the scope of Article 7(3) of the Statute.

### C. Conclusion

211. Accordingly, the Trial Chamber denies the request that the Prosecution be ordered to rephrase paragraphs 61 and 66.

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knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes".

[330] Written Submissions of Prosecution, para. 66.

[331] Prosecution Reply, para. 22.

[332] Written Submissions of Prosecution, para. 66.

## V. DISPOSITION

For the foregoing reasons, the Trial Chamber, pursuant to Rule 72 of the Rules:

**DISMISSES the Motion in full.**

Done in English and French, the English version being authoritative.

Dated this twelfth day of November 2002,
At The Hague
The Netherlands

Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]

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IN THE TRIAL CHAMBER

**Before: Judge Florence Ndepele Mwachande Mumba, Presiding**
**Judge Antonio Cassese**
**Judge Richard May**

**Registrar:**
**Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Judgement of: 10 December 1998**

**PROSECUTOR**

**v.**

**ANTO FURUNDZIJA**

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**JUDGEMENT**

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**The Office of the Prosecutor:**
**Ms. Brenda Hollis**
**Ms. Patricia Viseur-Sellers**
**Ms. Michael Blaxill**

**Counsel for the Accused:**
**Mr. Luka Misetic**
**Mr. Sheldon Davidson**

## I. INTRODUCTION

The trial of Anto Furundzija, hereafter "accused", a citizen of Bosnia and Herzegovina who was born on 8 July 1969, before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 8 June 1998 and came to a close on 12 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber,

**HEREBY RENDERS ITS JUDGEMENT.**

### A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",[1] and by the Rules of Procedure and Evidence of the

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International Tribunal, hereafter "Rules", adopted by the Judges of the International Tribunal on 11 February 1994, as amended.[2] Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[3] Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

## B. Procedural Background

2. On 10 November 1995 Judge Gabrielle Kirk McDonald confirmed the Indictment against the accused, charging him with a grave breach of the Geneva Conventions and violations of the laws or customs of war. The accused was charged with three individual counts of (a) torture and inhumane treatment; (b) torture; and (c) outrages upon personal dignity including rape. These charges were in respect of acts alleged to have been committed at the headquarters of the Jokers, a special unit within the armed forces of the Croatian Community of Herzeg-Bosna, known as the Croatian Defence Council, hereafter "HVO". In her Decision confirming the Indictment, Judge McDonald ordered, pursuant to Rule 53 of the Rules,[4] that there be no public disclosure of the Indictment.

3. The accused was arrested on 18 December 1997 by members of the multinational Stabilisation Force, hereafter "SFOR", acting pursuant to a warrant for arrest issued by the International Tribunal. The accused was immediately transferred to the International Tribunal and detained in its detention unit in The Hague, the Netherlands. The same day, the President of the International Tribunal assigned this case to Trial Chamber II, comprising Judge Antonio Cassese, presiding, Judge Richard May and Judge Florence Ndepele Mwachande Mumba. The Trial Chamber remained thus constituted throughout the preliminary proceedings before the trial. On 11 March 1998 Judge Mumba replaced Judge Cassese as Presiding Judge.

4. The initial appearance of the accused, pursuant to Rule 62 of the Rules, was held on 19 December 1997. The accused, represented on this occasion by Mr. Srdjan Joka, a member of the Bar of the Republic of Croatia, entered a plea of not guilty to all counts of the Indictment and was remanded in detention pending trial. In a subsequent Decision effective from 14 January 1998, made pursuant to the Directive of the International Tribunal on the Assignment of Counsel, as amended,[5] the Registrar of the International Tribunal determined the accused to be indigent and assigned Mr. Luka S. Misetic, practising in Chicago, in the United States of America, as defence counsel to the accused with his fees to be paid by the International Tribunal.

5. On 13 January 1998 the Prosecution, filed a confidential motion seeking measures for the protection of victims and witnesses. The Defence filed a confidential response on 26 January 1998, opposing the motion, in part on the ground that the measures sought would deny the accused his right to a fair and public hearing as guaranteed by Article 21 of the Statute. Oral argument was heard on the motion during a closed session hearing on 12 February 1998. The Trial Chamber thereupon issued an Order on 13 February 1998 granting the motion in part and deferring consideration of the further measures sought until such time as the Prosecution was able to provide additional information. At a status conference on the same day, the Trial Chamber consulted the parties with a view to enabling it to better manage the case and expedite proceedings. The Prosecution was ordered to provide the Trial Chamber with inter alia the witness statements, other documentary material upon which it intended to rely at trial and a pre- trial brief setting out in full the details of the case and the points at issue. The Order was detailed in a Scheduling Order of 13 February 1998.

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6. On 11 February 1998 the Defence filed a confidential motion to compel the production of certain documents by the Prosecution. There followed the Prosecution's confidential response opposing the motion, filed on 23 February 1998. On 4 March 1998 the Trial Chamber instructed the Prosecution to disclose to it the material that was the subject matter of the motion so as to enable the Trial Chamber to adequately consider the matter. The Prosecution, in a confidential and ex parte submission to the Trial Chamber, complied with this Order on 5 March 1998. The following day the Defence filed a confidential reply in support of its motion of 11 February 1998.

7. The Defence, on 26 February 1998, submitted a preliminary motion to dismiss all counts against the accused (Counts 12, 13 and 14), alleging that the Indictment was defective in that it did not contain a concise statement of the facts and the crimes with which the accused was charged. On 27 February 1998 the Defence filed an additional motion to dismiss the count of the Indictment charging the accused with a grave breach of the Geneva Conventions (Count 12), on the ground that the Indictment failed to adequately allege the existence of an international armed conflict. In its response filed on 6 March 1998 the Prosecution opposed the motions; without conceding the arguments of the Defence, the Prosecution declared that it would not pursue Count 12 of the Indictment in the interests of a fair and expeditious trial and the judicial economy of the Trial Chamber.

8. Oral arguments on the three motions were heard in closed session on 9 March 1998 and the Trial Chamber gave its oral ruling on the motions. A closed session status conference was then held, at which the Trial Chamber and the parties discussed discovery matters and the state of preparedness for trial. A written Order confirming the Trial Chamber's oral Decision was issued on 13 March 1998. The Trial Chamber denied the motion to compel the production of documents on the basis that the requested material was irrelevant to the case against the accused. The Trial Chamber also granted the Prosecution leave to withdraw Count 12 of the Indictment but rejected the motion seeking to dismiss all counts against the accused based on defects in the form of the Indictment. The Prosecution was furthermore ordered to file a document specifying the manner in which the accused was alleged to have breached Article 7(1) of the Statute. The Prosecution responded to this Order by filing the said document on 31 March 1998.

9. The Trial Chamber issued an Order on 31 March 1998, setting 8 June 1998 as the date for the commencement of trial. Following the Order, the Defence, on 6 April 1998, filed a motion seeking to dismiss Counts 13 and 14 of the Indictment on the basis of defects in the form of the Indictment, lack of subject-matter jurisdiction and failure to establish a prima facie case. This motion was accompanied by a separate motion filed the same day, in which the Defence sought leave to file the former motion instanter. In a response filed out of time on 22 April 1998, the Prosecution opposed the former motion.

10. In a motion filed on 24 April 1998 the Defence sought to preclude the testimony of all witnesses for whom the Prosecution had witness statements in its possession prior to 8 April 1998 and which the Prosecution had failed to disclose to the Defence. In the motion the Defence noted the Prosecution's obligation under sub-Rule 66(A)(ii) of the Rules to provide the Defence with copies of the statements of all witnesses which it intends to call at trial no later than 60 days before the date set for trial. Also on 24 April 1998, the Prosecution filed an ex parte and confidential motion concerning discovery of transcripts of proceedings. A further confidential motion seeking protective measures for a number of witnesses anticipated to be called at trial was submitted by the Prosecution on 29 April 1998.

11. On 29 April 1998, oral arguments were heard in open session on the Defence motion to dismiss Counts 13 and 14 of the Indictment. Thereafter a closed session status conference was held at which, inter alia, matters relating to the Prosecution's failure to comply with its obligations of disclosure under Rule 66 were discussed. On that day the Trial Chamber issued three separate Decisions in which it granted the Prosecution's motion for protective measures; dismissed the Defence motion to preclude the

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testimony of certain Prosecution witnesses; and dismissed the Defence motion on Counts 13 and 14 of the Indictment. In this Decision the Trial Chamber held that the relevant motion raised substantive legal issues which were only suitable for determination at trial. In a Scheduling Order issued the same day, the Trial Chamber also expressed its grave concern over the Prosecution's failure to comply with its obligations under sub-Rule 66(A)(ii) and ordered it to provide full disclosure to the Defence pursuant to that Rule no later than 1 May 1998. The Prosecution was further ordered to file, by 4 May 1998, a supplementary document specifying inter alia the acts or omissions that were alleged against the accused and the legal grounds upon which the Prosecution would rely at trial. The Defence was also required to inform the Trial Chamber, by 15 May 1998, whether in consideration of the need to ensure an expeditious trial, it would be in a position to waive its right to timely disclosure under sub-Rule 66(A)(ii) and to proceed with the trial on 8 June 1998, keeping in mind that in the circumstances, postponement of the trial date would not be attributed to the Defence.

12. The Prosecution's confidential reply to the Trial Chamber's Order was filed on 1 May 1998, with a further supplemental document submitted three days later. On 6 May 1998, the Trial Chamber issued an Order directing the Prosecution to file its pre-trial brief no later than 22 May 1998. Also on that day, the Defence filed what it termed an emergency petition in which it stated its belief that the Prosecution was in contempt of the International Tribunal and sought a reconsideration of its motion of 6 April 1998 to dismiss Counts 13 and 14 of the Indictment. Following a response filed by the Prosecution on 11 May 1998, the Defence replied on 12 May 1998. In its Decision on the motion, issued on 13 May 1998, the Trial Chamber found that sufficient information regarding the case against the accused had been provided by the Prosecution to enable the accused to develop his defence. In the circumstances, the Trial Chamber found it unnecessary to rule on the allegation that the Prosecution was in contempt of the International Tribunal and also declined to reconsider its previous Decision on the Defence motion to dismiss Counts 13 and 14 of the Indictment.

13. On 15 May 1998 the Defence filed its response to the Trial Chamber's Order of 29 April 1998 in which it explained that it intended to proceed with trial on 8 June 1998 and objected to any postponement of that date. The Defence also indicated that it would waive neither its right to full disclosure under sub-Rule 66(A)(ii) nor the right of the accused under Article 21 of the Statute to a trial without undue delay. Also on that day, the Prosecution, pursuant to Rule 67 of the Rules, notified the Defence of the names of the witnesses which it intended to call to testify at trial. On 22 May 1998 the Prosecution's pre-trial brief was filed. The Defence filed a supplemental response to the Trial Chamber's Order of 29 April 1998 on 22 May 1998. Therein, in view of its earlier stance, the Defence agreed to file all its pre-trial motions by 22 May 1998 provided the Prosecution would respond to all such motions by 27 May 1998. The Trial Chamber granted this request on 22 May 1998 and the Prosecution was ordered to respond accordingly.

14. On 21 May 1998, the Defence filed a preliminary motion seeking to dismiss Counts 13 and 14 of the Indictment on the ground that the International Tribunal lacked subject-matter jurisdiction to try the charges alleged against the accused under Article 3 of the Statute. Following the Prosecution's response opposing the motion, filed on 27 May 1998, the Trial Chamber issued its Decision denying the motion on 29 May 1998. Rejecting the Defence's interpretation of the Appeals Chamber's Decision in the case of Prosecutor v. Dusko Tadic,[6] hereafter Tadic Jurisdiction Decision, the Trial Chamber emphasised that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute; that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved; and that the allegations charged in the Indictment can indeed be prosecuted under Article 3.

15. Also on 29 May 1998, the Prosecution filed a confidential motion. The Prosecution sought the Trial

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Chamber's determination as to its obligations of disclosure in respect of transcripts in any other trial in which its intended witnesses may have testified and which may have been redacted by order of the Trial Chamber before which the trial in question was heard. A status conference was held in closed session the same day, at which this and other matters relating to the Prosecution's fulfilment of its duty of disclosure were discussed. Following its oral ruling on the same day, the Trial Chamber subsequently issued a written Decision. The Prosecution was ordered inter alia, to turn over to the Defence, by 2 June 1998, all trial transcripts in their redacted form, of the testimony in proceedings before other Trial Chambers given by the witnesses it intended to call at this trial; to decide on whether it would call a particular material witness at trial; and by 2 June 1998 to issue a redacted version of the amended Indictment against the accused. In addition, the Defence was ordered to confirm in writing by 4 June 1998 whether it was fully prepared and ready to proceed to trial on 8 June 1998 on Counts 13 and 14 of the Indictment, it being understood that in the circumstances, postponement of the trial date would not be attributed to the Defence. Declaring that it was appalled by what it considered to be conduct close to negligence in the Prosecution's preparation of the case, the Trial Chamber undertook to issue a separate decision on the Prosecution's handling of this matter. Accordingly, on 5 June 1998, the Trial Chamber issued a formal complaint to the Prosecutor concerning the conduct of the Prosecution. In a communication dated 8 June 1998, the Prosecutor acknowledged the complaint and undertook to investigate the matter.

16. Since the Indictment remains sealed against the other indicted persons, it has not been publicly revealed in its entirety and has required redaction. An amended Indictment, hereafter "Amended Indictment", withdrawing the one grave breach count and associated allegations was filed on 2 June 1998 and is set forth in Annex A to this Judgement. The Defence, on 4 June 1998, informed the Trial Chamber that, due to the continued confinement of the accused it wished to proceed with the trial on the scheduled date of 8 June 1998. However, it continued to assert that the proper remedy for the Prosecution's abuse of the discovery rules was a bar on any witness whose statements had not been supplied to it prior to 8 April 1998. A Prosecution response to this communication was filed on 5 June 1998. On that day the Prosecution also filed a motion in limine regarding the examination of evidence in cases of sexual assault and a further confidential motion requesting protective measures at trial for a number of Prosecution witnesses. Oral arguments on the motions were heard at a closed session hearing on 8 June 1998, during which the Defence presented an oral motion requesting the sequestration of witnesses. Issuing its oral rulings on the motions, which were subsequently confirmed in writing, the Trial Chamber ordered both the Prosecution and the Defence to make every effort to prevent contact between their witnesses prior to and during trial. A number of protective measures at trial, including the use of pseudonyms, were ordered in respect of four Prosecution witnesses, two witnesses being granted leave to testify in closed session and the use of image-distortion being permitted in respect of two others. The Trial Chamber thereafter, in open session, reiterated its willingness to adjourn the proceedings in order to give the Defence such time as it might require and requested the Defence to unequivocally state its readiness to proceed to trial. The Defence informed the Trial Chamber that it was prepared to go forward with the trial.

17. The trial of the accused commenced on 8 June 1998. By then Mr. Sheldon Davidson had been assigned as co-counsel for the Defence. The Prosecution team was lead by Ms. Patricia Viseur-Sellers, assisted by Mr. Michael Blaxill and Ms. Ijeoma Udogaranya. The presentation of the Prosecution case-in-chief lasted four sitting days. During this time, six witnesses testified before the Trial Chamber and four Prosecution exhibits were admitted into evidence.

18. On 11 June 1998, the Defence filed a confidential motion to dismiss the Indictment or, in the alternative, to preclude the Prosecution from adding the accused to Counts 9, 10 and 11 of the Amended Indictment. Following a response from the Prosecution the Trial Chamber issued a Decision the same day dismissing the motion as being misconceived, the Prosecution having made no application to amend

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the Indictment. On 12 June 1998, the Trial Chamber granted an oral motion by the Defence to disregard the testimony given by Witness A, a witness for the Prosecution who testified earlier that day, relating to acts with which the accused was not charged in the Indictment. The Trial Chamber held that it would only consider as relevant Witness A's evidence in so far as it related to paragraphs 25 and 26 of the Amended Indictment. Following a confidential request for clarification of that Decision filed by the Prosecution on 15 June 1998, the Trial Chamber on that day issued a confidential Decision detailing the extent to which the evidence given by Witness A was held to be admissible.

19. During the trial, the Prosecution, on 17 June 1998, filed a confidential motion seeking inter alia, protective measures for a witness intended to be called in rebuttal. The Defence filed a response opposing the motion on 19 June 1998. Holding that it would be a misuse of the right of rebuttal under Rule 85 of the Rules to permit the Prosecution to introduce such evidence in this instance, the Trial Chamber, in a confidential Decision issued on 19 June 1998, dismissed the motion.

20. The defence case-in-chief commenced on 15 June 1998 and continued over one and a half sitting days. Two witnesses, one an expert witness, appeared on behalf of the Defence and 22 defence exhibits were admitted into evidence. Upon the request of the Defence, protective measures were granted in respect of one witness who was designated by a pseudonym and permitted to give evidence in closed session. With the agreement of the parties and with a view to issuing a combined judgement on the merits and on sentence, if any, the parties during trial also addressed sentencing matters. The Defence called one witness in this regard. Both parties presented their closing arguments on 22 June 1998, whereupon the hearing was closed with judgement reserved to a later date.

21. After the close of the hearings, on 29 June 1998, the Prosecution disclosed two documents to the Defence. One was a redacted certificate dated 11 July 1995 and the other was a witness statement dated 16 September 1995 from a psychologist from the Medica Women's Therapy Centre, hereafter "Medica", in Zenica, Bosnia and Herzegovina,[7] concerning Witness A and the treatment that she had received at Medica.

22. On 10 July 1998 the Defence filed a motion to either strike the testimony of Witness A due to what it considered to be misconduct on the part of the Prosecution or, in the event of a conviction, for a new trial. The Prosecution filed its response to the motion on 13 July 1998. The Trial Chamber, on 14 July 1998, after having heard the oral submissions of the parties, issued an oral Decision re- opening the case. The Trial Chamber rejected the Defence request to reconsider its oral Decision on the grounds that the re-opening of the case was an inappropriate remedy. On 16 July 1998 the Trial Chamber issued its written Decision on the matter. It found that there had been serious misconduct on the part of the Prosecution in breach of Rule 68, and that the Defence consequently was prejudiced. It therefore ordered that the proceedings were to be re-opened only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993, and the Prosecution was ordered to disclose any other connected documents.

23. On 20 July 1998, the Defence filed a confidential request for the production of documents pursuant to sub-Rule 66(B). The Prosecution responded thereto on 31 July 1998. On 23 July 1998 however, the Defence filed an application for leave to appeal the Trial Chamber's Decision of 16 July 1998. On 29 July 1998, it also filed a confidential application for the issuance of a subpoena duces tecum to Medica, to which the Prosecution responded on 12 August 1998. The Trial Chamber, on 10 August 1998, stayed its Decision on these motions pending the Appeals Chamber's Decision on the application for leave to appeal. The Defence also filed two ex parte, in camera and sealed motions on 30 July 1998. The one was a request pursuant to Rule 71 for leave to take the deposition of a certain person, and the other concerned an application for the issuance of a subpoena ad testificandum and a letter of request to the

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Government of the USA. On 10 August 1998, the Trial Chamber issued an ex parte and confidential Order in response to these motions, also staying its Decisions thereto pending the Appeals Chamber's Decision on the application for leave to appeal. In a separate Order, on 10 August 1998 the Trial Chamber issued an ex parte and confidential Order staying its Decision relating to the Prosecution's submission of 31 July 1998, for an ex parte review of material pursuant to the Decision of 16 July 1998.

24. On 24 August 1998, the Appeals Chamber unanimously decided to refuse the Defence request for leave to appeal the Trial Chamber's Decision of 16 July 1998. The Appeals Chamber found that the sub-Rule 73(B) requirements for interlocutory appeals had not been met.

25. The Trial Chamber, on 27 August 1998, issued five Orders relating to the matters stayed pending the Appeals Chamber's determination of the application for leave to appeal the Trial Chamber's Decision of 16 July 1998. In a confidential Order the Trial Chamber dismissed the Defendant's request for the production of documents pursuant to sub-Rule 66(B). In another confidential Order the Trial Chamber allowed the application for the issuance of a subpoena duces tecum to Medica, ordering that any information recovered pursuant to the subpoena be submitted to the Trial Chamber for in camera review. The Defendant's ex parte and confidential request to take the deposition of a certain person was dismissed on the basis that the matters on which the person was expected to testify were beyond the scope of the Trial Chamber's 16 July 1998 ruling. The Trial Chamber accepted the Prosecution's submission for an ex parte review of material in another ex parte and confidential Order, holding that certain exhibits should not be disclosed to the Defence. As to the Defendant's application for issuance of a subpoena ad testificandum and a letter of request to the Government of the USA, the Trial Chamber issued an ex parte and confidential Order dismissing the application.

26. On 9 September 1998 the Defence filed an ex parte, in camera and sealed application for the issuance of a subpoena duces tecum and a letter of request to the Government of Bosnia and Herzegovina. The Trial Chamber issued an Order in response on 21 September 1998, in which the application to issue a subpoena duces tecum to a certain person and the corresponding request for assistance to the Government of Bosnia and Herzegovina was allowed. It also ordered that any information recovered pursuant to the subpoena must be submitted to the Trial Chamber for in camera review to determine its relevance and whether it should be disclosed to the parties. The confidential subpoena duces tecum and the confidential and ex parte request for assistance were issued on 21 September 1998 as well.

27. The reply of Medica in connection with the subpoena duces tecum of 27 August 1998 was filed on 22 September 1998. The Trial Chamber reviewed the Medica documents in camera. After having balanced the interests of medical confidentiality and fairness to the accused the Trial Chamber decided on 24 September 1998 that the Medica documents must be disclosed to both the Prosecution and the Defence in confidence. On 1 October 1998 the Trial Chamber ordered that the re-opening of the proceedings should commence on 9 November 1998.

28. The Defence filed a motion on 1 October 1998 requesting the Trial Chamber to order the Prosecution to disclose the identities of various witnesses, interpreters and interviewers, which were redacted by the Prosecution in five documents. The Prosecution's response to the motion was filed on 8 October 1998 following an Order of the Trial Chamber to that effect. On 14 October 1998, the Trial Chamber, in a confidential Decision, noted that following the Prosecution's agreement in its response, the authenticity and admission into evidence of the said documents were no longer at issue. Having noted the purpose of the re-opening of the proceedings and its previous Orders concerning protective measures for witnesses, the Trial Chamber ordered that the Prosecution must disclose to the Defence the identity of certain witnesses and the author of a certificate of psychological treatment.

29. The Government of Bosnia and Herzegovina, on 5 October 1998, filed a confidential and ex parte response to the request for assistance of 21 September 1998. In a confidential Decision of 9 October 1998, the Trial Chamber decided that the response must be disclosed to both parties. According to the response, the sought after information was not in the possession of the person in question.

30. The Defence filed a confidential submission on 9 October 1998 containing a list of the witnesses it intended to call at the re-opening of the proceedings and a summary of the facts on which each would testify. On 13 October 1998, the Trial Chamber issued a confidential Decision on the proposed calling by the Defence of a certain person as an adverse witness. It noted that according to its Decision of 16 July 1998 the Defence may call new evidence only to address any medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993. The Trial Chamber decided that the testimony of the intended adverse witness would not be relevant and that he could not be called as a witness.

31. Also on 9 October 1998, the Defence filed a confidential, ex parte and in camera motion for permission, nunc pro tunc, to disclose the trial testimony of Witnesses A and D to two of its intended expert witnesses, Dr. C.A. Morgan and Dr. J. Younggren. The Trial Chamber subsequently issued a confidential and ex parte Order on 13 October 1998. Having considered its Decision on the protective measures for Witnesses A and D at trial issued on 11 June 1998, the Trial Chamber granted the motion. It allowed the trial testimony to be disclosed to the Defence experts, but only to the extent that it was relevant for the preparation of the expert testimony required by the Defence.

32. On 16 October 1998 the Prosecution filed a confidential submission pursuant to the Trial Chamber orders of 31 August 1998 and 21 September 1998. The Prosecution inter alia requested that the Defence disclose the full statements of the expert witnesses it intended to call at the re-opening of the proceedings instead of the summaries of facts only. The motion also named Dr. D. Brown and Dr. C.C. Rath as the Prosecution's intended expert witnesses. The Trial Chamber issued a Scheduling Order on 20 October 1998, ordering both the Prosecution and Defence to comply with sub-Rule 94 bis (A) and (B)(i) and (ii). The Defence filed their full expert witness statements on 26 October 1998, while the Prosecution likewise submitted the full statements of its two expert witnesses on 30 October 1998. On 30 October 1998 the Defence filed a confidential motion notifying the Trial Chamber that it intended to recall both its expert witnesses in rejoinder. On 2 November 1998 the Prosecution filed a notice pursuant to sub-Rule 94 bis (B) that it wished to cross-examine both the Defence expert witnesses.

33. On 3 November 1998 the Prosecution filed a confidential motion in limine to limit expert evidence. The Defence responded to the Prosecution's motion on 5 November 1998. The Prosecution then, on 6 November 1998, filed a motion requesting leave to file a response to the Defendant's reply to the Prosecution's motion in limine. The Trial Chamber issued two Orders on 6 November 1998. In its confidential Order on the Prosecution motion in limine to limit expert evidence, the Trial Chamber dismissed the Prosecution motion of 3 November 1998. The Trial Chamber, in another confidential Order, also denied the Prosecution leave to file a reply to the Defendant's response of 5 November 1998.

34. The proceedings re-opened on 9 November 1998. Mr. Luka Misetic and Mr. Sheldon Davidson appeared as counsel for the accused. The Prosecution team comprised Ms. Brenda Hollis, Ms. Patricia Viseur-Sellers and Mr. Michael Blaxill. The Defence called four witnesses, including two expert witnesses, while the Prosecution called two expert witnesses.

35. On 9 November 1998 the Trial Chamber received an application to file an amicus curiae brief with the brief attached thereto. The eleven applicants were scholars of the international human rights of women or representatives of non-governmental organizations. The Trial Chamber, on 10 November 1998, issued an Order granting leave to file the amicus curiae brief. On 11 November 1998, another

application to file an amicus curiae brief was filed by three applicants on behalf of the Center for Civil and Human Rights of the Notre Dame Law School in Indiana, USA. The Trial Chamber issued an Order granting the applicants leave to file the brief on 11 November 1998. The Trial Chamber orally notified the Prosecution and Defence about these briefs on 11 November 1998 and invited the parties to make written submissions regarding the briefs by 20 November 1998, should they so wish.

36. The re-opened proceedings were closed on 12 November 1998 after the presentation of both parties' closing arguments. On 20 November 1998, the Defence filed a response to the amicus curiae briefs.

37. On 24 November 1998, the Prosecution filed an ex parte and confidential request to redact certain portions from the transcripts of the closing statements delivered on 22 June 1998 to comport with the order for non-disclosure of 10 November 1998. The Trial Chamber granted the request on 25 November 1998. Also on 25 November 1998, the Prosecution filed a motion to expunge certain portions of the 22 June 1998 closing arguments to conform with the decision on protective measures for Witnesses A and D issued by the Trial Chamber on 11 June 1998. On 26 November 1998, the Prosecution filed a confidential motion to conform the Defendant's response to the amicus curiae briefs to various decisions of the Trial Chamber dealing with protective measures for witnesses. The Defence, on 1 December 1998, filed a confidential response to the Prosecution's motions dated 25 and 26 November 1998. The Trial Chamber, on 3 December 1998, issued an Order granting the Prosecution's motions.

### C. The Amended Indictment

38. Paragraphs 1 to 7 of the Amended Indictment set out the background and general context in which the alleged crimes are said to have been committed. The accused is identified in paragraph 9, whilst paragraphs 12 to 17 set forth the general allegations relevant to the specific crimes alleged. The specific charges against the accused are based upon the following factual allegations, which are set out in paragraphs 25 and 26 of the Amended Indictment:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, REDACTED and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, REDACTED rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
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> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, REDACTED beat Witness A and Victim B on the feet with a baton. Then REDACTED forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail REDACTED actions.

In relation to these alleged acts, the Amended Indictment charges the accused with two counts of violations of the laws or customs of war, as recognised by Article 3 of the Statute of the International Tribunal: torture (Count 13) and outrages upon personal dignity including rape (Count 14).

## II. THE SUBMISSIONS OF THE PARTIES

### A. The Prosecution

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1. Factual Allegations

39. The Prosecution's factual allegations, substantiating those set out in the Amended Indictment, may briefly be set forth as follows. It is alleged that, on or around 15 May 1993, Witness A, a female Moslem civilian residing in Vitez, was arrested by members of a special unit of the military police of the HVO known as the `Jokers'. The headquarters of the Jokers was in a well-known local hostelry in the village of Nadioci, known as the `Bungalow'. The Jokers took Witness A to a house adjacent to the Bungalow, the `Holiday Cottage', where their living quarters were, and she was detained in a large room, hereafter "large room", in the company of a group of soldiers.

40. The accused, a local commander of the Jokers, arrived at the Holiday Cottage and immediately began to interrogate Witness A about a list of Croatian names and the activities of her sons. During the questioning by the accused, one of the soldiers forced Witness A to undress and then rubbed his knife along her inner thigh and lower stomach and threatened to put his knife inside her vagina should she not tell the truth. The accused continued to interrogate Witness A throughout this threatening conduct.

41. Thereafter, Witness A was moved to another room in the Holiday Cottage. A Croatian soldier, known to Witness A and identified in the Amended Indictment as Victim B, but referred to hereafter as Witness D, because he so appeared as a witness in these proceedings, was also brought into the room. He appeared to have been badly beaten. While the accused continued to interrogate Witness A and Witness D, the same soldier who had earlier assaulted Witness A beat both of them with a baton on their feet and then forced Witness A to have oral and vaginal intercourse with him. The accused did nothing to prevent these acts.

2. Legal Arguments

(a) The Individual Criminal Responsibility of the Accused

42. The Prosecution submits that the accused may be held individually responsible for his participation in the alleged crimes pursuant to Article 7(1) of the Statute, which reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles. 2 to 5 of the present Statute, shall be individually responsible for the crime." The Prosecution contends that such liability can be established by showing that the accused had intent to participate in the crime and that his act contributed to its commission. It is further submitted that such contribution does not necessarily require participation in the physical commission of the crime, but that liability accrues where the accused is shown to have been intentionally present at a location where unlawful acts were being committed.[8] Accordingly, the Prosecution argues that the accused's alleged acts of encouragement, and his omissions, were sufficient to trigger his individual criminal responsibility under Article 7(1) for the crimes alleged.[9]

(b) Violations of Common Article 3 of the Geneva Conventions of 1949 (torture)

43. Specifically in relation to the accused, the Prosecution submits that his alleged acts constitute the crime of torture, as recognised in article 3 common to the four Geneva Conventions of 1949, hereafter "common article 3". The Prosecution contends that by his conduct under the factual circumstances alleged, the accused, acting in an official capacity as a uniformed soldier on duty, intentionally inflicted severe physical or mental pain or suffering on Witness A, a non-combatant, during an interrogation for the purpose of obtaining information and for the purpose of intimidation, thereby committing torture. As it is asserted that these events took place in the context of, and were directly linked to, an armed conflict between the armed forces of the Government of the Republic of Bosnia and Herzegovina, which

declared itself independent on 6 March 1992, and the armed forces of the Croatian Community of Herzeg-Bosna, which considered itself an independent political entity inside the Republic of Bosnia and Herzegovina, the Prosecution submits that the elements of the crime of torture under common article 3 are met.

(c) Violations of Additional Protocol II of 1977 (outrages upon personal dignity including rape)

44. The Prosecution further submits that the accused is individually criminally responsible for the alleged acts under article 4(2)(e) of Additional Protocol II to the Geneva Conventions, hereafter "Additional Protocol II", which prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault". With reference to the Tadic Jurisdiction Decision that "customary international law imposes criminal liability for serious violations of common article 3 as supplemented by other general principles and rules on the protection of victims of internal armed conflict",[10] it was submitted that the substantive offences prohibited by article 4 of Additional Protocol II are part of customary law and that they enhance the protection afforded by common article 3.

45. It is argued that by his interrogation of Witness A, a non-combatant in the hands of an adverse party during a conflict, throughout which she was "maintained in a state of forced nudity",[11] "obligated to submit to several sexual assaults",[12] and was "humiliated by attacks on her personal, including sexual, integrity",[13] the accused committed outrages upon personal dignity, within the meaning of article 4(2)(e) of Additional Protocol II.

46. Similarly, the Prosecution argues that, by the accused's conduct during the time that "Witness A, a non- combatant in the hands of an adverse party during an armed conflict, was subjected to vaginal, anal and oral forcible sexual penetration",[14] the accused is criminally responsible for rape, as recognised under article 4(2)(e) of Additional Protocol II.

### B. The Defence

47. The Defence did not concede the existence of an armed conflict for the purposes of bringing the alleged crimes within the jurisdictional scope of Article 3 of the Statute.

48. As to the specific allegations in the Amended Indictment, the Defence contended that the accused is not guilty of the crimes alleged. It was asserted that the accused was not present for any sexual assault on Witness A, and submitted that Witness A's recollection of the events, which form the basis for the charge against the accused, is unreliable.

49. In support of these submissions, the Defence relied upon alleged inconsistencies in the testimony of Witness A. For example, the Defence stated that in Witness A's original statement to the Prosecution's investigators in 1995, she did not state that the accused was present while she was being beaten and sexually assaulted during the first phase of the interrogation in the Holiday Cottage.[15] Furthermore, the Defence asserted that Witness D, a Prosecution witness, would directly contradict Witness A's recollection of the events alleged.[16]

50. The findings of the Trial Chamber are set out in the following sections of the Judgement.

## III. THE EXISTENCE OF AN ARMED CONFLICT

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## A. The Prosecution Case

51. The Prosecution case, as stated in the Amended Indictment, is that from about January 1993 until mid-July 1993 the HVO was engaged in an armed conflict with the Army of Bosnia and Herzegovina, hereafter "ABiH". The Croatian Community of Herzeg-Bosna had declared itself an independent political entity inside the Republic of Bosnia and Herzegovina on 3 July 1992. During this time, the HVO attacked villages inhabited mainly by Bosnian Moslems in the Lasva River Valley region in central Bosnia and Herzegovina, including the municipality of Vitez. The accused was a member of the Jokers, a special unit of the HVO military police, which participated in the armed conflict in the Vitez municipality and especially in the attack on the village of Ahmici. These attacks led to the expulsion, detention, wounding and deaths of numerous civilians. The Prosecution alleges that this was the context in which the crimes, which the accused is alleged to have committed, took place.

52. Evidence of the existence of an armed conflict was given by Prosecution witnesses, including Dr. Muhamed Mujezinovic, a medical doctor in Vitez. According to the witness, the Croatian Democratic Union, hereafter "HDZ", won the first multi-party elections in Vitez in November 1990; the Party of Democratic Action, hereafter "SDA", came second.[17] Throughout 1991, relations between the ethnic groups seemed harmonious.[18] It was only late in 1991 that Dr. Muhamed Mujezinovic first heard about the political entity of Herzeg-Bosna.[19] This witness, a member of the SDA, became vice-president of its executive committee in Vitez in September 1991, and in this capacity he interacted with the HVO on a regular basis.[20] In the meantime, the HVO were arming themselves.[21] In March 1992, a crisis staff was formed in Vitez in response to the problems generated by the conflicts in Croatia and other parts of Bosnia and Herzegovina; it had an equal ethnic composition.[22] In a meeting of the crisis staff held in late April, a member of the HVO said that the Moslems in Vitez had to place themselves under the command of the Croatian Community of Herzeg-Bosna as they had no chance of staying in Vitez; however, this statement was not taken "seriously" and co- operation continued.[23]

53. The first incident of violence occurred on 20 May 1992 when a young Moslem was killed by an HVO guard.[24] This incident was followed by the take-over by the HVO of the local town hall, the police station and the Territorial Defence building on 18 June 1992, over which the flags of Herzeg-Bosna and Croatia were raised.[25] At a subsequent meeting of the Vitez crisis staff, the HVO members demanded that the Moslems place themselves under their command.[26] The Moslems however considered the actions of the HVO to be an illegal coup and refused to become part of the new government.[27] After this, the HVO took control over the town of Vitez.[28] Harassment of Moslems became frequent[29] and the Moslem community established a co-ordination board for the protection of Moslems.[30] In November of 1992, armed conflict erupted between the HVO and ABiH in Novi Travnik; there were simultaneous incidents of violence in Vitez.[31] Inter- ethnic tension in Vitez continued to rise as the HVO blockaded the town.[32] During this time, killings and other violence became increasingly frequent and Dr. Muhamed Mujezinovic regularly treated the wounded, most of whom were Moslem civilians.[33] On 15 January 1993, the Moslems of Vitez converted their Council for the Defence of Moslems into a war presidency which commanded the ABiH and Dr. Mujezinovic became the President.[34]For a brief period, a joint commission was established to relieve the tension in the area. However, the HVO continued to push for the disarmament of the AbiH.[35] Finally, on 16 April 1993, the HVO carried out a concerted attack on both Vitez and Ahmici.[36]

54. Witness A and Witness C testified that the fighting in Vitez started on 16 April 1993 between 5 a.m. and 6 a.m. with a loud detonation.[37] Mr. Sulejman Kavazovic, a member of the Territorial Defence of

Bosnia and Herzegovina, testified that after the explosion he saw a lot of HVO soldiers in full combat equipment running toward the part of the city controlled by the Territorial Defence of Bosnia and Herzegovina.[38] Witness A and Witness C gave evidence that Moslem apartments were searched by the HVO[39] and that prominent Moslems were temporarily detained at the Workers University.[40] From that day on, large numbers of the local Moslem population were reduced to living in basements and terrorised by HVO soldiers; Moslems were, on a daily basis, forced from their homes and taken away.[41]

55. Witness B testified about the HVO attack on Ahmici. On 16 April 1993, she woke up to the sound of shooting and explosions.[42] A group of HVO soldiers, including the accused, entered her house and searched it while verbally abusing the witness and her mother.[43] Witness B appealed to the accused for help as he was an acquaintance of hers, but he remained silent.[44] She was then forced to flee as the soldiers fired at her feet. Her house was set on fire.[45]

56. Witness D also testified to the outbreak of the armed conflict on 16 April 1993.[46] He was an HVO soldier who was arrested and held by the ABiH for about 10 days.[47] Subsequently, he was arrested and held by the Jokers for a month.[48] On his release, he continued serving as an active HVO soldier until he was wounded in the leg after six weeks.[49]

57. Mr. Sulejman Kavazovic gave evidence that he was forced to dig trenches on the front-line between the HVO and the Territorial Defence at "the river, at the [pilja locality," and on another occasion at Kratine.[50] He testified that the conflict continued into May 1993 and that he served as an officer in the ABiH until he was wounded on 25 May 1993. Mr. Kavazovic received notification of the cessation of hostilities in January 1995.[51]

## B. The Defence Case

58. The Defence has not conceded that a state of armed conflict existed at the relevant time, but called no evidence to counter the submissions of the Prosecution. In his closing remarks, Defence counsel submitted that the Prosecution evidence did not demonstrate that there was an armed conflict in terms of front-lines and military objectives, but only that there was an attack by the HVO on civilians.[52]

## C. Factual Findings

59. It was not disputed that the test to be applied in determining the existence of an armed conflict is that set out by the Appeals Chamber of the International Tribunal in the *Tadic Jurisdiction Decision*, which states:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.[53]

Applying that test, the Trial Chamber finds, on the clear evidence in this case, that at the material time, being mid- May 1993, a state of armed conflict existed between the HVO and the ABiH.

60. Considering the above finding, the Trial Chamber must now determine whether a nexus exists between the alleged criminal conduct of the accused and the armed conflict.

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## IV. THE LINK BETWEEN THE ARMED CONFLICT AND THE ALLEGED FACTS

### A. The Prosecution Case

61. The Prosecution submitted that the accused participated in the armed conflict as a local commander of the Jokers.[54] It is in this capacity that he is alleged to have interrogated Witness A, a civilian, about her fighting-age sons and relations between Moslems and HVO personnel.[55]

62. Several Prosecution witnesses identified the accused as a commander of the Jokers: Dr. Muhamed Mujezinovic,[56] Witness D,[57] Witness A,[58] and Mr. Sulejman Kavazovic.[59] Witness B also testified that during the attack on Ahmici, the accused was wearing a Jokers patch on his sleeve.[60]

63. Witness A testified that during her interrogation, she was accused of co-operating with HVO soldiers, in particular Witness D, with whom she was confronted by the accused. He asked her if she knew a man called Petrovic or another man from Busovaca[61] and accused her of having a code-name `Brasno'.[62] The accused also demanded to know whether her children were in the army and he threatened personally to kill them,[63] Witness D testified that he was beaten and interrogated by members of the Jokers, including the accused, about his arrest by the ABiH and whether he had told them anything about the Jokers.[64]

### B. The Defence Case

64. Although the Defence did not contest that the accused was a member of the Jokers, its case is that he was not present during the sexual assaults on Witness A, and that he did not interrogate her.[65] Moreover, the Defence argues that there was no armed conflict to which the accused could be linked.

### C. Factual Findings

65. The Trial Chamber accepts the evidence of Witness A about the nature of her interrogation by the accused. She was a civilian in the hands of the Jokers being questioned by the accused, who was a commander of that unit. He was an active combatant and participated in expelling Moslems from their homes. He also participated in arrests such as those of Witnesses D and E. The Trial Chamber holds that these circumstances are sufficient to link the alleged offences committed by the accused to the armed conflict.

## V. THE EVENTS AT THE BUNGALOW AND THE HOLIDAY COTTAGE IN NADIOCI

### A. Introduction

66. The Prosecution case against the accused turns on the evidence of Witness A, and to a lesser extent, Witness D. Both witnesses have testified as to what happened to them in mid-May 1993, at the Bungalow and the Holiday Cottage, in Nadioci, Central Bosnia. The precise dates involved are a matter of dispute between the parties. The Trial Chamber has been assured that these two vital witnesses have had no contact with each other or knowledge of the whereabouts of the other since then.

67. In response, the case of the Defence is that Witness A is mistaken. Due to the traumatic events that

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she endured and lapse of time, her memory regarding the events at issue is flawed. Suggestions are alleged to have been made to her during vulnerable stages of her physical and psychological recovery, therefore rendering her memory unreliable. This, it is argued, is demonstrated by inconsistencies in the statements, which she gave in 1993, 1995, 1997 and before the Trial Chamber in oral testimony. The Defence further contends that Witness A's testimony is directly contradicted by that of Witness D, thereby making it unreliable. Witness E was called to challenge certain assertions made by Witness D. The evidence of expert witness Dr. Loftus, who did not examine any of the witnesses, but testified in these proceedings, was submitted to demonstrate the weakness of memory, in particular where shock is involved.

68. The Defence does not deny that the accused was in the Holiday Cottage. There has been no denial that Witness A did in fact suffer the atrocities she claims were committed against her; the defence is simply that Witness A's recollection of the events is inaccurate and that the accused was not present when she was being assaulted.

69. Before examining the evidence pertaining to the events in question, it is necessary for the Trial Chamber to establish the factual background and circumstances which led to Witness A and Witness D being together at the Holiday Cottage in May 1993.

## B. Background and Circumstances

### 1. Witness A

70. The following testimony of Witness A was undisputed. In May 1993, she was a married woman of Bosnian Moslem origin.

71. Fighting between the HVO and the ABiH broke out in Vitez on 16 April 1993 and, through a series of events, Witness A came to be separated from her husband. She spoke of how, in spite of public warnings not to help Moslems, the man she later came to know as Witness D transferred her two sons to a safer building when she and others were taken to the headquarters of the HVO. At a later stage, she and some friends of the family arranged to have her sons sent to Travnik. Witness A, upon cross-examination, denied that her children were in the AbiH,[66] and that her husband had any involvement in the military.[67]

72. Witness A testified how she came to live in the family apartment in Vitez with one Vlatko Males, a childhood friend of her children; he was of Croatian origin and had a military affiliation to the HVO. Having promised to protect the mother of his friends in their absence, he moved into the apartment with Witness A. On a day in May, which she said was the 15 May 1993,[68] several soldiers from an elite unit of the HVO came to her apartment. They were dressed in black uniforms, which had the characteristic insignia of the Jokers, known to be a special task unit of the HVO with a "terrifying" reputation.[69] Witness A was not molested at this time, but was ordered to go with them. In her testimony, she recalled that it was approximately 10.30 in the morning.[70] She recounted being taken in a sports car to the Bungalow, which had been turned into the headquarters of the Jokers in 1991.

### 2. Witness D

73. Witness D was a member of the HVO, and much of his testimony was undisputed. Following the outbreak of hostilities in Vitez, he was assigned guard duties around the area of the HVO Headquarters, which included several residential buildings. One of these buildings housed the apartment of Witness A.

As one of the guards of the apartment block, Witness D, on several occasions during the four to five days that he was stationed there, transferred the children of Witness A to a safer building and back again.[71] On or around 8 May 1993, he was captured by the ABiH, and detained for several days, along with two other individuals,[72] one of whom was Witness E. During this time, he was interrogated about the HVO in the Vitez region; his videotaped interrogation was shown to the Trial Chamber as Defence Exhibit D9.

74. Defence Exhibit D10, a document issued by the Joint Committee for the Release of Detainees, dated 16 May 1993, demonstrates that Witness D was released in a prisoner-of- war exchange on 16 May 1993. He was then interrogated by the HVO in Busova~a and eventually released.[73] His evidence that, upon release, he walked back home was challenged by the testimony of Witness E, who testified that he and Witness D were given a lift back by car.[74] Witness D claims that the accused, a soldier identified hereafter as `Accused B' and another person picked him up by car as he was walking back home.[75] He was told that they had been looking for him and he was then driven to the Bungalow in Nadioci.

75. At the Bungalow, he told the Trial Chamber, he was held in detention and interrogated. The Defence did not challenge this witness's assertion that the accused questioned him about the circumstances of his arrest by the ABiH and what he had revealed to them, and that the accused also hit the witness. In the course of his detention at the Bungalow, Witness D was subjected to serious physical assaults by Accused B, for what he estimates to be three days, before his encounter with Witness A. The Defence also did not challenge Witness D's allegation that the accused was present for parts of the serious assaults on him.[76] Witness E saw this witness on what appears to have been his first day at the Bungalow, before he showed visible signs of physical assault.[77] Although Witness D does not mention seeing Witness E at the Bungalow at any time, the latter confirmed that he later witnessed some of the severe physical attacks which Accused B inflicted upon Witness D. Both witnesses spoke of a style of beating, which involved hitting the toes and the top of the foot close to the anklebone with a baton.[78] Witness E also testified that he saw Accused B hit Witness D on the head and elsewhere on his body.[79] He also corroborates Witness D's testimony that the accused was present for some of the beatings Witness D suffered.[80]

## C. Events in the Large Room

76. It is uncontested that on arriving at the Bungalow, Witness A was led away along a path to the Holiday Cottage, which appeared to form part of the Bungalow complex. She recalls having seen a large number of armed soldiers, dressed in the characteristic Jokers uniform, around the Bungalow, which was known to be their headquarters. Witness A was taken to a large room in the Holiday Cottage, which appears to have been the living quarters of the soldiers. She was told to sit and eat a piece of bread with pat, to give her "strength".[81] She was surrounded by soldiers dressed in Jokers uniforms who spoke in expectant tones about the arrival of the `Boss'. There were about forty of them in the room.

77. Witness A then heard someone say, "Furundzija has arrived",[82] and a young man entered the room holding some papers.[83] Witness A drew the conclusion that this man was the `Boss' who had been expected by the soldiers, and that his name was Furundzija.[84]

78. The man whom Witness A identified as Furundzija, the `Boss', she described as being a "rather thin young man, rather strong jaw or teeth. Height, well, medium for a man, a metre 75, one metre 80. I cannot tell you exactly"; he had "chestnut to black hair", which was "cut short and combed up".[85] Like

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the other soldiers, he was wearing a black Jokers uniform, but with the sleeves rolled up.[86] In her 1995 statement, she described him as "tall, maybe the height of . . . who tells me she is about 172 centimetres tall. He was thin, small featured and had short blond hair."[87] In cross-examination, the witness denied having told Prosecution investigators that this man had blond hair. She reiterated that the man definitely had dark brown hair and was around 175 to 180 centimetres tall.[88] When questioned by the Presiding Judge, the witness was able to identify the accused in court. Since the events in question, she had only seen him momentarily on a BBC television newscast after he had been arrested by SFOR troops. She recalled thinking that he looked as if he had put on weight.[89]

79. The Trial Chamber notes that the Medical Report of the accused's examination on arrival at the United Nations Detention Unit, admitted as Defence Exhibit D16, specifies his height as 1.83 metres and his weight as 82 kilograms. There are no notes of any distinguishing features. Defence counsel drew attention to these inconsistencies in the description of the accused, which, it submitted, demonstrated that the accused had not been present as alleged.

80. Witness A recalled that in the large room, the accused read the allegations against her and started to question her about her alleged co-operation with the ABiH[90] and about an individual named Petrovic.[91] Defence Counsel pointed out that this was inconsistent with her 1995 witness statement in which she stated that the soldiers asked her about Petrovic. The answers she gave the accused were apparently unsatisfactory and she was suddenly grabbed by the hair from behind and a knife was held to her throat. A man said, "If you don't know them, do you know me?".[92] This man, Accused B, forced her to undress and to remove her glasses.[93] Witness A, under cross-examination, was adamant that Furundzija was in the room before Accused B entered.[94]

81. The witness has testified that rapes and sexual abuse took place in the large room in the presence of the accused. This evidence falls outside the facts alleged in paragraphs 25 and 26 of the Amended Indictment, and is contrary to earlier submissions by the Prosecution.[95] At no stage of the proceedings did the Prosecution seek to modify the Amended Indictment to charge the accused with participation in these assaults. Further to an oral motion by the Defence on 12 June 1998, the Trial Chamber issued a Decision confirming that it would only consider as relevant Witness A's evidence in so far as it relates to paragraphs 25 and 26 as pleaded in the Indictment against the accused. Further clarification was sought by the Prosecution on 15 June 1998 and this was provided by the Trial Chamber orally and in writing on 15 June 1998. Therefore, the Trial Chamber will not consider evidence relating to rapes and sexual assault of Witness A in the presence of the accused, other than those alleged in paragraph 25 and 26 of the Amended Indictment.

82. The accused continued to interrogate Witness A, who was forced to remain naked in front of approximately 40 soldiers. Accused B drew a knife over the body and thigh of Witness A, threatening, inter alia, to cut out her private parts if she did not co-operate.[96] As this was happening, it is alleged that the accused continued to interrogate her about her children, her alleged visits to the Moslem part of Vitez and why certain Croats had helped her when she was Moslem.[97] The witness testified that the accused also issued threats against her children.[98]She spoke of a direct relationship between his dissatisfaction with her answers and the assaults inflicted upon her by Accused B.[99] She stated: "it was one at the same time the interrogation and the ill-treatment and the abuse".[100]

83. At one stage during the interrogation, Witness A testified that the accused became annoyed with her responses and left the large room, threatening to force her to confess by confronting her with another

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person who later turned out to be Witness D.[101] The Defence has not disputed that the accused left Witness A in the room and that there followed another phase of serious sexual assaults by Accused B, accompanied by questioning. After being subjected to multiple rapes, sexual assaults and physical abuse by Accused B, she was given a small blanket and taken to another room, the `pantry', still in a state of nudity.

**D. Events in the Pantry**

84. While Witness A was being taken to the pantry, Witness D was being brought out from the Bungalow for a confrontation with her. Witness D said that Accused B took him out and the accused met them downstairs in the Bungalow.[102] Witness A testified that the accused, another soldier described as Dugi and Accused B, took her out of the large room and that Accused B was with her throughout.[103]

85. The Defence has pointed to inconsistencies in the order in which the two victims entered the room as an indication that Witness A's memory is unreliable. Her testimony to the Trial Chamber on the order of entry is ambiguous[104] but in 1997, she clearly stated that Witness D was already in the room when she entered.[105] On the other hand, her 1995 Witness Statement is also clear: she entered the room first, and then Witness D entered.[106] Witness D says he entered the room and saw a woman he recognised as Witness A, naked but partially covered by a small blanket, leaning against the wall.[107] She was in tears and sobbing.[108] He also recalls that as he entered the room, the accused was there.[109] Witness A, on her part, recognised Witness D, and described her shock at seeing him: he had a swollen head, bruises on his face, was trembling and appeared to be in a grave condition.[110] The Trial Chamber recalls Witness E's testimony that Witness D was hit on the head and was badly beaten by Accused B in the Bungalow.

86. Witness A testified that the accused interrogated both of them.[111] They were accused of working for the AbiH.[112] Both witnesses then described how Witness D was beaten by Accused B. Witness A described how Accused B hit Witness D on the toes of the feet.[113] This was consistent with the description given by Witness E and Witness D of the style of beatings inflicted by Accused B on Witness D in the Bungalow.[114] Witness A said that the accused was in the doorway.[115] According to Witness D, the door was kept open and there was an audience of Jokers, both inside the room and outside.[116] He recalls that the accused was with the soldiers outside the room; he believed that they could see what was going on in the pantry.[117]

87. The attacks then moved on to Witness A: Accused B had warned Dugi, another soldier, not to hit her as he had "other methods" for women,[118] methods which he then put to use. Accused B hit Witness A[119] and forced her to perform oral sex on him. He raped her vaginally and anally, and made her lick his penis clean.[120] Witness D was forced to watch these assaults and he testified that the accused was one of the soldiers outside the room.[121] It appears to the Trial Chamber that the accused would have had to be in the vicinity of the door in order for Witness D to have seen him amidst the group of soldiers. Witness A categorically stated, in response to cross- examination, that the accused was present in the room: "Yes, he was in the room. He watched me and Witness D and Accused B. He was inside the room . and we were all together inside"[122] and said that "Furundzija was the person who interrogated and confronted me".[123] In Prosecution Exhibit P3, she stated that the accused was there all the time, "because he was the one who was confronting me with Witness D".[124] In 1995, she stated that the accused "was in the pantry questioning us as we were being beaten. He was there as Accused B forced me to have oral and vaginal sex with him. He did nothing to stop the beatings or the rapes".[125] Witness

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D testified that when he was taken out of the pantry, he saw the accused outside the doorway.[126]

88. Witness A continued to be sexually assaulted by Accused B until she collapsed in a state of exhaustion. This is demonstrated by the testimony of Witness A, and also by the evidence of Witness D, who having been returned to the Bungalow, heard a woman screaming from the direction of the Holiday Cottage and the name of Furundzija being called out. Later, a man whom Witness A recognised as Dragan Botic eventually took her upstairs to another room in the cottage.

89. The further abuses visited upon Witness A, who remained in the custody of the Jokers for several weeks, are not the subject matter of the charges against the accused. Witness A continued to be detained until she was released in a prisoner exchange on 15 August 1993. Whilst in captivity, she was repeatedly raped, sexually assaulted and subjected to other cruel, inhuman and degrading treatment. As a result, she experienced severe physical and mental suffering.

## E. The Re-opening of the Proceedings

### 1. Background and Reasons for Re-Opening the Proceedings

90. On 29 June 1998, after the proceedings and closing submissions had been concluded, the Prosecution disclosed for the first time to the Defence a document entitled "Certificate of Psychological Treatment" from Medica, a Womens' Therapy Center in Zenica, dated 11 July 1995.[127] This document related to Witness A and stated that she had contacted Medica on 24 December 1993 in connection with the psychological trauma she had been suffering since she was abused in the Bungalow. Defence Exhibit D37 stated that she had been receiving treatment in the counselling center and that the symptoms of Post-Traumatic Stress Disorder, hereafter "PTSD", had been relieved. The Prosecution also disclosed a statement dated 16 September 1995 from an unidentified witness who stated that she had first seen Witness A on 24 December 1993 at Medica and last saw the witness on 11 July 1995.[128]

91. Thereupon the Defence filed a motion requesting the Trial Chamber to strike out the testimony of Witness A because the late disclosure of the said documents prejudiced the Defence and that such prejudice permeated the strategy of the whole Defence case. Alternatively, it was requested that in the event of a conviction, a new trial be ordered. The Prosecution responded, after which the Trial Chamber heard oral submissions by both parties.

92. In the Decision of 16 July 1998 the Trial Chamber ruled that the interests of justice required a re-opening of the proceedings as the only available means to remedy the prejudice suffered by the Defence. The Prosecution disclosed the Medica documents to the Defence only after the close of the trial. These documents referred to medical and psychological treatment that Witness A was alleged to have received at Medica. In the circumstances of this case, the late-disclosed material was considered to be relevant to the issue of credibility of Witness A's testimony. The prejudice suffered directly stemmed from the fact that the Defence was unable to fully cross-examine relevant Prosecution witnesses and to call evidence to deal with the issues raised by the Medica documents. This right is encapsulated in Article 21(4)(e) of the Statute, which reads: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . .; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . .." In the event, the Trial Chamber ordered the re-opening of the proceedings. It permitted the recalling of Prosecution witnesses for cross-examination, but solely on any "medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993".[129] The Trial Chamber also permitted the Defence to call evidence on these issues and the Prosecution to call evidence in rebuttal.

93. The Trial Chamber further considered the rights of the accused and Witness A. In the circumstances of the case, the Trial Chamber was of the view that the protection of Witness A could only be allowed to affect the public nature of the trial, not its fairness. This view is supported by Article 20(4) of the Statute. The Statutory provisions of Articles 20(1), 21(2) and in particular the guarantees that an accused is entitled to according to Article 21(4), mandate the Trial Chamber to ensure that the accused receives a fair trial. These Articles read as follows: Article 20(4) provides that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence."; Article 20(1) reads that "the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."; and Article 21(2) reads that "in the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute". In addition, Article 21(3) of the Statute, which reads, "the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute", upholds the presumption of innocence of the accused. The Trial Chamber therefore has to allow the accused to explore every possible defence within the provisions of the Statute. Cognisant of its duty to search for the truth and applying the `interests of justice' test inherent in its powers, the Trial Chamber decided to re-open the proceedings to allow the Defence to remedy the prejudice suffered.

94. On 14 September 1998, in response to a subpoena duces tecum, Medica produced a report, Defence Exhibit D24, on the treatment of Witness A. The report states that on the basis of supportive and therapeutic work with the patient and information on what had occurred, it was possible to conclude that the patient was exhibiting symptoms of PTSD. An attached report compiled by a psychologist dated 24 December 1993 states that Witness A could not sleep without therapy and was afraid to fall asleep, thought of herself as unimportant, had an uncontrolled recollection of events and allowed herself to cry, and suppressed thoughts of the rapes. On 11 July 1995 she is recorded as occasionally coming to talk, taking a tranquilliser called Apaurin, and suffering from insomnia and weeping fits.

95. The case re-opened on 9 November 1998 and the Trial Chamber heard evidence for four days until 12 November 1998. Witness A and Dr. Mujezinovic were recalled for cross- examination, each side called two expert witnesses and both sides made submissions. What follows is a summary of the evidence relating to the central issue, namely whether the reliability of the evidence of Witness A has or may have been affected by any psychological disorder from which she may have suffered as a result of her ordeal. It is thus necessary to consider whether she was suffering from PTSD, and, if so, whether it has or may have affected her memory.

### 2. Summary of the Relevant Evidence

96. Dr. Mujezinovic said that he saw Witness A in the autumn of 1993. She was frightened and said that she wanted to kill herself; she could not sleep, had nightmares and thought people were accusing her and staring. He referred her to Dr. Racic-Sabic, an associate of Medica who worked in the neuro-psychiatric department in Zenica. The latter subsequently told him that Witness A would need a long period of psychiatric treatment as she was seriously traumatised.

97. Witness A gave a different account. She agreed that she had met Dr. Mujezinovic in 1993 and had a conversation. Although she was physically exhausted and had difficulty sleeping, she did not seek psychiatric help. She was not referred to Dr. Racic-Sabic and had no contact with that doctor. Medica had approached her and she had not asked for psychological assistance. She did not agree with the Medica Report and the diagnosis of PTSD. However, she had taken tranquillisers. She maintained that she accurately remembered the events which form the subject of this case.

98. Explanations for the discrepancies between the evidence of Dr. Mujezinovic and Witness A are to be found in the evidence of two experts. The Defence called Dr. Charles Morgan, Associate Professor of Psychiatry at Yale University School of Medicine and Associate Director of the PTSD Program at the National Centre for PTSD. He said that Witness A's denials that she had PTSD or treatment, were consistent with findings in studies of PTSD, for example, Dr. Carol North found in her study that subjects deny having symptoms of PTSD.[130]

99. Dr. Craig Rath, an experienced clinical and forensic psychologist from California, called by the Prosecution, said that the discrepancy is to be explained because while Medica believed that Witness A was starting psychotherapy, she herself did not see it in that light. This is because a typical approach in psychiatric treatment is to ask broad questions. The witness was demonstrating symptoms into which she had little insight. Medica approached her in a general manner in order to ventilate her feelings. Witness A then felt a little better and left what Medica saw as the therapy situation but without having built a therapeutic alliance with a therapist, although her "ventilation" had been therapeutic. Dr. Rath said that this would account for the discrepancy in the evidence. Medica viewed her as being treated, but there is no evidence that typical therapeutic techniques were ever applied and there is an issue whether she engaged in psychotherapy.[131] The difference in the accounts between the witness and Medica can be explained in these terms; the witness felt as if she had an informal talk with them whereas according to Medica this was part of her treatment.

100. The Trial Chamber accepts the evidence of Dr. Rath on this subject and finds that Witness A is mistaken in saying that she was not referred for treatment.

101. The Trial Chamber accepts the diagnosis that it is likely that Witness A had PTSD. This is based on the certificate from Medica and the evidence of Dr. Morgan, an expert in PTSD, who said that his reading of the documents suggested that Witness A was suffering from chronic PTSD. Dr. Daniel Brown, Assistant Clinical Professor in Psychology, Harvard Medical School, called by the Prosecution, agreed although pointing out that it is not clear whether Witness A had met all the criteria for PTSD.[132]

102. The Defence case was that because Witness A was suffering from PTSD and may have been treated for it, Witness A's memory was likely to have been affected and contaminated. This case was based on the evidence of Dr. Morgan to the effect that high levels of stress hormones can damage the area of the brain called the hippocampus, responsible for memory. Studies showed that the hippocampus in people with PTSD had been damaged and people suffering from PTSD performed more poorly in memory tests than people without PTSD. Studies which the witness had conducted with people suffering from PTSD showed a greater inconsistency in their accounts than people without PTSD.[133] Dr. Morgan used charts to demonstrate what he viewed as the inconsistencies in Witness A's accounts. Dr. Morgan said when giving evidence in rejoinder that he would not consider a single course of information from the reported memory of one individual suffering from PTSD to be scientifically reliable and that he would want independent corroborating evidence.[134]

103. The Defence also called Dr. Jeffrey Younggren, an experienced clinical and forensic psychologist from California and a Fellow of the American Psychological Association who has treated many PTSD victims. He said that his reading indicated that the trauma can have an effect on memory: the more trauma, the worse the memory. He referred to a report entitled "Medica's Psycho Team",[135] which stated that Medica had no knowledge about trauma and how to deal with it and lacked experience and theoretical knowledge. The witness said that this state of affairs could lead to contamination of memory, that group therapy can then fill in the blanks and lead to false beliefs. If Witness A participated in "dream and imagined journeys",[136] it could contribute to false beliefs.[137] The witness also said that he

was concerned about the mixed mission of Medica in saying that "their goal is to deal with war criminals".[138] This goal may be incompatible with the recovery and treatment of trauma patients.[139]

104. For the Prosecution, Dr. Brown said that there was a link between PTSD and inconsistency but it did not mean that the trauma caused inconsistency. The evidence about accuracy in recollection of normal, meaningful, personal events shows that the more meaningful the experience, the greater the accuracy of retention. It also shows that inconsistency does not necessarily mean inaccuracy.[140] Dr. Brown said that it was not known if Witness A had hippocampal damage.[141] Dr. Rath pointed out that there was no evidence that Witness A had engaged in group or "dream" psychotherapy or that a therapist had contaminated her memory.

105. The Prosecution argued in its closing remarks that any arguments that Witness A's credibility was diminished due to therapeutic interference with her memory or because of biological damage to her brain were based on pure speculation. PTSD does not render a person's memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies. The actions of the accused as interrogator and "boss" were core to this experience and the evidence of Witness D corroborated this core. The Prosecution concluded by stating it had proved the guilt of the accused beyond reasonable doubt.

106. The Defence argued in its closing remarks that as part of the standard of proof beyond reasonable doubt, doubts in this case should be resolved in favour of the accused. According to the Defence, the diagnosis of PTSD presents an explanation for the inconsistencies in Witness A's various statements and further discrepancies between her evidence and that of other witnesses and documentary evidence. In conclusion the Defence argued that these inconsistencies should not be dismissed but that they indicated a failure on the part of the Prosecution to meet the burden of proof in this case.

### 3. The Amicus Curiae Briefs

107. The Trial Chamber granted the applications seeking leave to file two amicus curiae briefs. Timely assistance in this manner is generally appreciated. Unfortunately, both the briefs dealt at great length with issues pertaining to the re-opening of the instant proceedings. By the time the two briefs were received, the re-opening of the proceedings had already been decided having commenced on 9 November 1998. Nevertheless, from the discussion on the re- opening proceedings above it should be clear that it was not the fact that Witness A received any medical and psychological counselling that automatically led the Trial Chamber to re-open the proceedings. Rather, the proceedings had to be re-opened in light of the late disclosure of the Medica material and the Trial Chamber's duty to uphold the fairness and presumption of innocence, as discussed above.

### 4. Findings

108. Having seen and heard all the witnesses and considered the evidence, the Trial Chamber has come to the following conclusions: the Trial Chamber finds that Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had. The Trial Chamber accepts her evidence that she has sufficiently recollected these material aspects of the events. There is no evidence of any form of brain damage or that her memory is in any way contaminated by any treatment which she may have had. Indeed the Trial Chamber accepts the evidence of Dr. Rath that such treatment that she may have had was of a purely preliminary nature. The Trial Chamber also considered that the aim in therapy is not fact-finding.

109. The Trial Chamber bears in mind that even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness.

## F. Inconsistencies in the Testimony of Witness A

110. Following the findings above, the Trial Chamber has to examine the inconsistencies in the testimony of Witness A in order to determine whether they are sufficient to render the material aspects of the evidence of Witness A unreliable. In doing so the Trial Chamber recalls the testimony of Dr. Morgan to the effect that tests carried out to determine the consistency and accuracy of answers given by subjects in memory studies have no bearing on the truthfulness of a witness in court proceedings in that there is no model in the world that can directly measure what anyone knows in their mind. Further, Dr. Morgan added that, "I know of no way of measuring what people actually remember."[142] Much of the Defence challenge to the reliability of Witness A centred around statements allegedly made by her to sources not associated with the International Tribunal.

111. The witness denied that Defence Exhibit D11b, a hand- written statement, was in her handwriting or had been signed by her. Therefore, this exhibit and the typed versions,[143] which appear as statements dated 11 September 1996 from the State Commission for Gathering Facts on War Crimes at the Territory of the Republic of Bosnia and Herzegovina, are unreliable.

112. Witness A also denies having given evidence in legal proceedings brought against Dario Kordic and others. She recalls having a conversation about her experiences, but denies having given a formal statement in the course of legal proceedings. The document filed as Defence Exhibit D12, Witness Interview on 21 December 1993 by the Investigating Judge of the Zenica High Court in the Criminal Case of Dario Kordic et al, has relevant identifications blacked out, including that of the signature of the witness. Witness A did not recognise this document. In the circumstances, this exhibit and its English translation, Defence Exhibit D12a, cannot be relied upon. As a consequence, challenges to the reliability of the testimony of Witness A which have been made on the basis of these documents are not accepted by the Trial Chamber.

113. The Trial Chamber finds that, despite her inconsistencies on the finer details which the Defence has validly pointed out, Witness A is a reliable witness. The evidence of expert witness Dr. Loftus, and cross-examination of Witness A, have not cast doubts on the reliability of her testimony. There is no evidence to substantiate the allegation made in the Defence closing statement that persons such as Enes Surkovic made suggestions on the sequence of events and identities of those involved in abusing Witness A and that these people influenced her recollection of events. The Trial Chamber is of the view that survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses. The Trial Chamber therefore attaches no particular significance to the inconsistencies in the order in which Witnesses A and D say they entered the pantry.

114. The Trial Chamber notes that the evidence of Witness A consistently places the accused at the scenes of the crimes committed against her in the Holiday Cottage in May 1993. It is also significant to note that she has been consistent throughout her statements in her recollection that the accused was never the one assaulting her during her period of captivity in the Holiday Cottage; Accused B is always described as the actual perpetrator of the rapes and other assaults. The Trial Chamber finds that Witness A has identified the accused as Anto Furundzija, the Boss. The inconsistencies in her identification

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testimony are minor and reasonable. In light of her recollection at the time of seeing the accused on television and even noticing that he had put on weight, the Trial Chamber is satisfied that the accused has sufficiently identified Witness A.

115. With respect to inconsistencies as to dates, the Trial Chamber observes that the dates referred to in oral testimony were put to Witness A by Defence Counsel; she herself admitted to being poor with dates and did not volunteer the information on the exact dates of the assaults. The Trial Chamber is more concerned with the events that occurred rather than the exact date on which they happened.

116. Witness A dealt with cross-examination in an honest and confident way and countered challenges to her memory of events by indicating that she was testifying to the best of her recollection, that the evidence she gave was the way she, as the person who endured these events, saw them happen. She told the Trial Chamber that "in those moments, one does not analyse too much",[144] an observation confirmed by the views of expert witness Dr. Loftus.[145] The witness's manner in court was convincing and although her testimony, in accordance with Rule 96 of the Rules[146], requires no corroboration, the Trial Chamber notes that the evidence of Witness D does confirm the evidence of Witness A in this regard. The Trial Chamber also notes that cross-examination of Witness D did not touch upon his detention at the Bungalow or the Holiday Cottage. Witness E, a witness for the Defence, testified that he found Witness D at the Bungalow and saw him being beaten by Accused B and that the accused was present during some of the assaults. When Witness E left the Bungalow, Witness D stayed behind, being eventually confronted with Witness A.

## G. The Evidence of Witness D and Witness E

117. Witnesses A and D described in detail the treatment they received at the hands of the accused and Accused B in a convincing manner. The style of beatings described by Witness D in the Bungalow was consistent with that described by Witness E who, although aged sixteen at the material time, appeared confident of his recollection. Witness D, as a member of the HVO who was suspected by the accused and Accused B of having betrayed them to the ABiH, knew the Jokers well. Notwithstanding his detention and punishment at their hands, he returned to active duty with the HVO upon his release. Both Witness D and Witness E clearly described the roles played by the accused and Accused B at the Bungalow. There was nothing material to cast doubt on their testimony.

118. With respect to the dates involved, Witness D consistently said that he could not remember exact dates.[147] He readily accepted the date shown on Defence Exhibit D10 as being the date of his release by the ABiH and identified his signature on the exhibit. He appeared not to have known Witness E beforehand as he was not sure about the name of "this person"[148] although he recalled having been released together with a "younger man" and another "older man".

119. The Trial Chamber attaches no particular significance to the question whether Witness D walked home alone, or whether he was driven back together with Witness E after their release on 16 May 1993. It is sufficient that Witness D was arrested and taken to the Bungalow earlier than Witness E.

## H. Factual Findings

120. Having considered the evidence, the Trial Chamber is satisfied beyond reasonable doubt that the following findings may be made.

### 1. The Arrest

121. On or about 16 May 1993, Witness D was arrested and taken to the Bungalow by the accused and Accused B. He was interrogated and assaulted by both of them. Accused B in particular, beat him with his fists and on the feet and toes with a baton, in the presence of Witness E, and most of the time in the presence of the accused who was coming and going.

122. On or about 18 or 19 May 1993, Witness A was arrested and taken from her apartment in Vitez by several members of an elite unit of soldiers attached to the HVO and known as the Jokers. She was driven by car to the Bungalow, the headquarters of the Jokers. Soldiers and several commanders of different units were based at the Bungalow, among whom were the accused, Accused B, Vlado Santic and others.[149]

123. On arrival at the Bungalow, Witness A was taken to a nearby house, the Holiday Cottage, which formed part of the Bungalow complex. She entered a room described as the large room, which was where the Jokers lodged. She was told to sit down and was offered bread and pat, to eat. Around her, the soldiers, dressed in Jokers uniforms, awaited the arrival of the man referred to as `the Boss', who was going to deal with her. Witness A then heard someone announce the arrival of `Furundzija', and the man she has identified to the satisfaction of the Trial Chamber as being Anto Furundzija, the accused, entered the room holding some papers in his hands.

### 2. In the Large Room

124. Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. She was subjected to cruel, inhuman and degrading treatment and to threats of serious physical assault by Accused B in the course of her interrogation by the accused. The purpose of this abuse was to extract information from Witness A about her family, her connection with the ABiH and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. The interrogation by the accused and the abuse by Accused B were parallel to each other.

125. Witness A was left by the accused in the custody of Accused B, who proceeded to rape her, sexually assault her, and to physically abuse and degrade her.

126. Witness A was subjected to severe physical and mental suffering and public humiliation.

### 3. In the Pantry

127. The interrogation of Witness A continued in the pantry, once more before an audience of soldiers. Whilst naked but covered by a small blanket, she was interrogated by the accused. She was subjected to rape, sexual assaults, and cruel, inhuman and degrading treatment by Accused B. Witness D was also interrogated by the accused and subjected to serious physical assaults by Accused B. He was made to watch rape and sexual assault perpetrated upon a woman whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated.

128. Accused B beat Witness D and repeatedly raped Witness A. The accused was present in the room as he carried on his interrogations. When not in the room, he was present in the near vicinity, just outside an open door and he knew that crimes including rape were being committed. In fact, the acts by Accused B were performed in pursuance of the accused's interrogation.

129. It is clear that in the pantry, both Witness A and Witness D were subjected to severe physical and mental suffering and they were also publicly humiliated.

130. There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.

## VI. THE LAW

### A. Article 3 of the Statute (Violations of the Laws or Customs of War)

131. Article 3 of the Statute of the International Tribunal provides as follows:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.

132. As interpreted by the Appeals Chamber in the Tadic Jurisdiction Decision,[150] Article 3 has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.

133. It follows that the list of offences contained in Article 3 is merely illustrative; according to the interpretation propounded by the Appeals Chamber, and as is clear from the text of Article 3, this provision also covers serious violations of international rules of humanitarian law not included in that list. In short, more than the other substantive provisions of the Statute, Article 3 constitutes an `umbrella rule'. While the other provisions envisage classes of offences they indicate in terms, Article 3 makes an open-ended reference to all international rules of humanitarian law: pursuant to Article 3 serious violations of any international rule of humanitarian law may be regarded as crimes falling under this provision of the Statute, if the requisite conditions are met.

### B. Torture in International Law

#### 1. International Humanitarian Law

134. Torture in times of armed conflict is specifically prohibited by international treaty law, in particular by the Geneva Conventions of 1949[151] and the two Additional Protocols of 1977.[152]

135. Under the Statute of the International Tribunal, as interpreted by the Appeals Chamber in the Tadic Jurisdiction Decision,[153] these treaty provisions may be applied as such by the International Tribunal if it is proved that at the relevant time all the parties to the conflict were bound by them. In casu, Bosnia

and Herzegovina ratified the Geneva Conventions of 1949 and both Additional Protocols of 1977 on 31 December 1992. Accordingly, at least common article 3 of the Geneva Conventions of 1949 and article 4 of Additional Protocol II, both of which explicitly prohibit torture, were applicable as minimum fundamental guarantees of treaty law in the territory of Bosnia and Herzegovina at the time relevant to the Indictment. In addition, in 1992, the parties to the conflict in Bosnia and Herzegovina undertook to observe the most important provisions of the Geneva Conventions, including those prohibiting torture.[154] Thus undoubtedly the provisions concerning torture applied qua treaty law in the territory of Bosnia and Herzegovina as between the parties to the conflict.

136. The Trial Chamber also notes that torture was prohibited as a war crime under article 142 of the Penal Code of the Socialist Federal Republic of Yugoslavia, hereafter "SFRY", and that the same violation has been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992.[155]

137. The Trial Chamber does not need to determine whether the Geneva Conventions and the Additional Protocols passed into customary law in their entirety, as was recently held by the Constitutional Court of Colombia,[156] or whether, as seems more plausible, only the most important provisions of these treaties have acquired the status of general international law. In any case, the proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code[157] and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907,[158] read in conjunction with the `Martens clause' laid down in the Preamble to the same Convention.[159] Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, hereafter "London Agreement", but it was one of the acts expressly classified as a crime against humanity under article II(1)(c) of Allied Control Council Law No. 10,[160] hereafter "Control Council Law No.10". As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms.

138. That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.[161]

139. It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and - if the requisite conditions are met - qua treaty law, the content of the prohibition being the same.

140. The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts. As the International Military Tribunal at Nuremberg put it in general terms: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[162] Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6 (2) of the Statute of the International Criminal Tribunal for Rwanda, hereafter "ICTR" are indisputably declaratory of customary international law.

141. It should be stressed that in international humanitarian law, depending upon the specific circumstances of each case, torture may be prosecuted as a category of such broad international crimes as serious violations of humanitarian law, grave breaches of the Geneva Conventions, crimes against humanity or genocide.

142. Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.

2. International Human Rights Law

143. The prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace.[163] In addition, treaties as well as resolutions of international organisations set up mechanisms designed to ensure that the prohibition is implemented and to prevent resort to torture as much as possible.[164]

144. It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below, that the prohibition on torture is a peremptory norm or jus cogens. This prohibition is so extensive that States are even barred by international law from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture.[165]

145. These treaty provisions impose upon States the obligation to prohibit and punish torture, as well as to refrain from engaging in torture through their officials. In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders.[166] Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.

146. The existence of this corpus of general and treaty rules proscribing torture shows that the

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international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.

3. Main Features of the Prohibition Against Torture in International Law

147. There exists today universal revulsion against torture: as a USA Court put it in Filartiga v. Pe•a-Irala, "the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind".[167] This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.

(a) The Prohibition Even Covers Potential Breaches

148. Firstly, given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in Soering,[168] international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment). It follows that international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition.

149. Let us consider these two aspects separately. Normally States, when they undertake international obligations through treaties or customary rules, adopt all the legislative and administrative measures necessary for implementing such obligations. However, subject to obvious exceptions, failure to pass the required implementing legislation has only a potential effect: the wrongful fact occurs only when administrative or judicial measures are taken which, being contrary to international rules due to the lack of implementing legislation, generate State responsibility. By contrast, in the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.

150. Another facet of the same legal effect must be emphasised. Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (lato sensu) only when such legislation is concretely applied.[169] By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international State responsibility. The value of freedom from torture is so great that it becomes imperative to preclude any national legislative act authorising or condoning torture or at any rate capable of bringing about this effect.

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(b) The Prohibition Imposes Obligations Erga Omnes

151. Furthermore, the prohibition of torture imposes upon States obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

152. Where there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations. The existence of such international mechanisms makes it possible for compliance with international law to be ensured in a neutral and impartial manner.

(c) The Prohibition Has Acquired the Status of Jus Cogens

153. While the erga omnes nature just mentioned appertains to the area of international enforcement (lato sensu), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.[170] The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio,[171] and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.[172] If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of

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obedience imposed by the individual State".[173]

156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty- making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in Eichmann, and echoed by a USA court in Demjanjuk, "it is the universal character of the crimes in question i.e. international crimes which vests in every State the authority to try and punish those who participated in their commission".[174]

157. It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.

4. Torture Under Article 3 of the Statute

158. Torture is not specifically prohibited under Article 3 of the Statute. As noted in paragraph 133 of this Judgement, Article 3 constitutes an `umbrella rule', which makes an open-ended reference to all international rules of humanitarian law. In its "Decision On The Defendant's Motion To Dismiss Counts 13 and 14 of The Indictment (Lack Of Subject Matter Jurisdiction)" issued on 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction over alleged violations of Article 3 of the Statute.

5. The Definition of Torture

159. International humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in article 1(1) of the 1984 Torture Convention whereby:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

160. This definition was regarded by Trial Chamber I of ICTR, in *Prosecutor v. Jean-Paul Akayesu*, hereafter *"Akayesu"*, as sic et simpliciter applying to any rule of international law on torture, including the relevant provisions of the ICTR Statute.[175] However, attention should be drawn to the fact that article 1 of the Convention explicitly provides that the definition contained therein is "for the purposes of this Convention". It thus seems to limit the purport and contents of that definition to the Convention

solely. An extra-conventional effect may however be produced to the extent that the definition at issue codifies, or contributes to developing or crystallising customary international law. Trial Chamber II of the International Tribunal has rightly noted in *Delalic* that indeed the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has hence concluded that that definition "thus reflects a consensus which the Trial Chamber considers to be representative of customary international law".[176] This Trial Chamber shares such conclusion, although on legal grounds that it shall briefly set out. First of all, there is no gainsaying that the definition laid down in the Torture Convention, although deliberately limited to the Convention, must be regarded as authoritative, *inter alia*, because it spells out all the necessary elements implicit in international rules on the matter. Secondly, this definition to a very large extent coincides with that contained in the United Nations Declaration on Torture of 9 December 1975, hereafter "Torture Declaration".[177] It should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition. Thirdly, a substantially similar definition can be found in the Inter- American Convention.[178] Fourthly, the same definition has been applied by the United Nations Special Rapporteur and is in line with the definition suggested or acted upon by such international bodies as the European Court of Human Rights[179] and the Human Rights Committee.[180]

161. The broad convergence of the aforementioned international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention.

162. The Trial Chamber considers however that while the definition referred to above applies to any instance of torture, whether in time of peace or of armed conflict, it is appropriate to identify or spell out some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. The Trial Chamber considers that the elements of torture in an armed conflict require that torture:

> (i)consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
> (iv) it must be linked to an armed conflict;
> (v)at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority- wielding entity.

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity. The proposition is also supported by some general provisions of such important international treaties as the Geneva Conventions and Additional Protocols, which consistently aim at protecting persons not taking part, or no longer taking part, in the hostilities from "outrages upon personal dignity".[181] The notion of humiliation is, in any event close to the notion of intimidation, which is explicitly referred to in the Torture Convention's definition of torture.

163. As evidenced by international case law, the reports of the United Nations Human Rights

Committee[182] and the United Nations Committee Against Torture, those of the Special Rapporteur,[183] and the public statements of the European Committee for the Prevention of Torture,[184] this vicious and ignominious practice can take on various forms. International case law,[185] and the reports of the United Nations Special Rapporteur[186] evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. In human rights law, in such situations the rape may amount to torture, as demonstrated by the finding of the European Court of Human Rights in *Aydin*[187] and the Inter-American Court of Human Rights in *Meijia.*[188]

164. Depending upon the circumstances, under international criminal law rape may acquire the status of a crime distinct from torture; this will be covered in the following section of the Judgement.

## C. Rape and Other Serious Sexual Assaults in International Law

### 1. International Humanitarian Law

165. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949,[189] Additional Protocol I of 1977[190] and Additional Protocol II of 1977.[191] Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties.[192]

166. At least common article 3 to the Geneva Conventions of 1949, which implicitly refers to rape, and article 4 of Additional Protocol II, which explicitly mentions rape, apply *qua* treaty law in the case in hand because Bosnia and Herzegovina ratified the Geneva Conventions and both Additional Protocols on 31 December 1992. Furthermore, as stated in paragraph 135 above, on 22 May 1992, the parties to the conflict undertook to observe the most important provisions of the Geneva Conventions and to grant the protections afforded therein.

167. In addition, the Trial Chamber notes that rape and inhuman treatment were prohibited as war crimes by article 142 of the Penal Code of the SFRY and that Bosnia and Herzegovina, as a former Republic of that federal State, continues to apply an analogous provision.

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code[193] and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the `Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults.[194] The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in *Yamashita*,[195] along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

169. It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators.

2. International Human Rights Law

170. No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in all of the relevant international treaties.[196] The right to physical integrity is a fundamental one, and is undeniably part of customary international law.

171. In certain circumstances, however, rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture, as stated above in paragraph 163.

3. Rape Under the Statute

172. The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war[197] or an act of genocide,[198] if the requisite elements are met, and may be prosecuted accordingly.

173. The all-embracing nature of Article 3 of the Statute has already been discussed in paragraph 133 of this Judgement. In its "Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject- Matter Jurisdiction)" of 29 May 1998, the Trial Chamber held that Article 3 of the Statute covers outrages upon personal dignity including rape.

4. The Definition of Rape

174. The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression".[199] This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.[200]

175. No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and "any form of indecent assault" on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, *inter alia*, confirmed by Article 5 of the International Tribunal's Statute, which explicitly provides for the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as "other inhuman acts".[201]

176. Trial Chamber I of the ICTR has held in Akayesu that to formulate a definition of rape in international law one should start from the assumption that "the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts".[202] According to that Trial Chamber, in international law it is more useful to focus "on the conceptual framework of State

sanctioned violence".[203] It then went on to state the following:

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[204]

This definition has been upheld by Trial Chamber II *quater* of the International Tribunal in *Delalic*.[205]

177. This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings",[206] account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

179. The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault: the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a woman,[207] others provide that rape can be committed against a victim of either sex.[208] The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ.[209] There are also jurisdictions which interpret the actus reus of rape broadly.[210] The provisions of civil law jurisdictions often use wording open for interpretation by the courts.[211] Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim:[212] force is given a broad interpretation and includes rendering the victim helpless.[213] Some jurisdictions indicate that the force or intimidation can be directed at a third person.[214] Aggravating factors commonly include causing the death of the victim, the fact that there

were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.

181. It is apparent from our survey of national legislation that, in spite of inevitable discrepancies, most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus.

182. A major discrepancy may, however, be discerned in the criminalisation of forced oral penetration: some States treat it as sexual assault, while it is categorised as rape in other States. Faced with this lack of uniformity, it falls to the Trial Chamber to establish whether an appropriate solution can be reached by resorting to the general principles of international criminal law or, if such principles are of no avail, to the general principles of international law.

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex - and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules - then he is not adversely affected by the categorisation of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.

185. Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

### 5. Individual Criminal Responsibility

187. It follows from Article 7(1) of the Statute that not only the commission of rape or serious sexual assault, but also the planning, ordering or instigating of such acts, as well as aiding and abetting in the perpetration, are prohibited.

188. There has been some variation in the Prosecution's allegations concerning responsibility for direct perpetration. In the "Prosecutor's Reply Re: Article 7(1) of the Statute of the International Tribunal" filed on 31 March 1998, the Prosecution claimed that it would not be trying the accused for committing rape as the direct perpetrator.[215] However, in the opening statement the following assertion was made: "We say that by conducting an interrogation under the circumstances described by Witness A, by transferring the victim to another room, by bringing in the other person for the confrontation, and remaining while further beating and sexual abuse occurred, marks (sic) the accused as a direct perpetrator committing the crimes of torture and outrages upon personal dignity, including rape".[216]

189. The Trial Chamber finds that as the Prosecution has relied on Article 7(1) without specification and left the Trial Chamber the discretion to allocate criminal responsibility, it is empowered and obliged, if satisfied beyond reasonable doubt that the accused has committed the crimes alleged against him, to convict the accused under the appropriate head of criminal responsibility within the limits of the Amended Indictment.

## D. Aiding and Abetting

### 1. Introduction

190. The accused is charged with torture and outrages upon personal dignity, including rape. For the purposes of the present case however, it is necessary to define "aiding and abetting" as used in Article 7 (1) of the Statute.

191. Since no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility. In particular, it must establish both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the actus reus of aiding and abetting, and also the relevant mens rea required to accompany this action for responsibility to ensue.

### 2. Actus Reus

192. With regard to the *actus reus*, the Trial Chamber must examine whether the assistance given by the aider and abettor need be tangible in nature or may consist only of encouragement or moral support. The Trial Chamber must also examine the proximity required between the assistance provided and the commission of the criminal act. In particular, it will have to consider whether the actions of the aider and abettor need to have a causal effect, so that without his contribution the offence would not be committed, or whether the acts of the aider and abettor need simply facilitate the commission of the offence in some way.

(a) International Case Law

(i) Introduction

193. Little light is shed on the definition of aiding and abetting by the international instruments providing for major war trials: the London Agreement,[217] the Charter of the International Military Tribunal for the Far East, establishing the Tokyo Tribunal,[218] and Control Council Law No. 10. It therefore becomes necessary to examine the case law.

194. For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.

195. First of all, there are the cases stemming from US military commissions or, in territory occupied by US forces, by courts and tribunals set up by the military government. While the military commissions operated under different directives within each theatre of US military operations, each applied a provision identical to that of the London Agreement with relation to complicity. In occupied territories, the courts and tribunals operated under the terms of Control Council Law No. 10.

196. The Trial Chamber will also rely on case law from the British military courts for the trials of war criminals, whose jurisdiction was based on the Royal Warrant of 14 June 1945,[219] which provided that the rules of procedure to be applied were those of domestic military courts, unless otherwise specified. In fact, unless otherwise provided,[220] the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue. However, there is sufficient similarity between the law applied in the British cases and under Control Council Law No. 10 for these cases to merit consideration. The British cases deal with forms of complicity analogous to that alleged in the present case. The term used to describe those liable as accomplices (in killing) is that they were "concerned in the killing".

197. Cases heard under Control Council Law No. 10, either by the German Supreme Court in the British Occupied Zone, or by German courts in the French Occupied Zone are also material to the Trial Chamber's analysis.

198. Finally, the International Tribunal has on a previous occasion examined the question of complicity under its Statute, namely in the Opinion and Judgement of 7 May 1997 in the case of *Prosecutor v. Dusko Tadic*,[221] hereafter *"Tadic Judgement"*.

(ii) Nature of Assistance

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199. The Trial Chamber will first examine the nature of the assistance required to establish *actus reus*. The cases which follow indicate that in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime.

200. In the British case of *Schonfeld*,[222] four of the ten accused were found guilty of being "concerned in the killing of" three Allied airmen, who had been found hiding in the home of a member of the Dutch resistance. All four claimed that their purpose in visiting the scene had been the investigation and arrest of the Allied airmen. One admitted to shooting the three airmen but claimed it was in self- defence; he was found guilty and sentenced to death. The roles of the three others were less direct. One drove a car to the scene and was the first to enter the house. Another had obtained the original information, searched a different house for the airmen earlier and claimed to have stood guard at the back entrance to the house along with the fourth convicted person. All except one denied having fired any shots themselves.

201. The court did not make clear the grounds on which it found these three to have been "concerned in the killing".[223] However, the Advocate General, citing the position in English law, outlined the role of an accessory who is not present at the scene but procures, counsels, commands or abets another to commit the offence, and that of an aider and abettor, either of which could have formed the basis of the court's decision. In doing so he gave an example of how an individual may participate without giving tangible assistance:

if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting.[224]

202. Again, in giving "additional confidence to his companions" the defendant facilitates the commission of the crime, and it is this which constitutes the actus reus of the offence.

203. In the British case of Rohde[225] six persons were found guilty of being "concerned in the killing" of four British women prisoners in German hands. The women were executed by lethal injection and their bodies disposed of in the prison camp crematorium. In defining the term "concerned in the killing", the Judge Advocate explained that actual presence at the crime scene was not necessary to be "concerned in the killing". He gave the example of a lookout, who would be "concerned in the killing" by providing a service to the commission of the crime in the knowledge that the crime was going to be committed.[226]

204. In the case of one of the accused, assistance ex post facto was found to be sufficient for criminal responsibility. As this was not the position under English law, the inference is warranted that the court applied a different law to these international crimes.[227] The service provided by the cremator may be analogous to that of the lookout, in that the knowledge that the bodies will be disposed of, in the same way that the knowledge that they will be warned of impending discovery in the lookout scenario, reassures the killers and facilitates their commission of the crime in some significant way.

205. Guidance can also be derived from the following cases, which were heard under the terms of Control Council Law No. 10.[228] In the *Synagogue* case, decided by the German Supreme Court in the British Occupied Zone, one of the accused was found guilty of a crime against humanity (the devastation of a synagogue)[229] although he had not physically taken part in it, nor planned or ordered it. His intermittent presence on the crime-scene, combined with his status as an "*alter Kämpfer*" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him.

206. The accused was convicted at first instance of a crime against humanity under the provision on co-perpetration of a crime (*"Mittäterschaft"*) of the then German penal code (Art. 47 *Strafgesetzbuch*). The conviction was confirmed on appeal. The appellate decision noted that the accused was a militant Nazi. The court went on to find that he knew of the plan at least two hours before the commission of the crime.

207. It may be inferred from this case that an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity.

208. The *Synagogue* case may be contrasted with the *Pig-cart parade* case, also from the German Supreme Court in the British Occupied Zone. The accused, P had attended, as a spectator in civilian dress, a SA (*Stürmabteilung*) "parade" in which two political opponents of the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei)* were exposed to public humiliation. P had followed the "parade" without taking any active part. The court found that P,

> followed the parade only as a spectator in civilian clothes, although he was following a service order by the SA for a purpose yet unknown . . . His conduct cannot even with certainty be evaluated as objective or subjective approval. Furthermore, silent approval that does not contribute to causing the offence in no way meets the requirements for criminal liability.[230]

P was found not guilty. He may have lacked the necessary mens rea. But in any event, his insignificant status brought the effect of his "silent approval" below the threshold necessary for the *actus reus*.

209. It appears from the *Synagogue* and *Pig-cart parade* cases that presence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility. This emphasis on the accused's authority was also affirmed in *Akayesu*. *Jean-Paul Akayesu* was the *bourgmestre*, or mayor, of the Commune in which atrocities, including rape and sexual violence, occurred. That Trial Chamber considered this position of authority highly significant for his criminal liability for aiding and abetting: "The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place: . . .".[231] Furthermore, it can be inferred from this finding that assistance need not be tangible. In addition, assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.

210. Mention should also be made of several cases which enable us to distinguish aiding and abetting from the case of co-perpetration involving a group of persons pursuing a common design to commit crimes.

211. The *Dachau Concentration Camp* case was held before a US Tribunal under Control Council Law No. 10.[232] All the accused held some position in the hierarchy running the Dachau concentration camp. While allegations of direct participation in instances of ill-treatment were made against certain accused, and allegations of command responsibility against others, the real basis of the charges was that all the accused had "acted in pursuance of a common design" to kill and mistreat prisoners, and hence to commit war crimes.

212. The organised and official nature of the system by which war crimes were perpetrated in this case adds a specific element to the "complicity" of the accused. The report of the case by the United Nations War Crimes Commission isolates three elements necessary to establish guilt in each case. The first was the existence of a system to ill-treat the prisoners and commit the various crimes alleged; the second was the accused's knowledge of the nature of this system; and the third was that the accused "encouraged, aided and abetted or participated" in enforcing the system. Once the existence of the system had been established, a given accused was potentially liable for his participation in this system. The roles of the accused ranged from camp commanders to guards and prisoner functionaries and all were found guilty, with the difference in the levels of participation reflected in the sentences. It would seem that the holding of any role in the administration of the camps was sufficient to constitute encouraging, aiding and abetting or participating in the enforcement of the system.

213. The prosecution in the *Dachau Concentration Camp* case, did not base its case on the direct participation of the accused in the crime. Regardless of whether the accused themselves had beaten or murdered the concentration camp inmates, the assistance they afforded to those who did, or the system, formed the basis of their guilt. The level of assistance required was low: any participation in the enterprise was sufficient, although as the accused were all members of staff of the camps, their contribution to the commission of the crimes was tangible - the carrying out of their respective duties - so that none were convicted on the basis of having lent moral support or encouragement alone.

214. The same approach underlies the judgement of the German courts in the *Auschwitz Concentration Camp*[233] trial. In summarising with approval the findings of the court of first instance in the case of the accused Höcker, the German Supreme Court stated:

> The assize court found that the accused's deeds had been proved on the basis of the fact that the accused was adjutant to the camp commander, and that participation at the arrival of the detainees were part of the adjutant's duties, as well as on the basis of the testimony of the witnesses Wal. and Pa., who witnessed such participation.[234]

215. In the same case the court remarked how the accused Mulka, by means of his presence on the ramp at the moment of arrival of the detainees "psychologically strengthened the SS-men"[235] in charge of separating the Jews destined for labour from those destined for the gas chambers. However, account was taken of the accused's role as adjutant to the camp commander, of his administrative duties related to the preparation of the mass killings, and of the specific characteristics of concentration camp trials outlined above.

216. This distinction between participation in a common criminal plan or enterprise, on the one hand, and aiding and abetting a crime, on the other, is also supported by the Rome Statute for an International Criminal Court,[236] hereafter "Rome Statute", adopted on 17 July 1998 by the Rome Diplomatic Conferences. Article 25 of the Rome Statute distinguishes between, on the one hand, a person who "contributes to the commission or attempted commission of . a crime by a group of persons acting with a common purpose" where the contribution is intentional and done with the purpose of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime",[237] from, on the other hand, a person who, "for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission".[238] Thus, two separate categories of liability for criminal participation appear to have crystallised in international law - co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.

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(iii) Effect of Assistance on the Act of the Principal

217. Back to aiding and abetting, in the *Einsatzgruppen* case,[239] heard by a US Military Tribunal sitting at Nuremberg, all of the accused except for one (Graf) were officers charged with war crimes and crimes against humanity pursuant to Control Council Law No. 10. The Tribunal held that the acts of the accomplices had to have a substantial effect on those of the principals to constitute the *actus reus* of the war crimes and crimes against humanity charged. This conclusion is illustrated by the cases of four of the accused: Klingelhoefer, Fendler, Ruehl and Graf. Klingelhoefer held a variety of positions, the least important of which was that of interpreter. The court said that even if this were his only function,

> it would not exonerate him from guilt because in locating, evaluating and turning over lists of Communist party functionaries to the executive of his organisation he was aware that the people listed would be executed when found.[240]

218. Fendler served in one of the Kommandos of the Einsatzgruppen for a period of seven months. The prosecution case against him was not that he himself conducted an execution but rather "that he was part of an organisation committed to an extermination programme".[241] The Court noted that:

> The defendant knew that executions were taking place. He admitted that the procedure which determined the so-called guilt of a person which resulted in him being condemned to death was "too summary". But, there is no evidence that he ever did anything about it. As the second highest ranking officer in the Kommando, his views could have been heard in complaint or protest against what he now says was a too summary procedure, but he chose to let the injustice go uncorrected.[242]

Both of these defendants were found guilty.

219. The cases of Ruehl and Graf provide a contrast which helps delineate the *actus reus* of the offence. The Tribunal held that both had the requisite knowledge of the criminal activities of the organisations of which they were a part. Ruehl's position, however, was not such as to "control, prevent, or modify" those activities. His low rank failed to "place him automatically into a position where his lack of objection in any way contributed to the success of any executive operation". [243]He was found not guilty.

220. Graf was a non-commissioned officer. The court held that:

> Since there is no evidence in the record that Graf was at any time in a position to protest against the illegal actions of the others, he cannot be found guilty as an accessory under counts one and two [war crimes and crimes against humanity] of the indictment.[244]

221. It is clear, then, that knowledge of the criminal activities of the organisation combined with a role in that organisation was not sufficient for complicity in this case and that the defendants' acts in carrying out their duties had to have a substantial effect on the commission of the offence for responsibility to ensue. This might be because their failure to protest made some difference to the course of events, or, in the case of Klingelhoefer, that his transmission of the lists of names led directly to the execution of the members of those lists.

222. In the British case of *Zyklon B*,[245] the three accused were charged with supplying poison gas used for the extermination of allied nationals interned in concentration camps, in the knowledge that the gas was to be so used. The owner and second-in-command of the firm were found guilty; Drosihn, the firm's

first gassing technician, was acquitted. The Judge Advocate set out the issue of Drosihn's complicity as turning on,

> whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was put could make him guilty.[246]

223. This clearly requires that the act of the accomplice has at least a substantial effect on the principal act - the use of the gas to murder internees at Auschwitz - in order to constitute the *actus reus*. The functions performed by Drosihn in his employment as a gassing technician were an integral part of the supply and use of the poison gas, but this alone could not render him liable for its criminal use even if he was aware that his functions played such an important role in the transfer of gas. Without influence over this supply, he was not guilty. In other words, *mens rea* alone is insufficient to ground a criminal conviction.

224. In *S. et al.*,[247] hereafter *"Hechingen Deportation"*, heard by a German court in the French occupied zone, five accused were charged with complicity in the mass deportation of Jews in 1941 and 1942 as a crime against humanity under Control Council Law No. 10.[248] The accused, S, was the local administrative authority responsible for organising the execution of Gestapo orders. He had complied with a Gestapo decree concerning the deportations. The court of first instance found S guilty of aiding and abetting the Gestapo in its criminal activity. His objection that his conduct in no way contributed to the crimes, because others would have taken his place if he had refused to comply with the Gestapo decree, was dismissed. The court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another.[249]

225. The Court of First Instance convicted also three other accused, Ho., K and B, female low-level government employees, who had been ordered to search Jewish women for valuables and jewellery before deportation[250] (their conviction was later quashed by the appeals court on the basis of different legal findings concerning the *mens rea* for aiding and abetting).[251]

226. Finally, in the *Tadic Judgement*, Trial Chamber II of the International Tribunal held that there was a basis in customary international law for holding an individual criminally responsible in respect of the various types of participation falling short of primary involvement, listed in Article 7(1) of the Statute.[252] The Trial Chamber examined a number of the post-Second World War trials and found that there was a requirement both that the conduct of the accused contribute to the commission of the illegal act, and that his participation directly and substantially effect the commission of the offence. When applying these criteria in the section on legal findings, the Trial Chamber held that the accused "intentionally assisted directly and substantially in the common purpose of the group" to commit the offence. [253]

(b) International Instruments

227. The two international instruments useful for these purposes are the 1996 Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission, and the Rome Statute. Neither instrument is legally binding internationally. The Draft Code was adopted in 1996 by the United Nations International Law Commission, a body consisting of outstanding experts in international law, including governmental legal advisers, elected by the United Nations General Assembly. The Draft Code was taken into account by the General Assembly: in its resolution 51 (160) of 30 January 1997 it expressed its "appreciation" for the completion of the Draft Code and among other

things drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the Draft Code to their work[254] In the light of the above the Trial Chamber considers that the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain contents or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world. As for the Rome Statute, at present it is still a non-binding international treaty (it has not yet entered into force). It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998.[255] In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.

228. The Code of Crimes against the Peace and Security of Mankind deals with aiding and abetting in article 2(3)(d), which would impose criminal responsibility upon an individual who "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission".[256]

229. In the absence of specification, it appears that assistance can be either physical or in the form of moral support. Encouragement given to the perpetrators may be punishable, even if the abettor did not take any tangible action, provided it "directly and substantially" assists in the commission of a crime. This proposition is also supported by a passage from the International Law Commission's Commentary concerning ex post facto assistance:

> The Commission concluded that complicity could include aiding, abetting or assisting ex post facto, if this assistance had been agreed upon by the perpetrator and the accomplice prior to the perpetration of the crime.[257]

230. This conclusion implies that action which decisively encourages the perpetrator is sufficient to amount to assistance: the knowledge that he will receive assistance during or after the event encourages the perpetrator in the commission of the crime. From this perspective, willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator.[258]

231. The International Law Commission's Commentary also states that "participation of an accomplice must entail assistance which facilitates the commission of a crime *in some significant way*".[259] The word "facilitates" suggests that it is not necessary for the conduct of the aider and abettor to cause the commission of the crime; it need not be a *conditio sine qua non* of the crime. The "directly and substantially" requirement in article 2, and the word "significant" used in the International Law Commission Commentary, however, clearly exclude any marginal participation. Article 25(3), in particular paragraphs (c) and (d), of the Rome Statute deals with aiding and abetting:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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[. . . ]

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

[. . .. ]

This wording is less restrictive than the Draft Code, which limits aiding and abetting to assistance which "facilitates in some significant way", or "directly and substantially" assists, the perpetrator. Article 25 of the Rome Statute, like the Draft Code, also clearly contemplates assistance in either physical form or in the form of moral support. Indeed, the word "abet" includes mere exhortation or encouragement.

(c) Conclusion

232. On the issue of the nature of assistance rendered, the German cases suggest that the assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals. This is supported by the provisions of the International Law Commission Draft Code. In view of this, the Trial Chamber believes the use of the term "direct" in qualifying the proximity of the assistance and the principal act to be misleading as it may imply that assistance needs to be tangible, or to have a causal effect on the crime. This may explain why the word "direct" was not used in the Rome Statute's provision on aiding and abetting.

233. On the effect of the assistance given to the principal, none of the cases above suggests that the acts of the accomplice need bear a causal relationship to, or be a *conditio sine qua non* for, those of the principal. The suggestion made in the *Einsatzgruppen* and *Zyklon B* cases is that the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal. Having a role in a system without influence would not be enough to attract criminal responsibility, as demonstrated by the case of the defendant Ruehl in the *Einsatzgruppen* case. This interpretation is supported by the German cases cited.

234. The position under customary international law seems therefore to be best reflected in the proposition that the assistance must have a substantial effect on the commission of the crime. This is the position adopted by the Trial Chamber.

235. In sum, the Trial Chamber holds that the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.

3. Mens Rea

(a) International Case Law

236. With regard to mens rea, the Trial Chamber must determine whether it is necessary for the accomplice to share the mens rea of the principal or whether mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute mens rea in aiding and abetting the crime. The case law indicates that the latter will suffice.

237. For example in the Einsatzgruppen case[260] knowledge, rather than intent, was held to be the requisite mental element.

238. The same position was taken in *Zyklon B* where the prosecution did not attempt to prove that the accused acted with the intention of assisting the killing of the internees. It was accepted that their purpose was to sell insecticide to the SS (for profit, that is a lawful goal pursued by lawful means). The charge as accepted by the court was that they knew what the buyer in fact intended to do with the product they were supplying.

239. Two of the not guilty verdicts in *Schonfeld* also provide an indication of the mens rea necessary to amount to being "concerned in the killing". Both concerned drivers who claimed to have followed instructions without knowing the purpose of the mission, and were therefore found not guilty. Despite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so.

240. In the *Hechingen Deportation* case, the court of first instance considered the *mens rea* required for aiding and abetting and concluded that this mental element encompassed both the knowledge of the crime being committed by the principals and the awareness of supporting, by aiding and abetting, the criminal conduct of the principals.[261] As mentioned above, the subsequent acquittal of the accused Ho., K., and B. on appeal was based on a different legal standard concerning the mens rea of those accused, requiring the aider and abettor to have acted out of the same cast of mind as the principal.[262]

241. Finally, in the *Tadic Judgment* it was found that the test of mens rea which emerged from the post-Second World War trials is "awareness of the act of participation coupled with a conscious decision to participate".[263] The requirement adopted by the Trial Chamber was that the mental element for aiding and abetting consists of a knowing participation in the commission of an offence.[264]

(b) International Instruments

242. Article 2(3)(d) of the International Law Commission's Draft Code on Crimes and Offences Against Mankind, provides that the mens rea required is that the assistance be given "knowingly". The Commentary adds:

> Thus, an individual who provides some assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable under the present sub-paragraph.[265]

243. Therefore, it is not necessary for an aider and abettor to meet all the requirements of mens rea for a principal perpetrator. In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct.

244. Reference should also be made to article 30 of the Rome Statute, which provides that, "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".[266]

(c) Conclusions

245. The above analysis leads the Trial Chamber to the conclusion that it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime. This is particularly apparent from all the cases in which persons were convicted for having driven victims and perpetrators to the site of an execution. In those cases the prosecution did not prove that the driver drove for the purpose of assisting in the killing, that is, with an intention to kill. It was the knowledge of the criminal purpose of the executioners that rendered the driver liable as an aider and abettor. Consequently, if it were not proven that a driver would reasonably have known that the purpose of the trip was an unlawful execution, he would be acquitted.

246. Moreover, it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.

247. Knowledge is also the requirement in the International Law Commission Draft Code, which may well reflect the requirement of mens rea in customary international law. This is the standard adopted by this Tribunal in the Tadic Judgement, although sometimes somewhat misleadingly expressed as "intent".[267]

248. One exception to this requirement of knowledge is the *Rohde* case, which appears to require no mens rea at all. However, this case is based on English law and procedure under the Royal Warrant. Furthermore, it is out of line with the other British cases, which do require knowledge. At the other end of the scale is the appeal court decision in the Hechingen Deportation case, which required that the accomplice share the mens rea of the perpetrator. However, the high standard proposed by this case is not reflected in the other cases.

249. In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.

### E. How to Distinguish Perpetration of Torture from Aiding and Abetting Torture

250. The definitions and propositions concerning aiding and abetting enunciated above apply equally to

rape and to torture, and indeed to all crimes. Nevertheless, the Trial Chamber deems it useful to address the issue of who may be held responsible for torture as a perpetrator and who as an aider and abettor, since in modern times the infliction of torture typically involves a large number of people, each performing his or her individual function, and it is appropriate to elaborate the principles of individual criminal responsibility applicable thereto.

251. Under current international law, individuals must refrain from perpetrating torture or in any way participating in torture.

252. To determine whether an individual is a perpetrator or co-perpetrator of torture or must instead be regarded as an aider and abettor, or is even not to be regarded as criminally liable, it is crucial to ascertain whether the individual who takes part in the torture process also *partakes of the purpose behind torture* (that is, acts with the intention of obtaining information or a confession, of punishing, intimidating, humiliating or coercing the victim or a third person, or of discriminating, on any ground, against the victim or a third person). If he does not, but gives some sort of assistance and support with the knowledge however that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture. Arguably, if the person attending the torture process neither shares in the purpose behind torture nor in any way assists in its perpetration, then he or she should not be regarded as criminally liable (think for example of the soldier whom a superior has ordered to attend a torture session in order to determine whether that soldier can stomach the sight of torture and thus be trained as a torturer).

253. These legal propositions, which are based on a logical interpretation of the customary rules on torture, are supported by a teleological construction of these rules. To demonstrate this point, account must be taken of some modern trends in many States practicing torture: they tend to "compartmentalise" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.

254. International law, were it to fail to take account of these modern trends, would prove unable to cope with this despicable practice. The rules of construction emphasising the importance of the object and purpose of international norms lead to the conclusion that international law renders all the aforementioned persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances. In other words, the nature of the crime and the forms that it takes, as well as the intensity of international condemnation of torture, suggest that in the case of torture all those who in some degree participate in the crime and in particular take part in the pursuance of one of its underlying purposes, are equally liable.[268]

255. This, it deserves to be stressed, is to a large extent consistent with the provisions contained in the Torture Convention of 1984 and the Inter-American Convention of 1985, from which it can be inferred that they prohibit not only the physical infliction of torture but also any deliberate participation in this practice.

256. It follows, *inter alia*, that if an official interrogates a detainee while another person is inflicting

severe pain or suffering, the interrogator is as guilty of torture as the person causing the severe pain or suffering, even if he does not in any way physically participate in such infliction. Here the criminal law maxim *quis per alium facit per se ipsum facere videtur* (he who acts through others is regarded as acting himself) fully applies.

257. Furthermore, it follows from the above that, at least in those instances where torture is practiced under the pattern described supra, that is, with more than one person acting as co-perpetrators of the crime, accomplice liability (that is, the criminal liability of those who, while not partaking of the purpose behind torture, may nevertheless be held responsible for encouraging or assisting in the commission of the crime) may only occur within very narrow confines. Thus, it would seem that aiding and abetting in the commission of torture may only exist in such very limited instances as, for example, driving the torturers to the place of torture in full knowledge of the acts they are going to perform there; or bringing food and drink to the perpetrators at the place of torture, again in full knowledge of the activity they are carrying out there. In these instances, those aiding and abetting in the commission of torture can be regarded as accessories to the crime. By contrast, at least in the case we are now discussing, all other varying forms of direct participation in torture should be regarded as instances of co-perpetration of the crime and those co-perpetrators should all be held to be principals. Nevertheless, the varying degree of direct participation as principals may still be a matter to consider for sentencing purposes.

Thus to summarise the above:

(i) to be guilty of torture as a perpetrator (or co- perpetrator), the accused must participate in an integral part of the torture and partake of the purpose behind the torture, that is the intent to obtain information or a confession, to punish or intimidate, humiliate, coerce or discriminate against the victim or a third person.

(ii) to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place.

## VII. LEGAL FINDINGS

### A. Relevant Criteria

#### 1. Applicability of Article 3 of the Statute

258. It is well established that for international humanitarian law to apply there must first be an armed conflict. The Trial Chamber has found that there was an armed conflict between the HVO and the ABiH at the material time. For the purposes of Article 3 of the Statute, the nature of this armed conflict is irrelevant. The Appeals Chamber in the *Tadic Jurisdiction Decision* held that it does not matter whether the serious violation occurred in the context of an international or internal armed conflict, provided the following requirements are met:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting

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important values, and the breach must involve grave consequences for the victim;
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[269]

259. The Trial Chamber has found that the International Tribunal has jurisdiction over torture and outrages upon personal dignity including rape under Article 3 of its Statute. There is therefore temporal, territorial and subject matter jurisdiction and the Trial Chamber is properly seised of this matter.

2. The Elements of Torture

260. These have been identified by the Trial Chamber in paragraph 162 of this Judgement.

3. The Elements of Rape

261. These have been identified by the Trial Chamber in paragraph 185 of this Judgement.

## B. Status of Those Involved

262. The accused was a commander of the Jokers, a special unit of the HVO. He was an active combatant and had engaged in hostilities against the Moslem community in the Lasva Valley area, including the attack on the village of Ahmici, where he personally participated in expelling Moslems from their homes in furtherance of the armed conflict already described. Accused B was a commander in one of the units of the HVO. Witness A was a Moslem civilian and non-combatant who was arrested and detained by the Jokers. Witness D, a Croatian, was a combatant with the HVO but was arrested by the Jokers and detained on suspicion of having betrayed them to the ABiH who had captured him for a period of time. Witness E, a Croatian, was a non-combatant who had been arrested by the ABiH after straying into their territory and was detained by the Jokers for questioning upon his release.

## C. The Amended Indictment

263. The Amended Indictment against the accused charges him with two counts, Count 13 and Count 14. The citation of events in the paragraphs in the Amended Indictment culminate in paragraphs 25 and 26 respectively supporting the charges in the counts. They read as follows:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA,[REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
>
> 26. Then Witness A and Victim B,[270] a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail [REDACTED]actions.

1. Count 13: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR (torture) recognised by Article 3 of the Statute

264. Count 13 is based on what happened in the large room and in the pantry of the Holiday Cottage. The Trial Chamber is satisfied that the accused was present in the large room and interrogated Witness A, whilst she was in a state of nudity. As she was being interrogated, Accused B rubbed his knife on the inner thighs of Witness A and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation by the accused. The accused did not stop his interrogation, which eventually culminated in his threatening to confront Witness A with another person, meaning Witness D and that she would then confess to the allegations against her. To this extent, the interrogation by the accused and the activities of Accused B became one process. The physical attacks, as well as the threats to inflict severe injury, caused severe physical and mental suffering to Witness A.

265. The intention of the accused, as well as Accused B, was to obtain information which they believed would benefit the HVO. They therefore questioned Witness A about the activities of members of Witness A's family and certain other named individuals, her relationship with certain HVO soldiers and details of her alleged involvement with the ABiH.

266. The Trial Chamber has found that the accused was also present in the pantry where the second phase of the interrogation of Witness A occurred. Witness D was taken there for a confrontation with Witness A to make her confess as 'promised' by the accused in the large room. Both Witness A and Witness D were interrogated by the accused and hit on the feet with a baton by Accused B in the course of this questioning. Accused B again assaulted Witness A who was still naked, before an audience of soldiers. He raped her by the mouth, vagina and anus and forced her to lick his penis clean. The accused continued to interrogate Witness A in the same manner as he had done earlier in the large room. As the interrogation intensified, so did the sexual assaults and the rape.

267. The intention of the accused, as detailed above, was to obtain information from Witness A by causing her severe physical and mental suffering. In relation to Witness D, the accused intended to extract information about his alleged betrayal of the HVO to the ABiH and his assistance to Witness A and her children.

(i) The Trial Chamber finds that in relation to Witness A, the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co- perpetrator by virtue of his interrogation of her as an integral part of the torture. The Trial Chamber finds that the accused tortured Witness A.

(ii) In relation to Witness D, paragraph 26 of the Amended Indictment alleges that having been badly beaten in the Bungalow, he was then taken with Witness A to another room. While the accused continued to interrogate Witness A and Witness D, Accused B beat them both on the feet with a baton. Witness D was then forced to watch Accused B's sexual attacks on Witness A, which have already been described. The physical attacks upon Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering.

268. On the evidence on record, the Trial Chamber finds that the elements of torture have been met. Within the provisions of Article 7(1) and the findings of the Trial Chamber on liability for torture, the accused is a co- perpetrator of torture, he is individually responsible for torture. The Trial Chamber is satisfied that the Prosecution has proved the case against the accused beyond reasonable doubt.

269. The Trial Chamber therefore finds the accused, as a co- perpetrator, guilty of a Violation of the Laws or Customs of War (torture) on Count 13.

2. Count 14: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon personal dignity including rape) recognised by Article 3 of the Statute

270. The rapes committed by Accused B on Witness A were not disputed in any of the details described by the victim and Witness D. What was contested was the presence of the accused, and, to some extent, whether he played any part in their commission. The Trial Chamber has found that Witness A was subjected to rape and serious sexual assaults by Accused B in the course of the interrogation by the accused.

271. The elements of rape, as discussed in paragraph 185 of this Judgement, were met when Accused B penetrated Witness A's mouth, vagina and anus with his penis. Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that any form of captivity vitiates consent. Under Rule 96 of the Rules, it is clear that no corroboration of the evidence of Witness A is required. The Trial Chamber notes that in any case, the evidence of Witness D does confirm the evidence of Witness A in this regard.

272. The Trial Chamber is satisfied that all the elements of rape were met. Again, the rapes and sexual assaults were committed publicly; members of the Jokers were watching and milling around the open door of the pantry. They laughed at what was going on. The Trial Chamber finds that Witness A suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity.

273. The position of the accused has already been discussed. He did not personally rape Witness A, nor can he be considered, under the circumstances of this case, to be a co- perpetrator. The accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him.

274. On the evidence on record, the Trial Chamber is satisfied that the Prosecution has proved its case against the accused beyond reasonable doubt. In accordance with Article 7(1) and the findings of the Trial Chamber that the actus reus of aiding and abetting consists of assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime and that the mens rea required is the knowledge that these acts assist the commission of the offence, the Trial Chamber holds that the presence of the accused and his continued interrogation aided and abetted the crimes committed by Accused B. He is individually responsible for outrages upon personal dignity including rape, a violation of the laws or customs of war under Article 3 of the Statute.

275. The Trial Chamber therefore finds the accused, for aiding and abetting, guilty of a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) on Count 14.

## VIII. SENTENCING

### A. Introduction

276. The accused, Anto Furundzija, has been found guilty on Count 13, a Violation of the Laws or Customs of War (torture), and Count 14, a Violation of the Laws or Customs of War (outrages upon personal dignity including rape) both under Article 3 of the Statute. It is pursuant to these findings of guilt that the Trial Chamber will proceed to sentence him.

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## B. Sentencing Guidelines

277. In determining the appropriate sentence for the accused in this case, the Tribunal is guided by its Statute and Rules. The Statute provides as follows:

> Article 23
> Judgement
>
> 1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
>
> [. . . ]
>
> Article 24
> Penalties
>
> 1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
>
> 2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
>
> [. . . ]

278. The Trial Chamber has also duly considered Rules 100[271] and 101 of the Rules.[272]

## C. Submissions of the Parties

279. Both parties made submissions regarding sentence in open session on 22 June 1998. The Prosecution submitted, in relation to the tortures, that "this goes to the heavier end of gravity for an offence of torture."[273] With regard to the outrages upon personal dignity, the Prosecution called the instances of rape in this case "probably the most severe form of outrage upon personal dignity, and the physical, personal, and sexual integrity of the victim."[274] Other aggravating circumstances mentioned by the Prosecution include the presence of other soldiers during the perpetration of the alleged crimes. According to the Prosecution, there are no mitigating circumstances in this case and it recommends that the accused be sentenced according to the sentencing practice of the former Yugoslavia, without giving any specific recommendation for the length of sentence.

280. The Defence called Dragan [trbac, an employee of the Sector for Civilian Defence in the Federal Ministry of Defence in Sarajevo, who had known the accused as a neighbour in Dubravica since birth.[275] He testified that the accused is married and has a daughter of approximately three years old.[276] He was living with his mother and family in Vitez before his arrest.[277] To his knowledge, the accused was never previously arrested for a crime. Although he was a member of the Territorial Defence and later the HVO,[278] he was never a nationalist.[279] Instead, the witness described him as "well-liked by his peers, communicative, vivacious", and "honest and fair."[280] Apart from this evidence, the Defence made

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no further submissions on sentencing.

## D. Aggravating Circumstances

281. As for the first count, the accused's role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while both were being tortured by Accused B. In such situations, the fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering. Torture is one of the most serious offences known to international criminal law and any sentence imposed must take this into account.

282. In relation to the second count, the Trial Chamber bears in mind that the accused did not himself perpetrate acts of rape, but aided and abetted in the rapes and serious sexual assaults inflicted on Witness A. The circumstances of these attacks were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity. The accused, far from preventing these crimes, played a prominent part in their commission.

283. In conclusion, the Trial Chamber holds that this case presents particularly vicious instances of torture and rape. The Trial Chamber further considers the accused's active role as a commander of the Jokers to be an aggravating factor. Finally, the Trial Chamber considers the fact that Witness A was a civilian detainee and at the complete mercy of her captors to be a further aggravating circumstance.

## E. Mitigating Circumstances

284. The Trial Chamber bears in mind the age of the accused. He was born on 8 July 1969 and is currently 29 years of age. At the time of the commission of the offences in May of 1993, he was 23 years of age. The Trial Chamber has also taken into consideration the evidence given by the witness Dragan [trbac, including the fact that the accused has no previous convictions and is the father of a young child. However, this may be said of many accused persons and cannot be given any significant weight in a case of this gravity.

## F. The General Practice in the Courts of the Former Yugoslavia

285. Sub-Rule 101(B)(iii) requires the Trial Chamber to consider the general practice regarding prison sentences in the courts of the former Yugoslavia. Article 41(1) of the SFRY Penal Code set out the various factors to be taken into account in determining sentence:

> The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, keeping in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment, and particularly: the degree of criminal responsibility; motives for the commission of the offence; the intensity of threat or injury to the protected object; circumstances of the commission of the offence; the perpetrator's past life; the perpetrator's personal circumstances and his behaviour after the commission of the offence; as well as other circumstances relating to the perpetrator.

For this purpose, the Trial Chamber also takes note of Chapter XVI of the 1990 SFRY Penal Code, entitled "Criminal Offences Against Humanity and International Law". Article 142 of that Code lists a number of criminal acts:

1982

> Whoever, in violation of international law in time of war, armed conflict or occupation, orders an attack against the civilian population . . . or killings, tortures, or inhuman treatment of the civilian population . . . compulsion to prostitution or rape . . . shall be punished by no less than five years in prison or by death penalty.[281]

As was held in the case of *Prosecutor v. Dusko Tadic*, hereafter *"Tadic Sentencing Judgement"*:

> [. . . ]the offences of which he has been convicted under Article 3 of the Statute, under Common Article 3 - itself an extension in those Conventions to armed conflicts not of an international character of the fundamental provisions of the grave breaches regime - are generally very similar to those covered by Article 142 of the SFRY Penal Code . . ..[282]

286. The Trial Chamber must itself interpret the SFRY Penal Code as the parties have not presented it with decisions of the courts of the former Yugoslavia dealing with similar situations. It is clear that article 142 allows for the imposition of severe penalties for war crimes, namely "at least five years in prison" or the death penalty. The Trial Chamber notes that by virtue of Article 24 of its Statute, the maximum penalty the International Tribunal may impose is that of life imprisonment, and never the death penalty.[283]

## G. Sentencing Policy of the Chamber

287. Apart from the factors mentioned above, the Trial Chamber bears in mind the severe physical pain and great emotional trauma that Witness A has had to suffer as a consequence of these depraved acts committed against her. It also notes the severe pain and suffering caused to Witness D.

288. It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also punitur ne peccatur (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence.

289. In another case before the International Tribunal, it was remarked that

> the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.[284]

Although this case does not deal with crimes against humanity, the Trial Chamber finds that this reasoning can also apply to war crimes and other serious violations of international humanitarian law.

290. The Trial Chamber is further guided in its determination of sentence by the principle proclaimed as early as in 1764 by Cesare Beccaria: "punishment should not be harsh, but must be inevitable."[285] It is the infallibility of punishment, rather than the severity of the sanction, which is the tool for retribution, stigmatisation and deterrence. This is particularly the case for the International Tribunal; penalties are made more onerous by its international stature, moral authority and impact upon world public opinion, and this punitive effect must be borne in mind when assessing the suitable length of sentence.

1983

291. Finally, none of the above should be taken to detract from the Trial Chamber's support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case.

## H. The Sentence to be Imposed for a Multiple Conviction

292. The question remains, as to how a double conviction reflects on sentencing. The Trial Chamber has found the accused guilty of the two counts with which he has been charged. Pursuant to sub-Rule 101 (C) of the Tribunal's Rules, the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

293. In pronouncing on this matter, the Trial Chamber is under a duty to apply the provisions of the Statute, in particular Article 24(1). Pursuant to article 48 of the former SFRY Penal Code, which is still applied in Bosnia and Herzegovina,[286] if the accused has committed several criminal offences by one act or several offences by several acts, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments.[287]

294. As was held by the Trial Chamber in the Tadic Sentencing Judgement, "(t)he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person".[288] This Trial Chamber notes that in numerous legal systems the penalty inflicted in case of multiple conviction for offences committed by one act, or by several acts which may be considered to form the same transaction, is limited to the punishment provided for the most serious offence.[289]

295. In the present case, Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture for the purpose of aggravating the sentence imposed under Count 13. On the other hand, in assessing the sentence imposed under Count 14, the Trial Chamber has considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore, the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture.

296. In the light of the above observations, the Trial Chamber is inclined to follow the practice of the Tribunal in the Tadic and Delalic cases.[290]

## IX. DISPOSITION

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the TRIAL CHAMBER finds, and imposes sentence, as follows:

With respect to the accused, ANTO FURUNDZIJA:

Count 13: GUILTY of a Violation of the Laws or Customs of War (torture).

For torture as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundzija to 10 years' imprisonment.

1984

Count 14: GUILTY of a Violation of the Laws or Customs of War (outrages upon personal dignity, including rape).

For outrages upon personal dignity, including rape, as a Violation of the Laws or Customs of War, the Trial Chamber sentences Anto Furundzija to 8 years' imprisonment.

The foregoing sentences are to be served concurrently, *inter se*.

**A. Credit for Time Served**

Pursuant to sub-Rule 101(D) of the Rules, a convicted person is entitled to credit "for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal." Anto Furundzija was detained by the authorities in Bosnia and Herzegovina on 18 December 1997, pursuant to a Warrant of Arrest and Order for Surrender issued by Judge Lal Chand Vohrah on 8 December 1995.[291] On 18 December 1997, Anto Furundzija was transferred to the United Nations Detention Center in The Hague, where he has remained in detention throughout the trial. Accordingly, 11 months and 22 days shall be deducted from the sentence today imposed on Anto Furundzija, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Anto Furundzija's sentence, subject to the above mentioned deduction, shall begin to run from today.

**B. Enforcement of Sentences**

Pursuant to Article 27 of the Statute and Rule 103 of the Rules, Anto Furundzija shall serve his sentence in a State designated by the President of the International Tribunal. The transfer of Anto Furundzija to the designated State shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused, Anto Furundzija, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the final appeal by the Appeals Chamber. Until such time as his transfer is effected, Anto Furundzija shall remain in the custody of the International Tribunal, in accordance with Rule 102.

Done in English and French, the English text being authoritative.

_____

Florence Ndepele Mwachande Mumba Presiding

_____

Richard May

_____

Antonio Cassese

Dated this tenth day of December 1998
At The Hague,
The Netherlands.

Seal of the Tribunal

1985

## ANNEX A- Amended Indictment

## THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

**Case: IT-95-17/1-PT**

**Before:**
**Judge Florence Ndepele Mwachande Mumba, Presiding**
**Judge Antonio Cassese**
**Judge Richard May**

**Registrar:**
**Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Date Filed: 2 June 1998**

**THE PROSECUTOR OF THE TRIBUNAL**

**AGAINST**

**ANTO FURUNDZIJA**

## AMENDED INDICTMENT

**Louise Arbour**, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (Tribunal Statute) alleges that:

1. On 6 March 1992, the Republic of Bosnia-Herzegovina ("BiH") declared its independence.

2. From at least 3 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside the Republic of Bosnia- Herzegovina.

3. From at least January 1993 through at least mid-July 1993, the HZ-BZ armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an armed conflict with the armed forces of the government of the Republic of Bosnia-Herzegovina.

4. From the outset of hostilities in January 1993, the HVO attacked villages chiefly inhabited by Bosnian Muslims in the Lasva River Valley region in Central Bosnia- Herzegovina. These attacks resulted in the death and wounding of numerous civilians.

5. In addition, other civilians were detained, transported from their places of residence, forced to perform manual labour, were tortured, subjected to sexual assaults, and other physical and mental abuse. Hundreds of Bosnian Muslim civilians were arrested by the HVO and taken to the locations such as the Vitez Cinema Complex and the Vitez Veterinary Station which were being used as detention facilities.

6. While imprisoned, numerous Bosnian Muslim prisoners were brought to the front lines where HVO soldiers forced them to dig protective trenches to protect HVO soldiers from being shot by BiH snipers.

1986

On several occasions Bosnian Muslim prisoners were killed and wounded while digging these protective trenches.

7. One of the locations relevant to this indictment where Bosnian Muslim prisoners were forced to dig trenches was at Kratine, a small hamlet in the Vitez municipality.

THE ACCUSED

8. [REDACTED]

9. ANTO FURUNDZIJA was born in Travnik on 8 July 1969, and currently resides in Dubravica, Vitez. During the war, he was a commander of the JOKERS working out of their headquarters (the "Bungalow") in Nadioci near Vitez.

10. [REDACTED ]

11. [REDACTED]

GENERAL ALLEGATIONS

12. At all times relevant to this indictment, a state of international armed conflict and partial occupation existed in the Republic of Bosnia-Herzegovina in the territory of the former Yugoslavia.

13. All acts or omissions set forth herein as grave breaches of the Geneva Conventions of 1949 (grave breaches) and recognised by Article 2 of the Statute of the Tribunal occurred during that armed conflict and partial occupation.

14. At all times relevant to this indictment, the victims referred to in the charges contained herein were persons protected by the Geneva Conventions of 1949.

15. At all times relevant to this indictment, the accused were required to abide by all laws or customs governing the conduct of war.

16. Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.

17. The general allegations contained herein are incorporated into each of the charges set forth below.

THE CHARGES

COUNTS 1 - 2
(UNLAWFUL CONFINEMENT OF CIVILIANS)

18. [REDACTED]

COUNTS 3 - 4
(INHUMANE AND CRUEL TREATMENT)

1987

19. [REDACTED]

COUNTS 5 - 8 (TORTURE AND MURDER)

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

COUNTS 9 - 11 (TORTURE/RAPE)

23. [REDACTED]

24. [REDACTED]

COUNTS 12 - 14 (TORTURE/RAPE)

25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDZIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDZIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.

26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While FURUNDZIJA continued to interrogate Witness A and Victim B, REDACTED beat Witness A and Victim B on the feet with a baton. Then REDACTED forced Witnesses A to have oral and vaginal sexual intercourse with him. FURUNDZIJA was present during this entire incident and did nothing to stop or curtail REDACTED actions.

By the foregoing acts and omissions, [REDACTED] Anto FURUNDZIJA committed the following crimes:

COUNT 12: (WITHDRAWN WITH THE CONSENT OF THE TRIAL CHAMBER).

COUNT 13: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (torture) recognised by Article 3 of the Tribunal Statute.

COUNT 14: a VIOLATION OF THE LAWS OR CUSTOMS OF WAR (outrages upon personal dignity including rape) recognized by Article 3 of the Tribunal Statute.

COUNTS 15 - 17 (TORTURE/RAPE)

27. [REDACTED]

COUNTS 18 - 21 (TORTURE/RAPE, UNLAWFUL CONFINEMENT)

28. [REDACTED]

1988

29. [REDACTED]

COUNT 22 - 25 (TORTURE/RAPE, UNLAWFUL CONFINEMENT)

30. [REDACTED]

2 June 1998
The Hague
The Netherlands

Graham T. Blewitt
Deputy Prosecutor

1989



# NORTH SEA CONTINENTAL SHELF

(Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands)

International Court of Justice
February 20, 1969
General List: Nos. 51 & 52

JUDGMENT OF 20 FEBRUARY 1969
Declarations:
Judge Sir Muhammad Zafrulla Khan
Judge Bengzon
Separate Opinions:
President Bustamante y Rivero
Judge Jessup
Judge Padilla Nervo
Judge Ammoun
Dissenting Opinions:
Vice-President Koretsky
Judge Tanaka
Judge Morelli
Judge Lachs
Judge ad hoc Sorensen

*3 Continental shelf areas in the North Sea-Delimitation as between adjacent States-Advantages and disadvantages of the equidistance method-Theory of just and equitable apportionment-Incompatibility of this theory with the principle of the natural appurtenance of the shelf to the coastal State-Task of the Court relates to delimitation not apportionment.
The equidistance principle as embodied in Article 6 of the 1958 Geneva Continental Shelf Convention-Non-opposability of that provision to the Federal Republic of Germany, either contractually or on the basis of conduct or estoppel.

Equidistance and the principle of natural appurtenance-Notion of closest proximity-Critique of that notion as not being entailed by the principle of appurtenance-Fundamental character of the principle of the continental shelf as being the natural prolongation of the land territory.
Legal history of delimitation-Truman Proclamation-International Law Commission-1958 Geneva Conference-Acceptance of equidistance as a purely conventional rule not reflecting or crystallizing a rule of customary international law-Effect in this respect of reservations article of Geneva Convention-Subsequent State practice insufficient to convert the conventional rule into a rule of customary international law-The opinio juris sive necessitatis, how manifested.

Statement of what are the applicable principles and rules of law-Delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, and so as to give effect to the principle of natural prolongation-Freedom of the Parties as to choice of method-Various factors relevant to the negotiation.
*4 Present: President BUSTAMANTE Y RIVERO; Vice-President KORETSKY; Judges Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, Sir Muhammad ZAFRULLA KHAN, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRIN, LACHS, ONYEAMA; Judges ad hoc MOSLER, SORENSEN; Registrar AQUARONE.

In the North Sea Continental Shelf cases,
between
the Federal Republic of Germany,
represented by
Dr. G. Jaenicke, Professor of International Law in the University of Frankfurt am Main,
as Agent,
assisted by
Dr. S. Oda, Professor of International Law in the University of Sendai,
as Counsel,
Dr. U. Scheuner, Professor of International Law in the University of Bonn,
Dr. E. Menzel, Professor of International Law in the University of Kiel,
Dr. Henry Herrmann, of the Massachusetts Bar, associated with Messrs. Goodwin, Procter and Hoar, Counsellors-at-Law, Boston,
Dr. H. Blomeyer-Bartenstein, Counsellor 1st Class, Ministry of Foreign Affairs,
Dr. H. D. Treviranus, Counsellor, Ministry of Foreign Affairs,
as Advisers,
and by Mr. K. Witt, Ministry of Foreign Affairs,
as Expert,
and
the Kingdom of Denmark,
represented by
Mr. Bent Jacobsen, Barrister at the Supreme Court of Denmark,
as Agent and Advocate,
assisted by
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,
as Counsel and Advocate,
H.E. Mr. S. Sandager Jeppesen, Ambassador, Ministry of Foreign Affairs,
Mr. E. Krog-Meyer, Head of The Legal Department, Ministry of Foreign Affairs,
Dr. I. Foighel, Professor in the University of Copenhagen,
Mr. E. Lauterpacht, Member of the English Bar and Lecturer in the University of Cambridge,
*5 Mr. M. Thamsborg, Head of Department, Hydrographic Institute,
as Advisers,
and by
Mr. P. Boeg, Head of Secretariat, Ministry of Foreign Affairs,
Mr. U. Engel, Head of Section, Ministry of Foreign Affairs,
As Secretaries,
and between
the Federal Republic of Germany,
represented as indicated above,
and
the Kingdom of the Netherlands,
represented by
Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs, Professor of International Law at the Rotterdam School of Economics,
as Agent,
assisted by
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,
as Counsel,
Rear-Admiral W. Langeraar, Chief of the Hydrographic Department, Royal Netherlands Navy,
Mr. G. W. Mass Geesteranus, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Miss F. Y. van der Wal, Assistant Legal Adviser to the Ministry of Foreign Affairs,
as Advisers,

and by
Mr. H. Rombach, Divisional Head, Hydrographic Department, Royal Netherlands Navy, as Deputy-Adviser,
THE COURT,
composed as above,
delivers the following Judgment:
By a letter of 16 February 1967, received in the Registry on 20 February 1967, the Minister for Foreign Affairs of the Netherlands transmitted to the Registrar:
(a) an original copy, signed at Bonn on 2 February 1967 for the Governments of Denmark and the Federal Republic of Germany, of a Special Agreement for the submission to the Court of a difference between those two States concerning the delimitation, as between them, of the continental shelf in the North Sea;
(b) an original copy, signed at Bonn on 2 February 1967 for the Governments of the Federal Republic of Germany and the Netherlands, of a Special Agreement for the submission to the Court of a difference between those *6 two States concerning the delimitation, as between them, of the continental shelf in the North Sea;
(c) an original copy, signed at Bonn on 2 February 1967 for the three Governments aforementioned, of a Protocol relating to certain procedural questions arising from the above-mentioned Special Agreements.
Articles 1 to 3 of the Special Agreement between the Governments of Denmark and the Federal Republic of Germany are as follows:

'Article 1

(1) The International Court of Justice is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965?
(2) The Governments of the Kingdom of Denmark and of the Federal Republic of Germany shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:
1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the court;
2. a Counter-Memorial of the Kingdom of Denmark to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Danish Rejoinder to be delivered within such time-limits as the Court may order.
(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.
(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof.'
Articles 1 to 3 of the Special Agreement between the Governments of the Federal Republic of Germany and the Netherlands are as follows:

'Article 1

(1) The International Court of Justice is requested to decide the following question: What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 1 December 1964?
*7 (2) The Governments of the Federal Republic of Germany and of the Kingdom of the Netherlands shall delimit the continental shelf of the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:
1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the Court;
2. a Counter-Memorial of the Kingdom of the Netherlands to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Netherlands Rejoinder to be delivered within such time-limits as the Court may order.
(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.
(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof.'
The Protocol between the three Governments reads as follows:

'Protocol

At the signature of the Special Agreement of today's date between the Government of the Federal Republic of Germany and the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands respectively, on the submission to the International Court of Justice of the differences between the Parties concerning the delimitation of the continental shelf in the North Sea, the three Governments wish to state their agreement on the following:
1. The Government of the Kingdom of the Netherlands will, within a month from the signature, notify the two Special Agreements together with the present Protocol to the International Court of Justice in accordance with Article 40, paragraph 1, of the Statute of the Court.
2. After the notification in accordance with item 1 above the Parties will ask the Court to join the two cases.
3. The three Governments agree that, for the purpose of appointing a judge ad hoc, the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands shall be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute of the Court.'
Pursuant to Article 33, paragraph 2, of the Rules of Court, the Registrar at once informed the Governments of Denmark and the Federal Republic of Germany of the filing of the Special Agreements. In accordance with Article 34, paragraph 2, of the Rules of Court, copies of the Special Agreements were transmitted to the other Members of the United Nations and to other nonmember States entitled to appear before the Court.
*8 By Orders of 8 March 1967, taking into account the agreement reached between the

Parties, 21 August 1967 and 20 February 1968 were fixed respectively as the time-limits for the filing of the Memorials and Counter- Memorials. These pleadings were filed within the time-limits prescribed. By Orders of 1 March 1968, 31 May and 30 August 1968 were fixed respectively as the timelimits for the filing of the Replies and Rejoinders.

Pursuant to Article 31, paragraph 3, of the Statute of the Court, the Government of the Federal Republic of Germany chose Dr. Hermann Mosler, Professor of International Law in the University of Heidelberg, to sit as Judge ad hoc in both cases. Rcferring to the agreement concluded between them according to which they should be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute, the Governments of Denmark and the Netherlands chose Dr. Max Serensen, Professor of International Law in the University of Aarhus, to sit as Judge ad hoc in both cases.

By an Order of 26 April 1968, considering that the Governments of Denmark and the Netherlands were, so far as the choice of a Judge ad hoc was concerned, to be reckoned as one Party only, the Court found that those two Governments were in the same interest, joined the proceedings in the two cases and, in modification of the directions given in the Orders of 1 March 1968, fixed 30 August 1968 as the time-limit for the filing of a Common Rejoinder for Denmark and the Netherlands.

The Replies and the Common Rejoinder having been filed within the timelimits prescribed, the cases were ready for hearing on 30 August 1968.

Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Brazil, Canada, Chile, Colombia, Ecuador, Finland, France, Honduras, Iran, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. Pursuant to paragraph 3 of the same Article, those pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

Hearings were held from 23 to 25 October, from 28 October to 1 November, and on 4, 5, 7, 8 and 11 November 1968, in the course of which the Court heard, in the order agreed between the Parties and accepted by the Court, the oral arguments and replies of Professor Jaenicke, Agent, and Professor Oda, Counsel, on behalf of the Government of the Federal Republic of Germany; and of Mr. Jacobsen and Professor Riphagen, Agents, and Sir Humphrey Waldock, Counsel, on behalf of the Governments of Denmark and the Netherlands.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of the Federal Republic of Germany,

in the Memorials:

'May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

*9 2. The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method), is not a rule of customary international law and is therefore not applicable as such between the Parties.

3. The equidistance method cannot be employed for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

4. As to the delimitation of the continental shelf between the Parties in the North Sea, the equidistance method cannot find application, since it would not apportion a just and equitable share to the Federal Republic of Germany';

in the Replies:

'May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. (a) The method of determining boundaries of the continental shelf in such a way that

every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.
(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.
(c) Even if the rule under (b) would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.
3. (a) The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.
(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.
4. Consequently, the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect.'
On behalf of the Government of Denmark,
in its Counter-Memorial:
'Considering that, as noted in the Compromis, disagreement exists *10 between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Convention of 9 June 1965;
Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties ex aequo et bono, but to decide what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary, determined by the above-mentioned Convention of 9 June 1965;
In view of the facts and arguments presented in Parts I and II of this Counter-Memorial, May it please the Court to adjudge and declare:
1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.
2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines fror which the breadth of the territorial sea of each State is measured.
3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission.'
On behalf of the Government of the Netherlands,
in its Counter-Memorial:
'Considering that, as noted in the Compromis, disagreement exists between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Treaty of 1 December 1964;
Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties ex aequo et bono, but to decide what

principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the abovementioned Treaty of 1 December 1964;
In view of the facts and arguments presented in Parts I and II of this Counter-Memorial, May it please the Court to adjudge and declare:
1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.
*11 2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission.'
On behalf of the Governments of Denmark and the Netherlands,
in the Common Rejoinder:
'May it further please the Court to adjudge and declare:
4. If the principles and rules of international law mentioned in Submission 1 of the respective Counter-Memorials are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.'
In the course of the oral proceedings, the following Submissions were presented by the Parties:
On behalf of the Government of the Federal Republic of Germany,
at the hearing on 5 November 1968:
'1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.
2. (a) The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.
(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.
(c) Even if the rule under (b) would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.
3. (a) The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.
(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.
*12 4. Consequently, the delimitation of the continental shelf, on which the Parties must agree pursuant to paragraph 2 of Article 1 of the Special Agreement, is determined by the principle of the just and equitable share, based on criteria relevant to the particular geographical situation in the North Sea.'
On behalf of the Government of Denmark,

at the hearing on 11 November 1968, Counsel for that Government stated that it confirmed the Submissions presented in its Counter-Memorial and in the Common Rejoinder and that those Submissions were identical mutatis mutandis with those of the Government of the Netherlands.
On behalf of the Government of the Netherlands,
at the hearing on 11 November 1968:
'With regard to the delimitation as between the Federal Republic of Germany and the Kingdom of the Netherlands of the boundary of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Convention of 1 December 1964.
May it please the Court to adjudge and declare:
1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.
2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission.
4. If the principles and rules of international law mentioned in Submission 1 are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party.'

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1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning 'the delimitation *13 as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them'-with the exception of those areas, situated in the immediate vicinity of the coast, which have already been the subject of delimitation by two agreements dated 1 December 1964, and 9 June 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands, and in the other between the Federal Republic and the Kingdom of Denmark.
2. It is in respect of the delimitation of the continental shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court is requested by each of the two Special Agreements to decide what are the applicable 'principles and rules of international law'. The Court is not asked actually to delimit the further boundaries which will be involved, this task being reserved by the Special Agreements to the Parties, which undertake to effect such a delimitation 'by agreement in pursuance of the decision requested from the ... Court'-that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable.

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3. As described in Article 4 of the North Sea Policing of Fisheries Convention of 6 May 1882, the North Sea, which lies between continental Europe and Great Britain in the east-west direction, is roughly oval in shape and stretches from the straits of Dover northwards to a parallel drawn between a point immediately north of the Shetland

Islands and the mouth of the Sogne Fiord in Norway, about 75 kilometres above Bergen, beyond which is the North Atlantic Ocean. In the extreme northwest, it is bounded by a line connecting the Orkney and Shetland island groups; while on its north-eastern side, the line separating it from the entrances to the Baltic Sea lies between Hanstholm at the north-west point of Denmark, and Lindesnes at the southern tip of Norway. Eastward of this line the Skagerrak begins. Thus, the North Sea has to some extent the general look of an enclosed sea without actually being one. Round its shores are situated, on its eastern side and starting from the north, Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium and France; while the whole western side is taken up by Great Britain, together with the island groups of the Orkneys and Shetlands. From this it will be seen that the continental shelf of the Federal Republic is situated between those of Denmark and the Netherlands.

4. The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80- 100 kilometres. Much the greater part of this continental shelf has already been the subject of delimitation **14* by a series of agreements concluded between the United Kingdom (which, as stated, lies along the whole western side of it) and certain of the States on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as 'median lines' which, for immediate present purposes, may be described as boundaries drawn between the continental shelf areas of 'opposite' States, dividing the intervening spaces equally between them. These lines are shown on Map 1 on page 15, together with a similar line, also established by agreement, drawn between the shelf areas of Norway and Denmark. Theoretically it would be possible also to draw the following median lines in the North Sea, namely United Kingdom/Federal Republic (which would lie east of the present line United Kingdom/Norway-Denmark-Netherlands); Norway/Federal Republic (which would lie south of the present line Norway/Denmark); and Norway/Netherlands (which would lie north of whatever line is eventually determined to be the continental shelf boundary between the Federal Republic and the Netherlands). Even if these median lines were drawn however, the question would arise whether the United Kingdom, Norway and the Netherlands could take advantage of them as against the parties to the existing delimitations, since these lines would, it seems, in each case lie beyond (i.e., respectively to the east, south and north of) the boundaries already effective under the existing agreements at present in force. This is illustrated for Map 2 on page 15.

5. In addition to the partial boundary lines FederalRepublic/Denmark and Federal Republic/Netherlands, which, as mentioned in paragraph 1 above, were respectively established by the agreements of 9 June 1965 and 1 December 1964, and which are shown as lines A-B and C-D on Map 3 on page 16, another line has been drawn in this area, namely that represented by the line E-F on that map. This line, which divides areas respectively untimed (to the north of it) by Denmark, and (to the south of it) by the Netherlands, is the outcome of an agreement between those two countries dated 31 March 1966, reflecting the view taken by them as to what are the correct boundary lines between their respective continental shelf areas and that of the Federal Republic, beyond the partial boundaries A-B and C-D already drawn. These further and unagreed boundaries to seaward, are shown on Map 3 by means of the dotted lines B-E and D-E. They are the lines, the correctness of which in law the Court is in effect, though indirectly, called upon to determine. Also shown on Map 3 are the two pecked lines B-F and D-F, representing approximately the boundaries which the Federal Republic would have wished to obtain in the course of the negotiations that took place between the Federal Republic and the other two Parties prior to the submission of the matter to the Court. The nature of these negotiations must now be described.

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*17 6. Under the agreements of December 1964 and June 1965, already mentioned, the partial boundaries represented by the map lines A-B and C-D had, according to the information furnished to the Court by the Parties, been drawn mainly by application of the principle of equidistance, using that term as denoting the abstract concept of equidistance. A line so drawn, known as an 'equidistance line', may be described as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party. An equidistance line may consist either of a 'median' line between 'opposite' States, or of a 'lateral' line between 'adjacent' States. In certain geographical configurations of which the Parties furnished examples, a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line. There exists nevertheless a distinction to be drawn between the two, which will be mentioned in its place.

7. The further negotiations between the Parties for the prolongation of the partial boundaries broke down mainly because Denmark and the Netherlands respectively wished this prolongation also to be effected on the basis of the equidistance principle,- and this would have resulted in the the dotted lines B- E and D-E, shown on Map 3; whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. It will be observed that neither of the lines in question, taken by itself, would produce this effect, but only both of them together-an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate and self-contained delimitations, each of which should be carried out without reference to the other.

8. The reason for the result that would be produced by the two lines B-E and D-E, taken conjointly, is that in the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, 'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle. The effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it. In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts such as are, to a moderate extent, those of Denmark and the Netherlands, is to cause boundary lines drawn on an equidistance basis to leave the *18 coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast. These two distinct effects, which are shown in sketches I-III to be found on page 16, are directly attributable to the use of the equidistance method of delimiting continental shelf boundaries off recessing or projecting coasts. It goes without saying that on these types of coasts the equidistance method produces exactly similar effects in the delimitation of the lateral boundaries of the territorial sea of the States concerned. However, owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight,-and there are other aspects involved, which will be considered in their place. It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.

9. After the negotiations, separately held between the Federal Republic and the other two Parties respectively, had in each case, for the reasons given in the two preceding paragraphs, failed to result in any agreement about the delimitation of the boundary extending beyond the partial one already agreed, tripartite talks between all the Parties took place in The Hague in February- March 1966, in Bonn in May and again in Copenhagen in August. These also proving fruitless, it was then decided to submit the matter to the Court. In the meantime the Governments of Denmark and the Netherlands had, by means of the agreement of 31 March 1966, already referred to (paragraph 5), proceeded to a delimitation as between themselves of the continental shelf areas lying between the apex of the triangle notionally ascribed by them to the Federal Republic (point E on Map 3) and the median line already drawn in the North Sea, by means of a boundary drawn on equidistance principles, meeting that line at the point marked F on Map 3. On 25 May 1966, the Government of the Federal Republic, taking the view that this delimitation was res inter alios acta, notified the Governments of Denmark and the Netherlands, by means of an aide- memoire, that the agreement thus concluded could not 'have any effect on the question of the delimitation of the German-Netherlands or the German-Danish parts of the continental shelf in the North Sea'.

10. In pursuance of the tripartite arrangements that had been made at Bonn and Copenhagen, as described in the preceding paragraph, Special Agreements for the submission to the Court of the differences involved were initialled in August 1966 and signed on 2 February 1967. By a tripartite Protocol signed the same day it was provided (a) that the Government of the Kingdom of the Netherlands would notify the two Special Agreements to the Court, in accordance with Article 40, paragraph 1, of the Court's Statute, together with the text of the Protocol itself; (b) that after such notification, the Parties would ask the Court to join the two cases; and (c) that for the purpose of the appointment *19 of a judge ad hoc, the Kingdoms of Denmark and the Netherlands should be considered as being in the same interest within the meaning of Article 31, paragraph 5, of the Court's Statute. Following upon these communications, duly made to it in the implementation of the Protocol, the Court, by an Order dated 26 April 1968, declared Denmark and the Netherlands to be in the same interest, and joined the proceedings in the two cases.

11. Although the proceedings have thus been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea continental shelf, and that there is no a priori reason why the Court must reach identical conclusions in regard to them,-if for instance geographical features present in the one case were not present in the other. At the same time, the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder, have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation. To this extent therefore, the two cases may be treated as one; and it must be noted that although two separate delimitations are in question, they involve-indeed actually give rise to-a single situation. The fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced, having regard to the manner in which the Parties themselves have brought the matter before it, as described in the two preceding paragraphs.

12. In conclusion as to the facts, it should be noted that the Federal Republic has formally reserved its position, not only in regard to the Danish- Netherlands delimitation of the line E-F (Map 3), as noted in paragraph 9, but also in regard to the delimitations United Kingdom/Denmark and United Kingdom/Netherlands mentioned in paragraph 4. In both the latter cases the Government of the Federal Republic pointed out to all the Governments concerned that the question of the lateral delimitation of the continental shelf in the North Sea between the Federal Republic and the Kingdoms of Denmark and the Netherlands was still outstanding and could not be prejudiced by the agreements concluded between those two countries and the United Kingdom.

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13. Such are the events and geographical facts in the light of which the Court has to determine what principles and rules of international law are applicable to the delimitation of the areas of continental shelf involved. On this question the Parties have taken up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it is contended that the whole matter is governed by a *20 mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, was designated by them as the 'equidistance-special circumstances' rule. According to this contention, 'equidistance' is not merely a method of the cartographical construction of a boundary line, but the essential element in a rule of law which may be stated as follows,-namely that in the absence of agreement by the Parties to employ another metbod or to proceed to a delimitation on an ad hoc basis, all continental shelf boundaries must be drawn by means of an equidistance line, unless, or except to the extent to which, 'special circumstances' are recognized to exist,-an equidistance line being, it will be recalled, a line every point on which is the same distance away from whatever point is nearest to it on the coast of each of the countries concerned-or rather, s rictly, on the baseline of the territorial sea along that coast. As regards what constitutes 'special circumstances', all that need be said at this stage is that according to the view put forward on behalf of Denmark and the Netherlands, the configuration of the German North Sea coast, its recessive character, and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation: only the presence of some special feature, minor in itself-such as an islet or small protuberance-but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.

14. These various contentions, together with the view that a rule of equidistance-special circumstances is binding on the Federal Republic, are founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf already mentioned (preceding paragraph), and partly on general considerations of law relating to the continental shelf, lying outside this Convention. Similar considerations are equally put forward to found the contention that the delimitation on an equidistance basis of the line E-F (Map 3) by the Netherlands-Danish agreement of 31 March 1966 (paragraph 5 above) is valid erga omnes, and must be respected by the Federal Republic unless it can demonstrate the existence of juridically relevant 'special circumstances'.

15. The Federal Republic, for its part, while recognizing the utility of equidistance as a method of delimitation, and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contends that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a 'just and equitable share' of the available continental shelf, in proportion to the length of its coastline or sea-frontage. It was also contended on behalf of the Federal Republic *21 that in a sea shaped as is the North Sea, the whole bed of which, except for the Norwegian Trough, consists of continental shelf at a depth of less than 200 metres, and where the situation of the circumjacent States causes a natural convergence of their respective continental shelf areas, towards a central point situated on the median line of the whole seabed-or at any rate in those localities where this is the case-each of the States concerned is entitled to a continental shelf area extending up to this central point (in effect a sector), or at least extending to the median line at some point or other. In this way the 'cut-off' effect, of which the Federal Republic complains, caused, as explained in paragraph 8, by the drawing of equidistance lines at the two ends of an inward curving or recessed coast, would be avoided. As a means of giving effect to these ideas, the Federal Republic proposed the method of the 'coastal front', or facade, constituted by a straight baseline joining these ends, upon which the necessary geometrical constructions would be erected.

16. Alternatively, the Federal Republic claimed that if, contrary to its main contention,

the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a 'special circumstance' such as to justify a departure from that method of delimitation in this particular case.

17. In putting forward these contentions, it was stressed on behalf of the Federal Republic that the claim for a just and equitable share did not in any way involve asking the Court to give a decision ex aequo et bono (which, having regard to the terms of paragraph 2 of Article 38 of the Court's Statute, would not be possible without the consent of the Parties),-for the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1 (c) of the same Article, the Court was entitled to apply as a matter of the justitia distributiva which entered into all legal systems. It appeared, moreover, that whatever its underlying motivation, the claim of the Federal Republic was, at least ostensibly, to a just and equitable share of the space involved, rather than to a share of the natural resources as such, mineral or other, to be found in it, the location of which could not in any case be fully ascertained at present. On the subject of location the Court has in fact received some, though not complete information, but has not thought it necessary to pursue the matter, since the question of natural resources is less one of delimitation than of eventual exploitation.

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18. It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them-at least in the particular form they have taken. It considers *22 that, having regard both to the language of the Special Agreements and to more general considerations of law relating to the regime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.

19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it;-namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is 'exclusive' in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

20. It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,-for the fundamental concept involved does not admit of

there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. *23 But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

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21. The Court will now turn to the contentions advanced on behalf of Denmark and the Netherlands. Their general character has already been indicated in paragraphs 13 and 14: the most convenient way of dealing with them will be on the basis of the following question-namely, does the equidistance-special circumstances principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively? Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle.
22. Particular attention is directed to the use, in the foregoing formulations, of the terms 'mandatory' and 'obligation'. It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary,-if for instance, the Parties are unable to enter into negotiations,- any cartographer can de facto trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.
23. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which 'special circumstances' cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be. It should also be noticed that the counterpart of this conclusion is no less valid, and that the practical advantages of the equidistance method would continue to exist whether its employment were obligatory or not.
24. It would however be ignoring realities if it were not noted at the same time that the use of this method, partly for the reasons given in paragraph 8 above and partly for reasons that are best appreciated by reference to the many maps and diagrams furnished by both sides in the course of the written and oral proceedings, can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable. It is basically this fact which underlies *24 the present proceedings. The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue.

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25. The Court now turns to the legal position regarding the equidistance method. The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case-that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then

the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it in the Special Agreements would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented the applicable rules of law-that is to say constituted the law for the Parties-and its sole remaining task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved.

26. The relevant provisions of Article 6 of the Geneva Convention, paragraph 2 of which Denmark and the Netherlands contend not only to be applicable as a conventional rule, but also to represent the accepted rule of general international law on the subject of continental shelf delimitation, as it exists independently of the Convention, read as follows:

'1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.'

*25 The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964, having received the 22 ratifications or accessions required for that purpose (Article 11), and was therefore in force at the time when the various delimitations of continental shelf boundaries described earlier (paragraphs 1 and 5) took place between the Parties. But, under the formal provisions of the Convention, it is in force for any individual State only in so far as, having signed it within the time-limit provided for that purpose, that State has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it, the former since 10 June 1964, the latter since 20 March 1966. The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party.

27. It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the regime of the Convention, and in particular of Article 6, has become binding on the Federal Republic in another way,-namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional regime; or has recognized it as being generally applicable to the delimitation of continental shelf areas. It has also been suggested that the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up.

28. As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a state in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed-that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime-then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a

particular method by which the intention to become bound by the regime of the convention is to be manifested-namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,-if, that is to say, a State which, though entitled *26* to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.

29. A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered-and could, if it ratified now, enter-a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention. This faculty would remain, whatever the previous conduct of the Federal Republic might have been-a fact which at least adds to the difficulties involved by the Danish-Netherlands contention.

30. Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,-that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.

31. In these circumstances it seems to the Court that little useful purpose would be served by passing in review and subjecting to detailed scrutiny the various acts relied on by Denmark and the Netherlands as being indicative of the Federal Republic's acceptance of the regime of Article 6;-for instance that at the Geneva Conference the Federal Republic did not take formal objection to Article 6 and eventually signed the Convention without entering any reservation in respect of that provision; that it at one time announced its intention to ratify the Convention; that in its public declarations concerning its continental shelf rights it appeared to rely on, or at least cited, certain provisions of the Geneva Convention. In this last connection a good deal has been made of the joint Minute signed in Bonn, on 4 August 1964, between the then-negotiating delegations of the Federal Republic and the Netherlands. But this minute made it clear that what the Federal Republic was seeking was an agreed division, rather than a delimitation of the central North Sea continental shelf areas, and the reference it made to Article 6 was specifically to the first sentence of paragraphs 1 and 2 of that Article, which speaks exclusively of delimitation by agreement and not at all of the use of the equidistance method.

32. In the result it appears to the Court that none of the elements invoked is decisive; each is ultimately negative or inconclusive; all are capable of varying interpretations or explanations. It would be one *27* thing to infer from the declarations of the Federal Republic an admission accepting the fundamental concept of conastal State rights in respect of the continental shelf: it would be quite another matter to see in this an acceptance of the rules of delimitation contained in the Convention. The declarations of the Federal Republic, taken in the aggregate, might at most justify the view that to begin with, and before becoming fully aware of what the probable effects in the North Sea would be, the Federal Republic was not specifically opposed to the equidistance principle as embodied in Article 6 of the Convention. But from a purely negative conclusion such as this, it would certainly not be possible to draw the positive inference that the Federal Republic, though not a party to the Convention, had accepted the regime of Article 6 in a manner binding upon itself.

33. The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing. Moreover, in the present case, any such inference would immediately be nullified by the

fact that, as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic, as described earlier (paragraphs 9 and 12), at once reserved its position with regard to those delimitations which (effected on an equidistance basis) might be prejudicial to the delimitation of its own continental shelf areas.

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34. Since, accordingly, the foregoing considerations must lead the Court to hold that Article 6 of the Geneva Convention is not, as such, applicable to the delimitations involved in the present proceedings, it becomes unnecessary for it to go into certain questions relating to the interpretation or application of that provision which would otherwise arise. One should be mentioned however, namely what is the relationship between the requirement of Article 6 for delimitation by agreement, and the requirements relating to equidistance and special circumstances that are to be applied in 'the absence of' such agreement,-i.e., in the absence of agreement on the matter, is there a presumption that the continental shelf boundary between any two adjacent States consists automatically of an equidistance line,-or must negotiations for an agreed boundary prove finally abortive before the acceptance of a boundary drawn on an equidistance basis becomes obligatory in terms of Article 6, if no special circumstances exist?

35. Without attempting to resolve this question, the determination of which is not necessary for the purposes of the present case, the Court draws attention to the fact that the delimitation of the line E-F, as shown on Map 3, which was affected by Denmark and the Netherlands under the agreement of 31 March 1966 already mentioned (paragraphs 5 and 9), to which the Federal Republic was not a party, must have been based on *28 the tacit assumption that, no agreement to the contrary having been reached in the negotiations between the Federal Republic and Denmark and the Netherlands respectively (paragraph 7), the boundary between the continental shelf areas of the Republic and those of the other two countries must be deemed to be an equidistance one;-or in other words the delimitation of the line E-F, and its validity erga omnes including the Federal Republic, as contended for by Denmark and the Netherlands, presupposes both the delimitation and the validity on an equidistance basis, of the lines B-E and D-E on Map 3, considered by Denmark and the Netherlands to represent the boundaries between their continental shelf areas and those of the Federal Republic.

36. Since, however, Article 6 of the Geneva Convention provides only for delimitation between 'adjacent' States, which Denmark and the Netherlands clearly are not, or between 'opposite' States which, despite suggestions to the contrary, the Court thinks they equally are not, the delimitation of the line E-F on Map 3 could not in any case find its validity in Article 6, even if that provision were opposable to the Federal Republic. The vaiidity of this delimitation must therefore be sought in some other source of law. It is a main contention of Denmark and the Netherlands that there does in fact exist such another source, furnishing a rule that validates not only this particular delimitation, but all delimitations effected on an equidistance basis,-and indeed requiring delimitation on that basis unless the States concerned otherwise agree, and whether or not the Geneva Convention is applicable. This contention must now be examined.

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37. It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance- special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the corpus of general international law;-and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. This contention has both a positive law and a more

fundamentalist aspect. As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself,-the claim being that these various factors have cumulatively evidenced or been creative of the opinion juris sive necessitatis, requisite for the formation of new rules of customary international law. In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the continental *29 shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an a priori character of so to speak juristic inevitability.

38. The Court will begin by examining this latter aspect, both because it is the more fundamental, and was so presented on behalf of Denmark and the Netherlands-i.e., as something governing the whole case; and because, if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess any a priori character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice,-and that aspect of the matter would remain for later examination.

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39. The a priori argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist ipso facto and ab initio without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. This was one reason why the Court felt bound to reject the claim of the Federal Republic (in the particular form which it took) to be awarded a 'just and equitable share' of the shelf areas involved in the present proceedings. Denmark and the Netherlands, for their part, claim that the test of appurtenance must be 'proximity', or more accurately 'closer proximity': all those parts of the shelf being considered as appurtenant to a particular coastal State which are (but only if they are) closer to it than they are to any point on the coast of another State. Hence delimitation must be effected by a method which will leave to each one of the States concerned all those areas that are nearest to its own coast. Only a line drawn on equidistance principles will do this. Therefore, it is contended, only such a line can be valid (unless the Parties, for reasons of their own, agree on another), because only such a line can be thus consistent with basic continental shelf doctrine.

40. This view clearly has much force; for there can be no doubt that as a matter of normal topography, the greater part of a State's continental *30 shelf areas will in fact, and without the necessity for any delimitation at all, be nearer to its coasts than to any other. It could not well be otherwise; but post hoc is not propter hoc, and this situation may only serve to obscure the real issue, which is whether it follows that every part of the area concerned must be placed in this way, and that it should be as it were prohibited that any part should not be so placed. The Court does not consider that it does follow, either from the notion of proximity itself, or from the more fundamental concept of the continental shelf as being the natural prolongation of the land domain-a concept repeatedly appealed to by both sides throughout the case, although quite differently interpreted by them.

41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other

instruments-terms such as 'near', 'close to its shores', 'off its coast', 'opposite', 'in front of the coast', 'in the vicinity of', 'neighbouring the coast', 'adjacent to', 'contiguous', etc.,- all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. To take what is perhaps the most frequently employed of these terms, namely 'adjacent to', it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as 'adjacent' to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other. This would be even truer of localities where, physically, the continental shelf begins to merge with the ocean depths. Equally, a point inshore situated near the meeting place of the coasts of two States can often properly be said to be adjacent to both coasts, even though it may be fractionally closer to the one than the other. Indeed, local geographical configuration may sometimes cause it to have a closer physical connection with the coast to which it is not in fact closest.

42. There seems in comequence to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; and therefore the question of which parts of the continental shelf 'adjacent to' a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity. Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one. Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to *31 prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State.

43. More fundamental than the notion of proximity appears to be the principle- constantly relied upon by all the Parties-of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because-or not only because-they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers per se title to land territory. What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,-in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural-or the most natural- extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;-or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

44. In the present case, although both sides relied on the prolongation principle and regarded it as fundamental, they interpreted it quite differently. Both interpretations appear to the Court to be incorrect. Denmark and the Netherlands identified natural prolongation with closest proximity and therefrom argued that it called for an equidistance line: the Federal Republic seemed to think it implied the notion of the just and equitable share, although the connection is distinctly remote. (The Federal Republic did however invoke another idea, namely that of the proportionality of a State's continental shelf area to the length of its coastline, which obviously does have an intimate connection with the prolongation principle, and will be considered in its place.)

As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's *32 coastal front, cutting it off from areas situated directly before that front

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45. The fluidity of all these notions is well illustrated by the case of the Norwegian Trough (paragraph 4 above). Without attempting to pronounce on the status of that feature, the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations, as described in paragraph 4, to appertain to Norway up to the median lines shown on Map 1. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.

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46. The conclusion drawn by the Court from the foregoing analysis is that the notion of equidistance as being logically necessary, in the sense of being an inescapable a priori accompaniment of basic continental shelf doctrine, is incorrect. It is said not to be possible to maintain that there is a rule of law ascribing certain areas to a State as a matter of inherent and original right (see paragraphs 19 and 20), without also admitting the existence of some rule by which those areas can be obligatorily delimited. The Court cannot accept the logic of this view. The problem arises only where there is a dispute and only in respect of the marginal areas involved. The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (Monastery of Saint Naoum, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9, at p. 10).

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47. A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the 'Truman Proclamation', issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive *33 law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries 'shall be determined by the United States and the State concerned in accordance with equitable principles'. These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.

48. It was in the International Law Commission of the United Nations that the question of delimitation as between adjacent States was first taken up seriously as part of a general jurisdical project; for outside the ranks of the hydrographers and cartographers, questions of delimitation were not much thought about in earlier continental shelf doctrine. Juridical interest and speculation was focussed mainly on such questions as what was the legal basis on which any rights at all in respect of the continental shelf could be claimed, and what was the nature of those rights. As regards boundaries, the main issue was not that of boundaries between States but of the seaward limit of the area in respect of which the coastal State could claim exclusive rights of exploitation. As was pointed out in the course of the written proceedings, States in most cases had not found it necessary to conclude treaties or legislate about their lateral sea boundaries with adjacent States before the question of exploiting the natural resources of the seabed and subsoil arose;- practice was therefore sparse.

49. In the records of the International Law Commission, which had the matter under consideration from 1950 to 1956, there is no indication at all that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance because this gave expression to, and translated into linear terms, a principle of proximity inherent in the basic concept of the continental shelf, causing every part of the shelf to appertain to the nearest coastal State and to no other, and because such a rule must therefore be mandatory as a matter of customary international law. Such an idea does not seem ever to have been propounded. Had it been, and had it had the self- evident character contended for by Denmark and the Netherlands, the Commission would have had no alternative but to adopt it, and its long continued hesitations over this matter would be incomprehensible.

*34 50. It is moreover, in the present context, a striking feature of the Commission's discussions that during the early and middle stages, not only was the notion of equidistance never considered from the standpoint of its having a priori a character of inherent necessity: it was never given any special prominence at all, and certainly no priority. The Commission discussed various other possibilities as having equal if not superior status such as delimitation by agreement, by reference to arbitration, by drawing lines perpendicular to the coast, by prolonging the dividing line of adjacent territorial waters (the principle of which was itself not as yet settled), and on occasion the Commission seriously considered adopting one or other of these solutions. It was not in fact until after the matter had been referred to a committee of hydrographical experts, which reported in 1953, that the equidistance principle began to take precedence over other possibilities: the Report of the Commission for that year (its principal report on the topic of delimitation as such) makes it clear that before this reference to the experts the Commission had felt unable to formulate any definite rule at all, the previous trend of opinion having been mainly in favour of delimitation by agreement or by reference to arbitration.

51. It was largely because of these difficulties that it was decided to consult the Committee of Experts. It is therefore instructive in the context (i.e., of an alleged inherent necessity for the equidistance principle) to see on what basis the matter was put to the experts, and how they dealt with it. Equidistance was in fact only one of four methods suggested to them, the other three being the continuation in the seaward direction of the land frontier between the two adjacent States concerned; the drawing of a perpendicular to the coast at the point of its intersection with this land frontier; and the drawing of a line perpendicular to the line of the 'general direction' of the coast. Furthermore the matter was not even put to the experts directly as a question of continental shelf delimitation, but in the context of the delimitation of the lateral boundary between adjacent territorial waters, no account being taken of the possibility that the situation respecting territorial waters might be different.

52. The Committee of Experts simply reported that after a thorough discussion of the different methods-(there are no official records of this discussion)- they had decided that 'the (lateral) boundary through the territorial sea-if not already fixed otherwise-should be drawn according to the principle of equidistance from the respective coastlines'. They

added, however, significantly, that in 'a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation'. Only after that did they add, as a rider to this conclusion, that they had considered it 'important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf'.

*35 53. In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded. It is clear from the Report of the Commission for 1953 already referred to (paragraph 50) that the latter adopted it largely on the basis of the recommendation of the Committee of Experts, and even so in a text that gave priority to delimitation by agreement and also introduced an exception in favour of 'special circumstances' which the Committee had not formally proposed. The Court moreover thinks it to be a legitimate supposition that the experts were actuated by considerations not of legal theory but of practical convenience and cartography of the kind mentioned in paragraph 22 above. Although there are no official records of their discussions, there is warrant for this view in correspondence passing between certain of them and the Commission's Special Rapporteur on the subject, which was deposited by one of the Parties during the oral hearing at the request of the Court. Nor, even after this, when a decision in principle had been taken in favour of an equidistance rule, was there an end to the Commission's hesitations, for as late as three years after the adoption of the report of the Committee of Experts, when the Commission was finalizing the whole complex of drafts comprised under the topic of the Law of the Sea, various doubts about the equidistance principle were still being voiced in the Commission, on such grounds for instance as that its strict application would be open, in certain cases, to the objection that the geographical configuration of the coast would render a boundary drawn on this basis inequitable.

54. A further point of some significance is that neither in the Committee of Experts, nor in the Commission itself, nor subsequently at the Geneva Conference, does there appear to have been any discussion of delimitation in the context, not merely of two adjacent States, but of three or more States on the same coast, or in the same vicinity,-from which it can reasonably be inferred that the possible resulting situations, some of which have been described in paragraph 8 above, were never really envisaged or taken into account. This view finds some confirmation in the fact that the relevant part of paragraph 2 of Article 6 of the Geneva Convention speaks of delimiting the continental shelf of 'two' adjacent States (although a reference simply to 'adjacent States' would have sufficed), whereas in respect of median lines the reference in paragraph 1 of that Article is to 'two or more' opposite States.

55. In the light of this history, and of the record generally, it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and *36 it really remained to the end, governed by two beliefs;- namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement,-and in pursuance of the second that it introduced the exception in favour of 'special circumstances'. Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable.

56. In these circumstances, it seems to the Court that the inherency contention as now put forward by Denmark and the Netherlands inverts the true order of things in point of time and that, so far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter is rather a rationalization of the former-an ex post facto constract directed to providing a logical juristic basis for a method of delimitation propounded largely for

different reasons, cartographical and other. Given also that for the reasons already set out (paragraphs 40-46) the theory cannot be said to be endowed with any quality of logical necessity either, the Court is unable to accept it.

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57. Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem-a conclusion which also finds some confirmation in the difference *37 of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

58. If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

59. Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis. As was convincingly demonstrated in the maps and diagrams furnished by the Parties, and as has been noted in paragraph 8, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out. There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.

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60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an a priori logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood

that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

*38 61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention 'embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules'. Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet 'the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference'; and this emerging customary law became 'crystallized in the adoption of the Continental Shelf Convention by the Conference'.

62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an a priori necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or a an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

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63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding,-for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;-whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own *39 favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention 'other than to Articles 1 to 3 inclusive'-these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the jurisdical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which there relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the

attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general corpus of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the proceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of *40 drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,-for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat farreaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being 'exclusive'. So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

*41 68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which

have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

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69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre- existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: qua conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

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70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,-and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned **42* should, at all events potentially, be of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm- creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having

been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention-of which there is at present no official indication-it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

**43* 74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

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75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle-in the majority of the cases by agreement, in a few others unilaterally-or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark- Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance

principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of *44 their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection-and it seems necessary to stress it-is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris; -for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

'Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, ... there are other circumstances calculated to show that the contrary is true.'

Applying this dictum to the present case, the position is simply that in certain cases-not a great number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt *45 legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,-more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance-mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

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81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any a priori basis of logical *46* necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a 'special circumstance' for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,-since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

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83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.
84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Farties have expressly reserved to themselves.
85. It emerges from the history of the development of the legal regime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the opinio juris in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be

arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the *47 delimitation of adjacent continental shelves- that is to say, rules binding upon States for all delimitations; -in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:
(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;
(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,-for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;
(c) for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

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86. It is now necessary to examine these rules more closely, as also certain problems relative to their application. So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.
87. As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the Free Zones of Upper Savoy and the District of Gex, the judicial settlement of international disputes 'is simply an alternative to the direct and friendly settlement of such disputes between the parties' (P.C.I.J., Series A, No. 22, at p. 13). Defining the content of the obligation to negotiate, the Permanent Court, in its *48 Advisory Opinion in the case of Railway Traffic between Lithuania and Poland, said that the obligation was 'not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements', even if an obligation to negotiate did not imply an obligation to reach agreement (P.C.I.J., Series A/B, No. 42, 1931, at p. 116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 (a), but fresh negotiations are to take place on the basis of the present Judgment.

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88. The Court comes next to the rule of equity. The legal basis of that rule in the

particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision ex aequo et bono, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute. Nor would this be the first time that the Court has adopted such an attitude, as is shown by the following passage from the Advisory Opinion given in the case of Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against Unesco (I.C.J. Reports 1956, at p. 100):

'In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation ex aequo et bono. It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: 'That redress will be ensured ex aequo et bono by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say *49 that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (Corfu Channel case, Judgment of December 15th, 1949, I.C.J. Reports 1949, p. 249).'

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a *50 State with a restricted coastline. Equality is to be reckoned within the same plane,

and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the *51 idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the Yearbook of the International Law Commission for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on

maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal regime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal regime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice **52* of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted-(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to 'the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea'; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited.) The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,-these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

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*53 100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal regime of the continental shelf, have been examined for that purpose only. This regime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of

 which have occurred within a relatively short space of time.

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101. For these reasons,
THE COURT,
by eleven votes to six,
finds that, in each case,
(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and
(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;
(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:
(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
(2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;
(D) in the course of the negotiations, the factors to be taken into account are to include:
*54 (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.
Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands,

respectively.

(Signed) J. L. BUSTAMANTE R., President.

(Signed) S. AQUARONE, Registrar.

Judge Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in agreement with the Judgment throughout but would wish to add the following observations.

The essence of the dispute between the Parties is that the two Kingdoms claim that the delimitation effected between them under the Agreement of 31 March 1966 is binding upon the Federal Republic and that the Federal Republic is bound to accept the situation resulting therefrom, which would confine its continental shelf to the triangle formed by lines A-B-E and C-D-E in Map 3. The Federal Republic stoutly resists that claim.

Not only is Article 6 of the Geneva Convention of 1958 not opposable to the Federal Republic but the delimitation effected under the Agreement of 31 March 1966 does not derive from the provisions of that Article as Denmark and the Netherlands are neither States 'whose coasts are opposite each other' within the meaning of the first paragraph of that Article nor are they 'two adjacent States' within the meaning of the *55 second paragraph of that Article. The situation resulting from that delimitation, so far as it affects the Federal Republic is not, therefore, brought about by the application of the principle set out in either of the paragraphs of Article 6 of the Convention.

Had paragraph 2 of Article 6 been applicable to the delimitation of the continental shelf between the Parties to the dispute, a boundary line, determined by the application of the principle of equidistance, would have had to allow for the configuration of the coastline of the Federal Republic as a 'special circumstance'.

In the course of the oral pleadings the contention that the principle of equidistance cum special circumstances had crystallized into a rule of customary international law was not advanced on behalf of the two Kingdoms as an alternative to the claim that that principle was inherent in the very concept of the continental shelf. The Judgment has, in fairness, dealt with these two contentions as if they had been put forward in the alternative and were thus consistent with each other, and has rejected each of them on the merits. I am in agreement with the reasoning of the Judgment on both these points. But, I consider, it is worth mentioning that Counsel for the two Kingdoms summed up their position in regard to the effect of the 1958 Convention as follows:

'... They have not maintained that the Convention embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules. Their position is rather that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation between 1945 and 1958; that the State practice prior to 1958 showed fundamental variations in the nature and scope of the rights claimed; that, in consequence, in State practice the emerging doctrine was wholly lacking in any definition of these crucial elements as it was also of the legal regime applicable to the coastal State with respect to the continental shelf; that the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference; that the emerging customary law, now become more defined, both as to the rights of the coastal State and the applicable regime, crystallized in the adoption of the Continental Shelf Convention by the Conference; and that the numerous signatures and ratifications of the Convention and the other State practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law.'

If it were correct that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation *56 between 1945 and 1958 and that in State practice prior to 1958 it was wholly lacking in any definition of crucial elements as it was also of the legal regime applicable to the coastal State with respect to

the continental shelf, then it would seem to follow conclusively that the principle of equidistance was not inherent in the concept of the continental shelf.

Judge BENGZON makes the following declaration:

I regret my inability to concur with the main conclusions of the majority of the Court. I agree with my colleagues who maintain the view that Article 6 of the Geneva Convention is the applicable international law and that as between these Parties equidistance is the rule for delimitation, which rule may even be derived from the general principles of law.
President BUSTAMANTE Y RIVERO, Judges JESSUP, PADILLA NERVO and AMMOUN append Separate Opinions to the Judgment of the Court.
Vice-President KORETSKY, Judges TANAKA, MORELLI, LACHS and Judge ad hoc SORENSEN append Dissenting Opinions to the Judgment of the Court.
(Initialled) J. L. B.-R.
(Initialled) S. A.

*57 SEPARATE OPINION OF PRESIDENT J. L. BUSTAMANTE Y RIVERO

[Translation]
1. I share the opinions expressed in the text of the Judgment and the conclusions in its operative provisions, except so far as concerns paragraph 59, with regard to which I must express the reservation that will be found below. Nevertheless, I believe it to be possible to state some further considerations in support of certain principles and rules of law upon which the Parties might also base themselves for the purpose of carrying out the delimitation, the effecting of which they have reserved to themselves by Article 1, paragraph 2, of the Special Agreements whereby the Court was seised.
2. The reasoning I have followed in drawing up the present opinion was the following: although the institution of the continental shelf is a new institution, it is the fact that its application has now become very widespread. Numerous States, in all continents, have adopted its fundamental principles into their legislation and constantly apply them. In this sense, it is not going too far to say that the regime of the continental shelf has today a concrete existence and a growing vitality.
Since the governmental proclamations which lay at its origin (about 25 in number) have but rarely been challenged, but have, on the contrary, set a trend in motion, they have thereby acquired the character of relevant factors from the point of view of international law. While it is true that some proclamations formed the subject of reservations on the part of certain other States, those reservations arose from the fact that the rights proclaimed over the continental shelf gave to this concept an ambit which the objecting States considered excessive; it must consequently be concluded therefrom that the expression of such reservations merely constitutes further evidence of the effective nature of the institution from that time on. The writings of publicists have firmly supported the concept of the continental shelf and have recognized as legitimate its legal foundation, namely: the utilization of the natural resources of the seabed and subsoil for the benefit of the neighbouring peoples and of mankind in general. In several bilateral agreements, States have subsequently confirmed the system by adopting it for their mutual relations. Finally, the Geneva Conference tried to systematize the principles of the new institution in the 1958 Convention on the Continental Shelf and sought to define the methods by which they can be applied.
*58 Having regard to the recent appearance of this new branch of maritime law and to the still limited and not always happy experience that has been had of its methods of application, it is understandable that some hesitation might have been felt with regard to the formal incorporation of all its principles and norms into general international law. It seems to me, however, that certain basic concepts, at any rate, the acceptance of which corresponds to a well-nigh universally held opinion, or the sense of which necessarily flows from the very concept of the continental shelf, are already sufficiently deeply anchored for such incorporation to be possible. This is, moreover, what the Judgment

states so far as concerns, for example, the two principles set forth in paragraph 85, sub-paragraphs (a) and (b), the former referring to the obligation to negotiate incumbent upon the States concerned for the purposes of delimiting their continental shelves and the latter referring to the application of equitable principles for determining the rights of the participating parties. These two principles, expressly stated in the Truman Proclamation, respectively reflect the exclusive right of the State, as sovereign, itself to decide on the boundaries set to the national territory, and the need to introduce into the negotiations on the continental shelf, complex in themselves and frequently full of unforeseen factors, that factor of good faith and flexibility which equity constitutes and which reconciles the needs of peaceful neighbourly relations with the rigidity of the law. A third principle is laid down in the Judgment (paragraph 85, sub-paragraph (c)), when it considers as established the notion that the continental shelf of every maritime State is the natural prolongation of its land territory and must not encroach upon that which constitutes the natural prolongation of the land territory of another State. This concept of 'prolongation' is also implicit in the expression 'adjacent to the coast', which is employed in the description of the continental shelf in Article 1 of the Geneva Convention of 1958. I shall demonstrate later that the concept of 'prolongation', which takes on the aspect of 'convergence' in the particular geographical circumstances of closed seas, involves certain limitations regarding the drawing of the boundary line of the shelves situated in such seas.

3. I am nevertheless of the opinion that besides the essential principles which I have just mentioned, it is possible to deduce others from the accepted concept of the continental shelf, whether they be sought in the Truman Proclamation or in Articles 1 and 2 of the Geneva Convention, or whether they be the logical and necessary consequence of adapting the basic principles to certain unavoidable geographical facts of which examples are to be found throughout the world. I have listed such possible supplementary principles below.

4. The concept, already examined, of 'natural prolongation' of the land territory of the coastal State implies, as an obvious logical necessity, a relationship of proportionality between the length of the coastline of the land territory of a State and the extent of the continental shelf **59* appertaining to such land territory. Parallel with this, so far as concerns inter-State relations, the conclusion is inescapable that the State which has a longer coastline will have a more extensive shelf. This kind of proportionality is consequently, in my view, another of the principles embraced by the law of the continental shelf. The Judgment, in paragraphs 94 and 98, mentions this element as one of the factors to be taken into consideration for the delimitation of a shelf; the Court nevertheless did not confer upon it the character of an obligatory principle.

The preceding question leads quite naturally to that of the method to be applied for measuring the length of the coastline of the land territory of a State and, so far as concerns the continental shelf, I do not share the idea that that length must be measured as in the case of the territorial sea, from the low-water line. That criterion, laid down in the 1958 Convention, probably originates from the fact that the institution of the continental shelf is historically subsequent to that of the territorial sea and it was perhaps thought that an apparent similarity between the two cases rendered the adaptation thereof possible. In reality, the cases are different. The continental shelf, being but a natural prolongation of the land territory, forms an integral part thereof and is physically identified with it, so as to constitute a single land mass. A dividing line between the land territory and the shelf consisting of the low-water mark would be a boundary that would be variable, capricious and, furthermore, foreign to the concept of the continental shelf. After all, the low-water mark relates only to a changeable and irregular surface element, viz., the relief or topography of the coast. This uncertain element, subject to numerous physical and geographical circumstances, does not seem to be the most appropriate for defining the starting-point for a land mass such as the continental shelf, the close link between which and the land territory is beyond discussion. A more stable baseline must be found and it might be obtained by measuring the length of the coastline according to its general direction, by means of a straight line drawn between the two extreme points

of the marine frontier of the State concerned. In paragraph 98, the Judgment mentions this solution as one of the possible solutions in the present case. I must add that the principle of equity, which would apply at the same time as one of the elements which must govern the delimitation to be effected, would enable any difficulty which might arise in practice to be surmounted.

I must deal here with another, very closely related, subject. Neither do I share the viewpoint of the Geneva Convention of 1958, according to which the continental shelf commences only beyond the outer limit of the territorial sea. Such a viewpoint seems to me artificial and even highly debatable, not only because it contradicts the idea of adjacency to the coast referred to in Article 1 of the Convention, but, above all, because it upsets the geological concept of the land territory of which the continental shelf is but a physical prolongation under the territorial sea and even beyond it. Geology admits neither a break nor an intermediate **60* space between the coast of the land territory and the line where the continental shelf would be deemed to commence at the outer limit of the territorial sea. It seems to me that the truth is otherwise: that the territorial sea is superjacent to that part of the shelf which is closest to the coast. But there is no geological difference between the bed of the territorial sea and that part which extends beyond the outer limit of that sea. These two beds constitute in fact but a single geological formation: the continental shelf, the characteristic of which is to constitute an area of shallow depth in relation to the level of the superjacent sea, gradually prolongs the continent until the continental platform is reached, from which there is a sudden sharp drop to the great depths of the high seas.

5. If, on the basis of the criterion adopted in the Convention, the possibility of utilizing the natural resources of the seabed and of its subsoil close to the coast was the determinant reason in the creation of the continental shelf, it goes without saying that certain fundamental principles must be stated which furnish a basis for the legal system governing the exploration and exploitation of those resources.

In my opinion, the fact of taking into consideration the existence or the location of natural resources in the area of a continental shelf, far from constituting in principle an essential factor for judging where to draw the boundary with a neighbouring shelf, rather entails the risk of constituting a disturbing factor to the detriment of equity. But a court cannot ignore reality, which latter shows that at the origin of the concept of the continental shelf, opening to coastal States the possibility of exploiting the riches which it contains, is to be found a criterion of social and economic import. That is why it is indispensable to consider whether, on the basis of the elements furnished by the accepted concept of the continental shelf and contained in the initial proclamations, in the writings of qualified publicists, in the proceedings at Geneva and in the practice of States, it is possible to formulate certain postulates aimed at co-ordinating the basic concepts of the institution and the factors represented by geographical circumstances, technical requirements or economic needs. This notion of co- ordination is summarized in the principles and rules stated hereunder:

(a) The coastal State exercises sovereign rights over the continental shelf appertaining to its territory for the purposes of the exploration and exploitation of the natural resources to be found therein.

(b) The sovereign rights of a State over its continental shelf are exercised independently of the existence or non-existence of natural resources in the said shelf.

(c) The delimitation of any given continental shelf is not in principle subject to the location or direction of fields or deposits of such natural resources as may exist in the region in which the shelf is to be found, unless decisive circumstances so require, or an agreement to the contrary is reached between the States concerned, without prejudice to the rights of third parties.

**61* (d) The exploitation of a deposit extending across the boundary line of a continental shelf shall be settled by the adjacent States in accordance with the principles of equity and, preferably, by means of the system of joint exploitation or some other system which does not reduce the efficiency of working or the quantities obtained. (The Court, in paragraph 97, touched upon the question of deposits as one of the factors which must

reasonably be taken into consideration by the Parties.)

6. The special geographic situation of the continental shelves concerned requires, in my opinion, that rules of law, themselves also special, must be sought so as to enable the Parties to arrive at a just and equitable delimitation. The problems with which the Court has to deal must be placed within their particular geographical context. The continental shelves of Denmark, the Federal Republic of Germany, and the Netherlands, whose delimitation has to be carried out, appertain respectively to the territories of those three States, which are situated on the eastern coastline of the North Sea, while several other States border the rest of the approximately oval perimeter of this quasi-closed sea on the north, south and west. The area thus circumscribed is taken up by the various national continental shelves lying no deeper than 200 metres below sealevel (with the exception of the Norwegian Trough). The Parties agree as to this fact.

This special geographical configuration of the North Sea confers on the continental shelves included within it certain characteristic aspects so far as their location, form and mutual delimitation are concerned, and these aspects have an influence upon the legal regime. The aspects in question are as follows:

(a) In this kind of configuration, the natural prolongation of the territory of each State, starting from the shore, moves in a seaward direction towards the central area of the sea under consideration; while the lateral boundary lines of each shelf naturally and necessarily converge towards that same central area. The principle of convergence is therefore normal for the delimitation of the shelves in this kind of sea unless the Parties agree upon another solution.

(b) The natural convergence of the lateral delimitation lines of djacent shelves belonging to such seas in fact precludes the possibility of giving to those lines parallel directions and, in consequence, of obtaining shelves of a rectangular shape. This convergence therefore introduces a new factor, one which the necessity of avoiding all overlapping or encroachment renders practically inevitable, i.e., the progressive narrowing of the shelf as it approaches the central apex; the shelf then takes on approximately the form of a trapezium or triangle, according to whether the central maritime area is more or less elongated or, on the contrary, more nearly circular.

In the light of these facts, which demand that the concept of 'prolongation' be adapted to the exigencies of geography, and referring for the *62 time being solely to the problem of lateral delimitation, I believe that there is justification for laying down in the present instance, as a rule to be followed by the Parties, the adoption of the system of converging delimitation lines for the purpose of drawing the lateral boundaries of the continental shelf of the Federal Republic of Germany, both as concerns the German-Danish boundary to the north and as concerns the German-Dutch boundary to the south; of course the following two essential elements must also be borne in mind:

(i) the delimitation will be made only beyond the partial boundary lines determined by the treaties of 1 December 1964 and 9 June 1965 already cited (points D and B on the map shown as Annex 16 in the Counter- Memorial);

(ii) the extremities of the two lateral boundary lines to be drawn will meet the line or, as the case may be, the point indicating the western side or apex of the German shelf, the special legal situation of which is described in sub-paragraph (f) of the present paragraph. It is for the Parties to choose the method or methods for carrying out this lateral delimitation, in conformity with the terms of the Special Agreements now in force, as well as to combine those methods with the principle of equity, as contemplated in paragraph 85 of the Judgment.

(c) The convergence of the lateral boundaries of this type of shelf necessitates the consideration of a new and different delimitation, that of the apex or end boundary of the shelf in question, in the area where as a result of contact with the extremity or apex of the shelf of the opposite State there is a danger of a conflict of rights. This delimitation is customarily effected by the drawing of a median line, except in the case of agreement of the Parties to the contrary, or of the existence of special circumstances. So far as the North Sea is concerned, the use of the median line by the majority of the coastal States in the agreements for delimitation of their shelves of which mention will be made below

shows that a regional customary law has come into existence on this point.
(d) The characteristics considered in the three preceding paragraphs are not, in my opinion, new expressions or concepts of the law of the continental shelf, but are simply logical adaptations of other principles, which have already been described, under the inescapable influence of the geographical facts. For example, convergence is nothing but an aspect of the principle of the natural prolongation of the land territory, this prolongation being to a certain extent restricted as a result of the pressures resulting from local geography. The determination of the apex, as one of the boundaries of the continental shelf, is implicit in the definition thereof, since it must not be undefined and must not be prolonged beyond the neighbouring domain, that is to say beyond the apex of the shelf of the opposite State, nor yet beyond the points where the depth of the sea exceeds the 200-metre depth line, if the Convention *63 of 1958 is adopted. The principle of what is reasonable applies, in my view, in all cases, for the recognition as legally proper of these occasional variants of the principles and rules which are the basis of the legal regime of the continental shelf, as contained in its generally accepted definition, which principles have been backed by sufficiently repeated support of the opinio juris among States, and by the writings of publicists.
It is as well to add that the expression of these ideas does not imply that the present writer would wish to propose the application, in the present case, of the sector system (a concept which, from the strictly technical point of view, does not correspond to the situation in the North Sea), and less still to distribute between the Parties shares of such sectors taken from the shelf as a whole. The present writer's argument is particularly directed to the fact that, in the North Sea, taking into account its peculiar configuration, particularly on the eastern coast, the lateral demarcation lines of the national shelves necessarily converge toward the central area, and the fact that it is necessary to demarcate not merely the lateral boundaries of each shelf but also the apex or end boundary in order to fix in law the neighbour- relationship with the shelf of the opposite State.
(e) It remains to be added-and this observation seems to me not merely important, but possibly decisive-that in practice a substantial number of the continental shelves of the North Sea have already been delimited, wholly or in part, according to the very principles which I have just expressed. In other words, a body of treaty-law which is fairly widespread and generally accepted exists on this question among the coastal States of the North Sea. An examination of the Anglo-Norwegian Agreement of 10 March 1965, the Anglo-Dutch Agreement of 6 October 1965, the Danish-Norwegian Agreement of 8 December 1965, and the Anglo-Danish Agreement of 3 March 1966, is sufficient to show that the system of convergence lines towards the central space, and the use of the median line, have invariably been adopted for the delimitation of the shelves between opposite States, with reference to their apices. The German-Dutch Agreement of 1 December 1964 and the German-Danish Agreement of 9 June 1965 on the lateral delimitation of the shelves near the coast also show that the two partial lines which were drawn up by these Agreements, although their course was interrupted, are clearly lateral lines converging towards the central region of the sea. Consequently, when in this opinion I draw the Parties' attention to the obligation to refer, for the delimitation of the German continental shelf, to the rule set out in paragraph 6, I do no more than observe the existence of a customary law of a regional nature, which in the form of treaty law has generally prevailed for some years in the practice of coastal States of the North Sea.
(f) It still remains to determine the principles and rules according to which the delimitation of the apex (west side) of the shelf of the Federal Republic of Germany should be effected by the Parties. This demands *64 first that the legal situation be examined which results in this connection from the Agreement of 31 March 1966 between the Netherlands and Denmark on the delimitation of the continental shelves which these two countries have allotted to themselves on the basis of the equidistance principle; this also requires that the situation be studied which derives from the Agreements of 6 October 1965 and 3 March 1966, determining by an unbroken median line (points G-F-H on the map, Annex 16 to the Counter-Memorial) the boundaries between the apices of

the Anglo-Dutch and Anglo-Danish shelves respectively.
As to the first of these three agreements, the Court has considered that it was not opposable to the Federal Republic of Germany which, not having been a party thereto, informed the contracting parties of its reservations (Annex 15 to the Memorial). The Court has also indicated that, Denmark and the Netherlands not being adjacent States, their application of the equidistance system was not in conformity with the text of Article 6, paragraph 2, of the 1958 Geneva Convention.
So far as concerns the two other agreements mentioned (Netherlands/United Kingdom and Denmark/United Kingdom), in regard to which the Federal Republic of Germany has also made observations (Annexes 10 and 13 to the Memorial), it is not for the Court to make any finding as to their content or validity, since there is among the contracting parties thereto a State which is not a party to the present cases; according to the terms of the Special Agreements, the Court lacks jurisdiction. Since this is how matters stand, there would be no possibility of the Court laying down any rule concerning the drawing of a median line as between the United Kingdom and the Federal Republic. From the hypothetical point of view, various possibilities could be envisaged for the future: one might contemplate an Anglo-German settlement, in which the Netherlands and Denmark would acquiesce, which would enable the Anglo-Dutch- Danish median line to be redrawn so as to introduce therein, probably with a slight eastward inflection, a small section of Anglo-German median line, or simply a point, if it is the apex of a triangle which is envisaged; one might also imagine a tripartite agreement between Federal Germany, Denmark and the Netherlands in which the theoretical or mathematical position of a German- British median line would be fixed for the sole purpose of situating upon it the line (or point) where it would meet the two Danish-German and Dutch-German lateral boundary lines of the continental shelf of the Federal Republic, which lines would be drawn in conformity with the indications of paragraph 6 (b) above-the purpose thereof being the final completion of the delimitation of the German shelf. In the latter hypothesis, a narrow passage would probably preserve the junction of the extremities of the Dutch and Danish shelves behind the German shelf and, that being so, it would not be necessary for the United Kingdom to participate contractually for the purpose of adjusting the present median line. These hypotheses or perhaps others, more acceptable or more practical, might be *65 envisaged outside the ambit of the proceedings before the Court; but they all give rise to the profound conviction that in order to settle this situation in a satisfactory manner the Court has, in my view no other rule to prescribe to the Parties than observance of the principle of equity, always inspired by the two legal factors already defined; the concept of lateral convergence starting from points B and D of the map referred to above, and the concept of access to what would at least in theory be the Anglo-German median line or a point thereon, whether it be that the negotiations provide for the apex of a trapezium, or whether they provide for that of a triangle. At this point I must revert to the text of paragraph 85 (a) and (b) of the Judgment:
'the parties are under an obligation to enter into negotiations [which] ... are meaningful, ... [and] are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied'.

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Having thus expressed my separate opinion, I must go on to add the following declaration:
The comparison given in paragraph 59 of the Judgment by way of example is quite correct when it shows the quite different effects on the equidistance line of certain irregular configurations of the coastline according to whether the line is used for drawing the lateral boundaries of territorial waters, whose seaward extent is not considerable, or for defining the lateral boundaries of more extensive continental shelves. But from the fact that no uniform agreement, still less unanimity, exists between States as to the breadth of the territorial sea of each of them, and that it is not always certain that in every case the breadth of the continental shelf of a given State will extend beyond that of

its territorial sea, it is impossible to conclude with certainty that the deviation-effects affecting the equidistance line will occur in practice in the way and to the extent indicated in that text. I have therefore thought it preferable to express some reservations so far as concerns my adherence to the content of the said paragraph 59, the more so in that if the problems of the territorial sea are connected problems, they do not directly constitute the principal object of the dispute, which concerns the continental shelf in concreto.

(Signed) J. L. BUSTAMANTE Y RIVERO.

*66 SEPARATE OPINION OF JUDGE JESSUP

I concur in the Judgment of the Court and especially in its conclusion that the equidistance method or principle is not established as obligatory in international law. It would be possible to emphasize by more detailed quotations how crystal clear it is that neither the International Law Commission nor its Committee of Experts considered that 'equidistance' was prescribed by existing law or that it was a concept inherent in the very nature of the continental shelf.

In my opinion, more extended discussion than is to be found in the Judgment of the Court may usefully be devoted to what, in the words of Counsel for Denmark and the Netherlands, are 'some of the realities of the 'just and equitable share' in the present cases'. At the same time, I agree with the Court that the contentions of the Federal Republic in favour of this concept cannot be accepted in the form given to them.

Although, for reasons which were not fully disclosed, but which may be surmised, the Parties in this case chose to deal obliquely in their pleadings with the actuality of their basic interests in the continental shelf of the North Sea, it is of course obvious that the reason why they are particularly concerned with the delimitation of their respective portions is the known or probable existence of deposits of oil and gas in that seabed. The North Sea is one of the great historic fishing grounds of the world, but there is no indication in the pleadings of the Parties in this case that, in connection with delimiting the shelf, they were in any way concerned about control over such living organisms as are described in paragraph 4 of Article 2 of the 1958 Convention on the Continental Shelf. In addition to the Parties in this case, Great Britain and Norway are also actively interested in the exploitation of North Sea oil and gas, but the petroleum industry has not evinced any interest in the area of the continental shelf appertaining to Belgium or to France.

As indicated in the Court's Judgment, a series of seven international bilateral agreements among pairs of the littoral States have plotted lines delimiting portions of the shelf which the Parties consider to be appurtenant to themselves and to each other. In these various areas during the last five years, there has been a steadily increasing activity in the exploration and drilling for oil and gas, although private interests for a time *67 naturally hesitated to make the very large investments required [FN1] until the enactment of national laws revealed the terms on which concessions would be granted [FN2] and until the settlement of disputed national claims to certain areas. The ambivalence which characterized the pleadings of the Parties in regard to the relevance of the mineral resources of the continental shelf will appear from a few passages in both the written and the oral pleadings.

The Federal Republic of Germany

The Memorial of the Federal Republic, in Part I, Chapter I, opens with a physical description of the continental shelf of the North Sea. It notes (in section 7):

'After the discovery of a very rich field of natural gas near Slochteren in the Dutch province of Groningen close to the mouth of the Ems, the first test drillings were made in 1963. Since then a number of finds have been made, including several exploitable deposits of natural gas in the British area ...'

References are made to various governmental acts of Denmark, the Federal Republic, Great Britain and the Netherlands, relative to future development of these mineral resources (sections 12-15).

As the Memorial (in Chapter I of Part II) begins to develop the legal theory of 'the just and equitable share', there is clear reference to natural resources (sections 29 and 30). The emphasis on resources is strengthened in sections 34 and 35 especially by the invocation of the law on the apportionment of the waters of a river basin. In section 48, Judge Hudson is quoted as stating that 'the economic value of proven deposits of minerals' should be taken into consideration in the delimitation of the continental shelf. In section 66, one reads:

'From the point of view of exploitation and control of such submarine areas, the decisive factor is not the nearest point on the *68 coast, but the nearest coastal area or port from which exploitation of the seabed and subsoil can be effected. The distance of an oil, gas or mineral deposit from the nearest point on the coast is irrelevant for practical purposes, even for the laying of a pipe-line, if this point on the coast does not offer any possibilities for setting up a supply base for establishing a drilling station or for the landing of the extracted product.'

As the Memorial proceeds to develop the argument about 'special circumstances', there are references and quotations to the effect that the location of 'indivisible deposits of mineral oil or natural gas' may constitute such circumstances (section 70). These references are repeated in section 79, where it is said that-

'the literature on the subject attributes relevance also to historical, economic, and technical factors, in particular to the geographical distribution of the mineral resources of the continental shelf and to the maintenance of the unity of their deposits' [FN3].

It is not wholly clear from the text, however, whether this is the 'geographical criterion' to which the Federal Republic would attribute primary importance. However, in the following section, the Memorial, in arguing for the 'principle of equality', asserts that all the coastal States of the North Sea are interested, inter alia, 'in the appropriate exploitation of the mineral deposits of the seabed in order to avoid wasteful or harmful methods of extraction which would lead to despoliation'. Here reference is made to the Supplementary Agreement of 14 May 1962 to the German-Netherlands Ems-Dollard Treaty of 8 April 1960, which provides for joint exploitation and sharing of costs and profits in the Ems Estuary [FN4].

Finally the Memorial, in section 95, at least hints that the Court would be free to indicate that the location of mineral resources may be one of the criteria to be taken into account 'in order to achieve a just and equitable apportionment'.

In the Reply (section 31) there is a discussion of allegations in the *69 Danish Counter-Memorial to the effect that the Federal Republic had been influenced by recently acquired knowledge of the prospects for finding oil and gas in the continental shelf. The Reply asserts that-

'the German explorations referred to in the Counter-Memorial could not possibly provide the Federal Republic of Germany with reliable information about the existence of oil and gas deposits in the disputed area. Only actual drilling as undertaken in 1967 under a Danish concession, might have resulted in such information.'

It is added that 'German explorations were stopped on the request of the Danish Government in the disputed area' but that the latter granted drilling concessions there.

Denmark

Chapter I of the Danish Counter-Memorial at once draws attention to the interest in mineral resources by leading off in section 7 with a somewhat detailed discussion of explorations and drillings in the North Sea beginning as early as 1963 with the single Danish concessionnaire making its first drillings in 1966. The reader is referred to Annex 7 of the Counter-Memorial which is a memorandum by the Adviser to the Danish Concessionnaire together with a map showing the location of what then (1967) were deemed the most promising locations for wells. The memorandum also called attention to the existence of a ridge extending about 220 kilometres into the North Sea known as the 'Fyn- Grindsted High'. It is stated that due to its geological structure, this ridge is 'considered devoid of hydrocarbon prospects of importance, and ... consequently reduces the prospective area of Denmark and the Danish North Sea continental shelf considerably'. In Chapter II of the Counter-Memorial, sections 14-16 set forth further

details concerning exploration and exploitation of oil and gas in the continental shelf area claimed by Denmark, including mention of the 1963 concession to the A. P. Moller Companies. In Chapter II, sections 21 and 22 describe German explorations in the North Sea continental shelf 'including the southern part of the Danish shelf area'. Reference is made to the Danish protest and assertions which have been mentioned in connection with the Reply of the Federal Republic. It is also remarked that the German proclamation of 1964 concerning the exclusive rights in the continental shelf was probably inspired by press reports that an American company [FN5] was planning to drill outside the German territorial sea.

*70 In sections 31 and 34, which deal with the negotiations between Denmark, the Federal Republic and the Netherlands, reference is made to the German suggestions of possible joint utilization of resources in certain areas, but no opinion is expressed.

Later, in section 49, the Danish Counter-Memorial argues that the German Memorial confuses the question of 'space' with the question of 'resources' and in this connection rejects the invoked analogy of the waters of a river basin.

In section 125, the Danish Counter-Memorial replies to the point made in section 66 of the German Memorial to the effect that the important coastal point must be one useful in connection with drillings and extractions of minerals. The Counter-Memorial states that-

'experience shows that, if a deposit is exploited, the nearest points on the coast, even if theretofore unused or scarcely inhabited, may be developed into important elements of support for the exploitation ...'

In section 149 there is reference to certain bilateral agreements between North Sea States providing for consultation in regard to the exploitation of resources bordering the boundary line [FN6].

The Netherlands

The Counter Memorial of the Netherlands, like that of Denmark, but in less detail, opens Chapter I with some references to the early drillings in the North Sea. The discussion is expanded in section 11, showing that gravity measurements and seismic explorations had been conducted by Netherlands interests (especially Nederlandse Aardolie Maatschappij-N.A.M.) in the North Sea since 1956. Since 1960 'these activities have been especially concentrated on the northern part and up to the median lines which separate the Netherlands part from the German and Danish parts of the shelf'. Between August 1962 and 1966, a total of 24 licences had been granted to about 19 companies or groups of companies representing American, Belgian, British, French, German and Italian interests; these licences 'cover all of that part of the continental shelf which comes under the jurisdiction of the Netherlands on the basis of the equidistance principle'.

Further licences have been issued since the new Netherlands legislation went into effect in early 1967. Figure 2 on page 315 of the Netherlands *71 Counter-Memorial shows the charting of the blocks for which licences are granted.

In section 18, the Counter-Memorial explains that the domestic legislation and international agreements of the Netherlands-

'take into account the possibility of the presence of single geological structures extending across the dividing line between parts of the continental shelf under the North Sea'.

Section 29 refers to the Special Agreement with the Federal Republic concerning co-operative activities in the Ems Estuary where the international frontier 'has been disputed for centuries'.

As in section 49 of the Danish Counter-Memorial, the Netherlands Counter- Memorial in section 43 replies to the German argument invoking the rules on sharing waters of a river-basin. Similarly, section 119 develops the same argument as that in the Danish Counter-Memorial in section 125, in respect of the relative importance of various points on the coast. Likewise, in section 143, one finds the discussion of special agreements covering situations in which there are 'indivisible deposits of mineral oil or natural gas'.

The Common Rejoinder of Denmark and the Netherlands adds little to the general picture already presented. But in section 20, where the issue of the distinction between 'space' or 'area' and 'resources' is further developed, it is stated that-

'there is no necessary connection between the surface of an area and the amount of

exploitable resources therein. ... Indeed the total amount of the natural resources of the area, indicated as the continental shelf beneath the North Sea, is unknown and the same goes for the location of those resources.'

In section 21, where there is further rebuttal of the argument based on the use of waters of international rivers, there is the following statement which is not lacking in significance:

'Surely it is possible that a single geological structure extends across a boundary line on the continental shelf, as it is possible that a single geological structure extends across the delimitation lines between concession areas on the part of the continental shelf appertaining to one State. Both municipal legislations and the international practice of States show that the problems arising from such a situation are not solved by a modification of the boundaries of the concession area or of the continental shelf as the case may be, but by different methods which do not affect those boundaries. In this connection reference is made to paragraph 18 of the Netherlands Counter- Memorial ...' *72 -which deals with consultations in case of imbrications or overlaps. Section 22 argues that the Federal Republic itself renounced basing its claim on the sharing of 'resources'.

In section 51, it is recalled that in both the Counter-Memorials (Danish, paragraph 88 and Netherlands, paragraph 82) it had been pointed out that there had not been much occasion for States to make treaties concerning lateral boundaries 'before the question of exploiting the mineral resources of the seabed and subsoil arose'.

It is apparent from the above extracts that the problem of the exploitation of the oil and gas resources of the continental shelf of the North Sea was in the front of the minds of the Parties but that none of them was prepared to base its case squarely on consideration of this factor, preferring to argue on other legal principles which are sometimes advanced with almost academic detachment from realities.

In the oral proceedings, there are a number of statements which are of interest in considering whether the known or probable location of mineral resources is a key factor. From the side of the Federal Republic, its Agent, in his opening address on 23 October stated flatly:

'The main consideration that influences State practice in the acquisition and delimitation of continental shelf areas is the idea of getting a share in the potentialities of the continental shelf that have accrued to the coastal States by the progress of modern technology.'

All of these various but often ambivalent references to the natural resources of the shelf, considered in the light of the German argument for a 'just and equitable share', led one Member of the Court to put the following question to the Agent of the Federal Republic on 25 October:

'Will the Agent of the Federal Republic of Germany, at a convenient time, inform the Court whether it is the contention of the Federal Republic of Germany that the actual or probable location of known or p tential resources on or in the continental shelf, is one of the criteria to be taken into account in determining what is a 'just and equitable share' of the continental shelf in the North Sea?'

The German Agent replied to this question on 4 November in the following terms:

'In response to this question I would like to state the following: First, the criteria to be taken into account in determining what *73 is a just and equitable share of the continental shelf are primarily, but not exclusively, geographical factors. The consideration of other factors and the weight which should be attributed to them depends on their merits under the circumstances of the concrete case.

Secondly, if, as in the North Sea, there is no reliable information about the actual location of economically exploitable resources of considerable importance, the geographical situation alone determines the equitable apportionment. Once agreement had been reached on the delimitation of the continental shelf, later knowledge as to the location of such resources should not affect the agreed boundary.

Thirdly, economically exploitable resources of considerable importance, located in areas where the boundary is disputed or yet undetermined may, under the principle of the just and equitable share, be taken into account in determining the allocation of areas to one

or the other State. This may be accomplished either by changing the course of the boundary line, or by means of joint exploitation if the latter is feasible. Such a case may arise in particular if the boundary line would cut across a single deposit. Since there are no such resources in the North Sea, the delimitation of the continental shelf should be made on the basis of the geographical situation, along the lines suggested by the Federal Republic of Germany. (Emphasis supplied).

In this context, I may add that the simplest way to have achieved an equitable apportionment with respect to known or unknown resources would have been to place the areas of the continental shelf of the North Sea situated farther off the coast under a regime of joint control and exploitation. The Federal Republic had advocated such a solution in the earlier stages of the negotiations; since the North Sea States had begun to divide the continental shelf among themselves by boundaries, such a situation seems to be outside the realm of reality. In the present situation, a division by sectors reaching the centre of the North Sea is an effective way to give the Parties an even chance with respect to the potentialities of the continental shelf.'

It is difficult to reconcile the statement that 'there are no such resources in the North Sea', i.e., where the boundary line would cut across a single deposit, with the statement that 'there is no reliable information about the actual location of economically exploitable resources of considerable importance' in the North Sea. Presumably the Agent had in mind only that part of the North Sea which is in dispute in this case.

Subsequently, on the same day, the German Agent made the following comments:

*74 'If there are several States adjacent to the same continental shelf, this transfer of jurisdiction [to the exclusive jurisdiction of the coastal States] involves a partitioning, among those States, of area, and the potential resources therein, which have accrued to the coastal State from the common fund of mankind. The making of such an apportionment implies that the self-evident principle of the just and equitable share must be given effect. The necessary criteria will have to be developed from the concept of the continental shelf and adapted to the situation of the particular case.' (Emphasis supplied.)

Then, after further invocation of the rules for the uses of waters of international rivers:

'As I have ... pointed out ... the delimitation of continental shelf areas is in its essence not a mere extension of sovereignty. It is primarily a distribution of submarine areas in which each coastal State is given an exclusive right to exploit the potential resources of those areas. Since the resources of the continental shelf which have to be distributed among several adjacent States are as much limited as are the resources of an international water-basin, the law is in both cases faced with the same problem, namely the equitable distribution of such resources.'

The sum total of these comments is somewhat ambiguous when one seeks a direct answer to the question posed by a Member of the Court. Nor is the matter greatly clarified by noting certain remarks of Professor Oda, Counsel for the Federal Republic. On 25 October Professor Oda cited an agreement between Iran and Saudi Arabia concerning a disputed offshore area whereby they did not divide the area-

'by a median line or another geometrical demarcation but rather by a novel, so-called 'economic' solution. This has been done by dividing all of the 'recoverable oil' in the previously disputed area into two equal parts. Ideas which had been advanced earlier, of dividing the 'oil in place' were discarded. The equal share now relates instead to all 'recoverable oil' contained in the pertinent geological structure.'

On the other side, argument for Denmark and the Netherlands did not fail to take account of the realities of the location of resources of oil and gas. On 28 October, the Agent for Denmark made the following statement:

'At the same time the Danish Government must consider this case as being of the utmost importance. Denmark has so far had no natural resources or riches. In the modern search for oil and gas *75 extensive exploration has taken place without positive results, apart from the fact that not very far north of the boundary line in question oil and gas have been found. Even if it is not yet known whether commercial exploitation is possible, the position of the boundary line must be considered as being of the utmost importance.'

On 31 October, the Netherlands Agent hinted, as had the Agent for the Federal Republic,

at the possibility of certain difficulties being overcome by means other than changing a boundary line, scilicet, by joint exploitation. He said:
'In both cases there may be said to be an element of artificiality in part of the truly equidistant boundary line ... Furthermore, international law and practice demonstrate that there are other means of solving the problems arising from the artificiality of boundary lines-other means than the drawing of a different boundary line.
In this connection, I may make reference, by way of example, to the United Kingdom/Netherlands Agreement concerning the exploitation of single geological structures overlapping the boundary line.'
On 7 November the same Agent, after dealing again with the invocation of the rules governing the use of the waters of international rivers, said that while the Federal Republic relied on those rules-
'at the same time and on the other hand does not consider the actual or probable location of known or potential resources on or in the continental shelf in the North Sea as one of the criteria for its scheme of so-called equitable apportionment. This, at least [said the Agent] seems to be the upshot of the reply given by the learned Agent of the Federal Republic to one of the questions ...'
put by a Member of the Court, as described heretofore.
On the last day of the oral proceedings, 11 November, Counsel for Denmark and the Netherlands, in the course of a somewhat satirical discussion of what he called the 'macrogeographical' approach, made a somewhat detailed comparison of the economic and particularly of the mineral resources of the three States parties to the case. He noted that the Federal Republic 'has been rich in mineral and fuel' whereas, 'until recently, the Netherlands had quite minor mineral and fuel resources'. Denmark, in turn, 'in the past had altogether negligible mineral and fuel resources'. He continued to note that the Netherlands in recent years has uncovered 'important sources of natural gas and *76 some crude oil' [FN7]. As for Denmark, its economic position-
'might be transformed if oil or natural gas now became available to her in the continental shelf. In this connection the Court was informed, in Chapter I of Part I, and in Annex 7 of the Danish Counter-Memorial, that the quite extensive exploration already carried out indicates that the only areas of promise so far discovered lie just to the north, on the Danish side, of the Danish equidistance boundary. In short, the stretching of the Federal Republic's continental shelf to the so-called centre of the North Sea in the manner demanded by our opponents may well have the result of cutting off Denmark from the one reasonable expectation which she has of acquiring appreciable domestic sources of energy.'
All of these observations, Counsel informed the Court, were presented 'only to indicate some of the realities of the 'just and equitable share' in the present cases'. Finally, he was more dogmatic in asserting that the German Agent's reply to the question from a Member of the Court constituted an agreement that the Court has only to consider 'geographical factors'; in other words he was maintaining that despite his own observations on relative wealth of the three States in mineral fuel resources, the Court was not called upon to take such resources in the continental shelf into account if it sought to determine what is a 'just and equitable share'.
Although the arguments in the pleadings were deflected by the Parties away from outright reliance on the location of hydrocarbons under the North Sea, their bilateral and trilateral negotiations were specifically related to such resources and indicated that more was known about their location than the pleadings indicate [FN8].
The Government of the Federal Republic made it clear from the outset (that is, in the spring of 1964) that it was primarily interested in reaching an agreement with the Netherlands in the area close to shore so that 'the German oil companies will be able to commence drilling operations at the points near the coast in which they are at present mainly interested'. (German Does., No. 8.) The area in question was seaward of the Ems Estuary beyond that part already covered by the 1962 agreement for co-operative exploitation of the mineral resources *77 there. Both Governments noted that national legislation had not yet been enacted and that there was danger of an 'uncontrolled and

hence probably inefficient hunt for oil and gas'. But the ultimate reach of the dividing line between the two national areas in the North Sea was always reserved, it being noted that the value of various areas was still unknown. The situation was summarized in a paper dated 10 August 1964, prepared for the Cabinet of the Federal Republic:

'However, in view of the drilling operations for natural gas started by a German syndicate this summer in the western part of the German Bight, an early settlement of the boundary problem in the coastal area was urgently required. Hence the first step was to agree with the Netherlands on the partial boundary laid down in the present draft treaty; it does not prejudice the further course of the boundary in view of the reservations stated by both Parties in the attached Joint Minutes of the Negotiations of 4 August 1964, and it clarifies the situation in the area near the coast on which the German mineral oil industry sets great hopes in view of the large natural gas deposits found in the Netherlands northern province of Groningen.' (German Docs., p. 23.)

The agreement was concluded on 1 December 1964.

From the point of view of the Government of the Federal Republic:

'As far as can be judged at this stage [6 October 1964], the talks with Denmark will not be of the same economic importance as those with the Netherlands, as so far there are no definite suppositions that any mineral oil and natural gas deposits worth prospecting are to be found in the German- Danish boundary area ...' (German Docs., p. 26.)

On the Danish side, the concessionnaire, A. P. Moller Companies, Ltd., who worked closely with the Government, shared a view which had been expressed in the Netherlands-German negotiations, namely that the German-Netherlands inshore agreement was due to pressure from the oil companies, and that the German- Danish boundary area held very slight prospects.

According to a Danish Government memorandum dated 17 February 1965:

'At a meeting held to deal with the question of continuing the **78* negotiations with Germany and attended by representatives of the Ministry of Foreign Affairs, the Ministry of Public Works, and the Danish Syndicate which has been granted an exclusive concession to explore and exploit deposits of hydrocarbons in the Danish underground and the continental shelf, the representative of the Syndicate said that it was not actually or concretely interested in having established a Danish-German equidistance line of demarcation in the North Sea area next to the coast, because in view of the results of the explorations made in that area and in view of other information available it was to be assumed that there was only little likelihood of finding deposits of gas or oil there; the Syndicate would not be particularly active there. However, there were appreciably greater possibilities of finding deposits of gas or oil further to the west, i.e. towards the middle of the North Sea in the border regions adjacent to Germany, the Netherlands, and Great Britain. The Syndicate is particularly interested in that area, which area would naturally be lost if the German aspirations were realized.' (Danish Docs., p. 6.)

The concessionnaire accordingly hoped that Danish-Netherlands negotiations would begin soon. But the Danish-German inshore agreement was signed on 9 June 1965 and the Danish-Netherlands agreement was not signed until 31 March 1966, after the close of the tripartite negotiations.

It is of course true that there is no rule of international law which requires States surrounding an area such as the North Sea to delimit their respective sections of the continental shelf in such a way as to apportion to each State a 'fair share' of the mineral resources on or in that shelf. Such a rule would be impossible of application since it would require as a condition precedent precise knowledge of the location and size or productivity of all parts of the area. Such knowledge is not complete for the North Sea even today, some five years after numerous wildcat operations were undertaken; scientific surveys had begun much earlier, and the Slochteren discovery goes back to 1959. The first British licences for drilling in the North Sea were granted in 1964; the first Dutch licences were issued between 1962 and 1966. The Danish concession was extended to the continental shelf in October 1963 but the first wells spudded in were not commercially exploitable. As already noted, more promising results are now indicated in drillings slightly north of the Danish-German 'equidistance' line. In the German sector, 11

or 12 dry holes were drilled in three years, 1964-1967.
If the argument for a 'just and equitable share' had been rested on a notion of apportioning natural resources, the counter-argument might have insisted (as indeed it hinted) that resources on the adjacent mainland *79 or in the bed of the territorial sea must also be taken into account. This would have been disadvantageous to the Federal Republic because of its terrestrial supplies notably between the Dutch frontier and the River Weser.
It has been stated that 'the oil industry is strictly international' and in many of the explorations in the continental shelf in the North Sea the interests of one petroleum company are not confined to a single national sector and are frequently blended in a group or consortium which may contain as many as a dozen separate companies. The same drilling rigs, barges or platforms are chartered to operate first in one national sector and then in another.
'The process of exploring acreage which has already been explored by another company using different ideas and with different hypotheses goes on continually. It frequently happens that significant discoveries of oil and gas are made on acreage which a competitor has given up after completing what he considers an adequate exploration programme.' (North Sea Gas, [U.K.] Labour Party: Report of the North Sea Study Group (August 1967), p. 15.)
However, the interests of the petroleum companies are, of course, not identical with those of the Governments of the several States. The latter are concerned with the national revenue to be derived from fees, taxes, royalties or profit-sharing, with increases in national productivity, and also with the impact on the national balance of payments if imports of fuels to meet domestic needs are eliminated or reduced by the production of natural gas in the State's portion of the continental shelf.
The Court must assume that the Parties have acted in good faith. This means that Denmark and the Netherlands, in concluding their delimitation agreement on 31 March 1966, believed that their action, which was based on the equidistance method, was justified by existing international law. In my view it would not be equitable to take the position that since the Court has now held that the equidistance method has not been made obligatory by international law, any acts such as the granting of licences or concessions in the areas of the shelf claimed by Denmark or the Netherlands are to be treated as null and void ab initio. Rather, I think there should be applied the following conclusion of the Arbitral Tribunal which, in the Grisbadarna case, on 23 October 1909, decided the delimitation of a certain part of the maritime frontier between Norway and Sweden:
'... in the law of nations, it is a well established principle that it is necessary to refrain as far as possible from modifying the state of *80 things existing in fact and for a long time; ... that principle has a very particular application when private interests are in question, which, once disregarded, can not be preserved in an effective manner even by any sacrifices of the State, to which those interested belong ...' (Wilson, The Hague Arbitration Cases, 1915, pp. 111, 129).
The Parties to the instant case have in effect recently acted upon this same principle in respecting habitual fishing practices: Fisheries Convention of 9 March 1964, Articles 3 and 4, 581 United Nations Treaty Series, pages 58, 60. That Convention provides for a transitional period in which such established rights may be phased out, a provision which would not be suitable in dealing with drilling operations already undertaken. But it may also be noted that while in the Grisbadarna case the Tribunal spoke of a state of things 'existing ... for a long time', the Fisheries Convention considers as 'habitual', exploitations during a period of ten years. Considering the rapidity of the progress of exploitation in the petroleum industry in the North Sea, no restrictive limit should be placed on the elapsed time. The existence of actual drilling or exploitation in a certain place cannot be considered in the present circumstances to base a title on prescription, or on prior user or occupation; nor is it to be assimilated to 'historic title' which is mentioned as a 'special circumstances' in Article 12 of the 1958 Convention on the Territorial Sea. Nevertheless, the Parties might well bear in mind a provision in the 1897 treaty between Great Britain

and Venezuela which provided that:
'In determining the boundary line, if territory of one party be found by the tribunal to have been at the date of this treaty in the occupation of the subjects or citizens of the other party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the tribunal, require.' (5 Moore, International Arbitrations, p. 5018.)
In any event, an agreed delimitation of the continental shelf by the three States in conformity with the Judgment of the Court, would not seem to impinge upon most of the areas which have already proved productive, but would involve an area for wildcatting. In the British sector, the major producing fields, e.g., Leman Bank and Indefatigable Bank, are located south of the 54th degree of latitude and between 2 degrees and 3 degrees E. The West Sole Field and the Hewett Field are even further to the west. All of these lie to the west of the median line between the Federal Republic and Great Britain. The widely heralded, but still unproved, Mobil gas strike in November 1968 in Netherlands Block P-6, is south of the 53rd parallel and therefore not in an area to which the Federal Republic could justly lay claim. The productive locations in the Norwegian sector **81* are north of the median line between the Federal Republic and Norway. The promising locations in the Danish sector could be involved in a new delimitation of the Federal Republic's portion, and to them the Grisbadarna principle might, in all equity, be applied. These would seem to be the only locations where exploitation has already produced promising results, within the limits of the sector delineated in the chart No. 6 introduced by the Agent of the Federal Republic on 4 November 1968. This sector is marked by the lines B-F and D-F on map No. 3 which is included in the Judgment of the Court. The Agent of the Federal Republic stated that 'the present claim of the Federal Republic of Germany is within the limits of such an equitable sector'. He stated that they accepted or acquiesced in the partial boundary lines agreed upon with the Netherlands on 1 December 1964 and with Denmark on 9 June 1965. Accordingly, any possible claim to the shelf north of the Danish line or west of the Netherlands line must be deemed to be relinquished. Moreover, the westernmost point of such a German triangular sector could not justifiably lie to the west of the true median line between the Federal Republic and the United Kingdom, or to the north of the true median line between the Federal Republic and Norway.
However, as the Judgment of the Court points out, there will be areas in which, in accordance with rules and principles indicated by the Court, two States may have equally justifiable claims, or, in other words, areas in which those claims will overlap. As the Court indicates, in such situations the solution may be found in an agreed division of the overlapping areas or in an agreement for joint exploitation 'the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit' (paragraph 99).
Of the existing North Sea agreements relating to joint exploitation and mentioned in paragraph 97 of the Judgment of the Court, that between the Netherlands and the Federal Republic applying to the Ems Estuary is, as already noted, the most complete example of full co-operation in both exploitation and profit-sharing. The Agreement of 6 October 1965 between the Netherlands and the United Kingdom calls for consultation on the most effective exploitation of overlapping deposits and on 'the manner in which the costs and proceeds relating thereto shall be apportioned'. If the two Governments fail to reach agreement, the matter is to be referred, at the request of either one, to an arbitrator whose decision is binding. If licensees are involved, their proposals are to be considered by the Governments. The other agreements in general call for consultation with a view to agreement; in the United Kingdom- **82* Norway Agreement of 10 March 1965 there is again provision for consulting any licensees.
Outside the North Sea, the problem of a deposit extending across a boundary line is dealt with in a similar manner in the Agreement between Italy and Yugoslavia of 8 January 1968 concerning the delimitation of their respective areas of the intervening continental shelf in the Adriatic. In the Persian Gulf, there are examples of agreements for shared exploitation and shared profits at least in the Kuwait-Saudi Arabia Agreement of 7 July 1965, and the Bahrein-Saudi Arabia Agreement of 22 February 1958. An equal division of

recoverable oil seems to have been provided for in a recently initialled agreement between Iran and Saudi Arabia which was mentioned by both sides in the oral proceedings.

Most of the North Sea agreements, and the agreement in the Adriatic, specifically relate to a deposit which extends across a boundary line, but the German-Dutch Agreement on the Ems Estuary and agreements in the Persian Gulf provide for joint exploitation or profit-sharing in areas of considerable extent where the national boundaries are undetermined or had been recently agreed upon subject to the provision for joint interests, as particularly in the case of the Partition of the Neutral Zone. Therefore, while, as the Court states, the principle of joint exploitation is particularly appropriate in cases involving the principle of the unity of a deposit, it may have a wider application in agreements reached by the Parties concerning the still undelimited but potentially overlapping areas of the continental shelf which have been in dispute.

Nor is it irrelevant to recall that the principle of international co- operation in the exploitation of a natural resource is well established in other international practice. The Federal Republic invoked the Helsinki Rules of the International Law Association concerning the sharing of the waters of a river basin traversing or bordering more than one State. Whether or not those Rules are the most accurate statement of the existing international law, as to which I express no opinion, there are numerous examples of co-operative use and of sharing of fluvial resources. The history of ocean fisheries is full of examples of co-operative agreements and the Preamble of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas recites-

'... that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international co- operation through the concerted action of all the States concerned ...'.

**83* A striking example of co-operation in the exploitation of a living resource is the Convention between the United States, Canada, Japan and the Soviet Union concerning the fur seals of the North Pacific Oceans; the United States and the Soviet Union harvest the pelts and then share the proceeds with Canada and Japan (cf., 314 United Nations Treaty Series, 106).

On land, Austria and Czechoslovakia have agreed upon co-operative exploitation of an oil pool which crosses under the frontier, and as far back as 1866 Bolivia and Chile agreed to divide the produce of the guano deposits in an area where they were defining the common boundary.

Moreover, 'Today, the municipal laws of most of the oil-producing nations of the world have passed through the earlier phases of non-regulation and limited co-relative rights and now contain specific provisions requiring co-operative development of a shared petroleum resource pool by all common interest- holders'. Many laws require the interested parties to 'adopt a unitized plan of development under which competition is now altogether eliminated and co- operation is required on co-ordinating such points as number and spacing of wells tapping the same common source'. (Onorato, 'Apportionment of an International Petroleum Deposit', 17 International and Comparative Law Quarterly, 85 (1958).) The British and Norwegian, and apparently the Dutch regulations all provide for ministerial action to avoid irrational operation when a deposit underlies more than one concession area. Co-operative executive action for a like purpose deals with comparable situations across state borders in the United States. (Morris, 'The North Sea Continental Shelf: Oil and Gas Legal Problems', 2 The International Lawyer, 191, 210 ff. (1968).)

Clearly, the principle of co-operation applies to the stage of exploration as well as to that of exploitation, and there is nothing to prevent the Parties in their negotiations, pending final delimitations, from agreeing upon, for example, joint licensing of a consortium which, under appropriate safeguards concerning future exploitation, might undertake the requisite wildcat operations.

I am quite cognizant of the fact that the general economy of the Court's Judgment did not conduce to the inclusion of the detailed, and largely factual, analysis which I have

considered it appropriate to set forth in this separate opinion, but I believe that what is stated here, even if it is not considered to reveal an emerging rule of international law, may at least be regarded as an elaboration of the factors to be taken into account in the negotiations now to be undertaken by the Parties. Beyond *84 that, I hope it may contribute to further understanding of the principles of equity which, in the words of Judge Manley O. Hudson, are 'part of the international law which it [the Court] must apply'. (Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70, 1937, p. 77.)
I wish to state also that I associate myself with the points made in the Declaration of Judge Sir Muhammad Zafrulla Khan.
Difficult as the problems are, it is fortunate that the three States which confront them are expressly committed to various methods of amicable settlement. They are aware of their right, under Article 60 of the Statute, to return to this Court for further guidance, or they may, if the need should arise, resort to the procedures of arbitration and conciliation set forth in the treaties of 1926 which are cited in the Special Agreements of 2 February 1967.

(Signed) Philip C. JESSUP.

*85 SEPARATE OPINION OF JUDGE PADILLA NERVO

I am in agreement with the Judgment of the Court, and particularly with its findings: that the use of the equidistance method of delimitation is not obligatory as between the Parties; that delimitation is to be effected by agreement in accordance with equitable principles in such a way as to leave to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory under the sea, without encroachment on the natural prolongation of the land territory of the other. I also concur in the statement of the Court regarding the factors that the Parties are to take into account in the course of the negotiations.

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I wish to make the following observations which emphasize my individual point of view regarding the main issues before the Court, my analysis of the conflicting contentions of the Parties in the present case and the reasoning which leads me to agree with the Court.
When reference is made in the Special Agreements to 'principles and rules of international law', it should be borne in mind that there are certain rules of a practical nature, so called 'principles', which are in reality only methods or systems used to apply the principles. This is so in respect of the 'equidistance rule' which is referred to as a 'principle' in the Continental Shelf Convention.
In the present case, Denmark and the Netherlands rely on the application of the 1958 Geneva Convention on the Continental Shelf, which they have signed and ratified.
The Federal Republic of Germany contends that the Convention is not applicable, since it has not ratified it.
There is no doubt that the Federal Republic is not contractually bound by the Convention. There is no controversy about this point. Therefore on these bases the 1958 Convention is not opposable as such to the Federal Republic.
Denmark and the Netherlands contend that the Federal Republic has manifested its agreement to the Convention in respect of a number of its provisions, in particular that it has concluded with them two treaties for the purpose of drawing, according to what are in reality equidistance lines, those parts of the boundary lines between the German and Danish, and the German and Netherlands continental shelves which are near the coast.
*86 In my opinion it does not follow from this fact that the Federal Republic is bound to accept equidistance lines 'as regards the further course of the dividing line'. It appears from the negotiations which took place for the purpose of concluding the above-mentioned two treaties that the Federal Republic did not rely on Article 6 of the Convention for drawing the boundary near the coast. Those lines were drawn by

agreement among the Parties and their direction, extent and result were considered by them as being fair, just and equitable. If those lines were in reality equidistance lines to a certain extent (they suffered in fact some deviations) that circumstance does not change the fact that the boundary lines were determined by agreement between the Parties concerned. That emphasizes the assertion that only by agreement can, in the last resort, these problems be settled.

The fundamental issue between the Parties in the cases before the Court is the question whether or not the equidistance line should constitute the boundary line between their respective continental shelves beyond the partial boundaries they have already agreed upon.

On this question there has been disagreement between the Parties from the beginning of their negotiations. Denmark and the Netherlands insisted that the equidistance line alone could be the basis on which the boundary line might be fixed by agreement. The Federal Republic took the position that the geographical situation in that part of the North Sea required another boundary line which would be more fair to both sides.

If Article 6 of the Convention is not contractually binding on the Federal Republic, the Court must consider whether or not the rule it embodies or reflects is opposable to it on some other basis, and whether that part of Article 6 which relates to the equidistance principle constitutes a recognized rule of general international law which would as such be binding on the Federal Republic.

So far as State practice prior to the 1958 Convention is concerned, and as far as it has been possible for this to be ascertained, it does not appear that the cases of use of the equidistance line for the lateral delimitation of the continemal shelves of adjacent States are numerous, nor does that practice show a uniform, strict and total application of the equidistance line in such cases so as to be qualified as customary. In my opinion, Article 6 does not embody a pre-existing accepted rule of customary international law, or one which has come to be regarded as such.

The equidistance rule is rather a conventional rule or technical method which could be altered by the parties to the Convention. According to the Convention the parties, by agreement, are able to disregard the principle of equidistance. If the equidistance rule was a pre-existing rule of general international law, Article 6 would not give primacy to settlement by agreement, nor could an agreement between the parties overlook, disregard or evade the application of a binding rule.

*87 During the preparatory work of the International Law Commission there were many difficulties in respect of the text of Article 6 of the Continental Shelf Convention, as the Commission was doubtful regarding the criterion of equidistance and the unpredictable results of its application.

Although the International Law Commission reported on the whole law of the sea together, the 1958 Conference adopted separate conventions on the territorial sea, the high seas, and the continental shelf, and also a fourth convention on fishing.

Consideration of the fact that it was widely held that the continental shelf was a new concept and that international law on the subject was in process of development led to the decision to incorporate the articles relative to the continental shelf into a separate convention, allowing reservations to all of them except Articles 1 to 3 (formerly Articles 67, 68 and 69), as stated in Article 12.

Article 6 of the 1958 Convention did not at that time 'embody already received rules of customary law and was not then declaratory of existing rules', and it has not since then, in my view, by the practice of States and accumulation of precedents, acquired the character of binding customary law.

The consideration that the law on the subject in 1958 was in process of development was emphasized by the provision in Article 13, allowing the revision of the Convention at the request of any contracting party, at any time after five years from the date the Convention entered into force. As a result of that Article, it will be feasible to modify the Convention after June 1969.

In practice, the application of the equidistance method for lateral delimitations, prior to 1958, has not been rigid in all cases. Certain factors or special circumstances have been

taken into account as justifying a deviation from its rigid application, and the equidistance line has been replaced by other lines fixed by agreement. Its use can not be qualified as customary.
At Geneva, the equidistance principle was regarded as the most equitable method for fixing boundaries, though not the only one, but the purpose and the aim was to find or develop a rule which ought to be equitable. Justice and equity was an overwhelming consideration in the minds of the framers of the Continental Shelf Convention in their search for a rule which would not result in harsh inequities, so far as they could predict the actual results of its application.
Adjacent States parties to the Convention are not obliged, by Article 6, to determine the boundary of the continental shelf adjacent to their territories by the rigid application of the principle of equidistance; they are free to determine the boundary otherwise if they so desire, by agreement between them.
The criterion of equidistance is a technical norm which should aim at *88 realizing what is just according to the natural law of nations. (Article 38 (1) (c) of the Court's Statute.)
The Convention includes some technical rules which cannot yet be regarded as principles of international law.
The obligation to negotiate is a principle of international law. Preference should be given to agreement. The first sentence in Article 6 is categorical, it is a statement of principle- 'the boundaries ... shall be determined by agreement'.
'The absence of agreement' cannot be considered as a weapon in the hands of any State to impose upon another adjacent State the application of the equidistance rule, but regard should be given to the special circumstances of the case, which may be the reason for the disagreement to the application of the equidistance rule. If the adjacent State disagrees as to the existence of special circumstances, the other State may not determine the boundary of its continental shelf by a unilateral act.
The existing agreements between States in the North Sea are not sufficient proof of the recognition by the States concerned of the equidistance principle in Article 6 as 'generally accepted law' binding upon them. It could rather appear that since the delimitations by the equidistance method were made by agreement between the States concerned, there was some recognition of the fact that the result of the application of such method was satisfactory to those States and was considered by them to be just and equitable. If it had been considered to be unfair by one of the parties, no agreement could have been reached.
Geographical realities may justify a deviation from a rigid application of the equidistance principle.
Until settled by agreement or by arbitration, the question is open. In the cases before the Court, if there is no agreement, the boundary lines unilaterally fixed do not exist so as to be opposable to the Federal Republic.
The effect of the right conferred by Article 12 of the Continental Shelf Convention to make reservations to (inter alia) Article 6, as regards the contention that the Convention either crystallized the equidistance method as a general rule of law or is to be regarded as having founded such a rule, can be more clearly ascertained in the light of the discussion on the subject at the plenary meetings of the 1958 Conference on the Law of the Sea.
It was considered that since the continental shelf was a new subject of international law it was desirable that a large number of States should become parties to the Convention, even if they made reservations to articles other than Articles 67 to 69 (1 to 3), and many representatives were of the opinion that there should be a clear provision in the Convention regarding reservations, since great difficulties had arisen from the lack of such a provision in previous conventions.
*89 It was stated that in discussing the question of reservations to the proposed articles, it should be remembered that the Conference had been convened to draw up international standards which would be progressively accepted until they became common to all States.
The Convention should be worded so that all States could become parties to it. The

question of reservations was of fundamental importance. The Convention would be valueless if ratified by only a few States. Frequently, governments wanted to make to a convention rese vations which did not affect common standards, and were unwilling to become parties to it unless they could do so.
Representatives wishing to permit reservations had been reproached for defending national interests; but, in fact, they were attending the Conference for that very purpose. The debate showed that if an absolute prohibition of the making of reservations were pressed there could be no agreement.
International law, it was said, must be built up gradually, but that rule did not preclude attempts to base international instruments on justice and equality among States.
In conclusion it seems correct to affirm that the right to make reservations to Article 6 shows that the States at Geneva did not intend to accept the equidistance method as a general rule of law from which they could not depart and which would be binding on them in all cases. Therefore the contention that the Convention crystallized the equidistance method as a general rule of law, or is to be regarded as having founded such rule, is not justified, and it appears from the records that the debates at the Geneva Conference do not afford a basis for or give support to such a contention.
Although the cases of Denmark and the Netherlands have been joined for purposes of presentation to the Court, because both Parties are putting forward the same basic contentions, they remain separate cases in the sense that one relates to the Danish-German line of demarcation, and the other to the German- Netherlands line; but if these lines were taken separately and in isolation there would be no problem: it is the simultaneous existence of both lines, if constructed throughout on equidistance principles, that leads to an inequitable result, and causes the Federal Republic's objection. It is the existence of the three coasts with Germany in the middle (and its coastal configuration) which creates the problem.
Two lines are here involved which, by their interaction have in fact automatically determined the Federal Republic's area of the continental shelf. The Court cannot ignore this fact but has to take full account of it.
Geographically, the North Sea constitutes what for purely practical purposes may be called an 'internal' sea, in the sense that while it has *90 some outlets to the ocean it is bordered along almost the whole of its periphery by the territories of a number of coastal States.
There is a general consensus on the part of all the coastal States to the effect that the bed of the North Sea constitutes in its totality a single continental shelf, the various parts of which each appertain to one State.
Several of the coastal States on the North Sea are opposite each other and others, lying on the same side of the sea, are adjacent and have lateral boundaries.
Consequently, the continental shelves appertaining to the coastal States whose coasts almost totally enclose the North Sea are converging continental shelves, with an initial base or boundary constituted by the coast of the territory of each State, and an end-point or boundary which touches the continental shelf of the opposite States on the other side of the sea.
In the case of the States parties to the present dispute, the Netherlands, the Federal Republic and Denmark are States the coasts of which are opposite to the coast of the United Kingdom. If in principle the rule contained in Article 6, paragraph 1, of the Continental Shelf Convention is applied, the boundary between the continental shelves of the Federal Republic of Germany and the United Kingdom would be constituted by the median line in the North Sea drawn between the coasts of the two States. But the possibility of drawing such a median boundary line is excluded on account of the fact that, under the treaty of 31 March 1966 between the Governments of the Netherlands and Denmark, two areas of the continental shelves which those States have bilaterally accorded each other are interposed in the central area of the North Sea, between the Federal Republic and the United Kingdom. In fact, such overlaps appear to prevent the implementation of the relevant treaty rules and it appears that this particular case, that of an internal sea, was not contemplated when the text of Article 6 was drafted. Neither

paragraph 1 nor paragraph 2 of Article 6 have made provision for the overlaps which may arise from the simultaneous existence of median and lateral equidistance lines where there are both opposite and adjacent States in a particular internal sea. It appears therefore that the case of the North Sea, so far as the situation of the Parties to the present dispute is concerned, could be deemed a case in which special circumstances exist.

The delimitation should be reasonable. It is the repercussion or combination of both lines which caused the German objection and which does in fact lead to an unreasonable result. Their combined effect is not equitable in respect to the Federal Republic. That was the cause of the disagreement and the very reason why the Parties have brought their dispute to this Court.

I believe that the Parties, by submitting the matter to the Court in the way selected by them, recognized in effect that the respective lines cannot be determined in isolation from one another, and that the matter constitutes an integral whole.

*91 On 30 October, during the oral proceedings, Counsel for the two Kingdoms said that in a sense the Netherlands and Denmark are slantingly opposite to each other but that by no stretch of imagination could they be called adjacent States.

If Article 6, paragraph 2, prescribes the equidistance method only in the case of two adjacent States, the fact that the two Kingdoms, not being adjacent States, have determined their boundaries between them on the basis of equidistance shows, it appears, that if their agreement is based on the Geneva Convention it had to be concluded under the first sentence of the first paragraph of Article 6, that is, merely as a bilateral ad hoc agreement and not on the basis of some principle.

There is no rule of international law which allows a State to delimit its continental shelf with every other State unilaterally by the application of the equidistance method, unless the other State acquiesces in such a boundary. The equidistance boundary may not be imposed upon a State which has not acceded to the Convention.

In the present case, the point in issue is whether that part of Article 6 of the 1958 Convention on the Continental Shelf which relates to the equidistance method does or does not embody a rule of general international law binding on the Federal Republic.

It is generally admitted that in State practice prior to the Geneva Conference of 1958 the tendency was to refer in general terms to the delimitation of continental shelf boundaries on 'equitable principles', without mention of the 'equidistance' principle in particular. State practice up to that date was not regarded by the International Law Commission as sufficiently consistent to establish any customary rule as already in existence with respect to the continental shelf.

I have said above what in my opinion is the character of the State practice after 1958, which does not show that the 'equidistance' rule has yet evolved as customary law.

In the preparatory work of the International Law Commission, as at the Geneva Conference, the sentiment that the equidistance principle should not be an absolute rule was always predominant. When it was suggested that the 'special circumstances' rule should be eliminated from the text of Article 6, the proposal to that effect was overwhelmingly rejected.

The equidistance method was to be applied, so to speak, in the last resort, only when agreement was not forthcoming and when the demarcation in any concrete case did not have characteristics which would justify the drawing of lines of delimitation by any other method.

The flexibility and adaptability of the text of Article 6 to a variety of situations, potential conflicting claims, geographical and geological differences regarding coastal States all over the world, were considerations and preoccupations always present during the framing of Article 6, in order to make possible a large measure of acceptance by governments.

*92 The right to make reservations to Article 6 was another safety valve against a rigid application or interpretation of the equidistance concept in a manner which would alter its real nature as a technical norm to be used constructively in instances where there was no agreement or special circumstances did not exist.

When, during the negotiations, one of the parties alleges the existence of special circumstances, there is only one way out of the impasse: compromise and further negotiations. There is no possibility of arriving at an acceptable, fair and peaceful solution, and one which will therefore endure, if it is not searched for by the ways and means stated in Article 33 of the Charter of the United Nations Organization.
The obligation to negotiate is an obligation of tracto continuo; it never ends and is potentially present in all relations and dealings between States.
The purpose of the continental shelf doctrine and of the Convention is to contribute to a world order, in the foreseeable rush for oil and mineral resources, to avoid dangerous confrontation among States and to protect smaller nations from the pressure of force, economic or political, from greater or stronger States.
The pacific settlement of disputes in this field should promote friendly relations and enduring co-operation especially among neighbouring States. Solutions likely to be considered by one of the parties as inequitable would be difficult to enforce, they would in time be evaded and would breed new disputes.
The question arises: do geographical realities justify a deviation from the rigid application of the equidistance rule? I believe they do justify such deviation.
The distorting effect caused by the application of the lateral equidistance line, when it cannot be accounted for by the length of the coastline, justifies the application of the special circumstances principle.
If the application of the equidistance rule would result in harsh inequities in a given specific case, this result may be considered as a special circumstance justifying another boundary line, in the absence of agreement between the parties concerned.
I think it is correct to say that the discussion on the reservation of 'special circumstances' showed that this clause was understood not so much as a limited exception to a generally applicable rule, but more in the sense of an alternative of equal rank to the equidistance method.
The configuration of the North Sea coasts of Denmark, of the Federal Republic and of the Netherlands and the effects produced by such geographical configuration on the boundaries of the continental shelves of these three States, as they result from the application of equidistance, constitute a circumstance entitling the Federal Republic to claim from Denmark and the Netherlands a revision in its favour of the boundaries of its continental shelf.
*93 I agree with the contention that 'the history and documents of the Geneva Conference on ... the Continental Shelf show that the origin of the ' special circumstances' clause was the fact that coastal features or irregularities fairly frequently exercise a harmful influence on the equidistance line, resulting in considerable inflexions or deviations, the effect of which is inequitably to reduce the ... shelf area that would normally go to a party. It was consequently in order to provide a safeguard for the rights of the losing party, in a spirit of equity that the 'special circumstances' provision was introduced, allowing 'another boundary line' to be drawn instead of the equidistance line or in combination with it.'
This is also confirmed by the commentary which the International Law Commission added to Article 72 of its draft (subsequently Article 6 of the Continental Shelf Convention):
'... provision must be made for departures [i.e., from the equidistance line] necessitated by any exceptional configuration of the coast, as well as by the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic.' (Yearbook of the International Law Commission, 1956, II, p. 300.)
Attempts made at the Geneva Conference on the Law of the Sea to strike out the alternative of 'special circumstances' and to make the equidistance method the only rule were rejected by a large majority.
In addition to special situations of a technical nature-navigable channels, cables, safety or defence requirements, protection of fisheries (fish banks), indivisible deposits of mineral oil or natural gas, etc.-special geographical situations such as special coastal configurations have been regarded as special circumstances.
M. W. Mouton, 'The Continental Shelf', Recueil des Cours, Volume 85 (1954, I), page

420:
'It is stipulated that this rule is applicable in the absence of agreement between the States concerned and unless another boundary line is justified by special circumstances. The modifications to the general rule are allowed either because the exceptional configuration of the coasts, the presence of islands or navigable channels necessitate departure from these rules, or because of the existence of common deposits situated across the mathematical boundary.'
Colombos, The International Law of the Sea, 1959, page 70:
'The rule, however, admits of some elasticity in the case of *94 islands or navigable channels as well as in the case of an exceptional configuration of the coast.'
Olivier de Ferron, Le droit de la mer, Vol. II, page 202:
'Article 6 of the Geneva Convention in fact provides that these (sc., the median line and the lateral equidistance line) may be modifed by agreement between the States concerned, when 'another boundary line is justified by special circumstances', for example when the exceptional configuration of the coast or the presence of islands or of navigable channels necessitates this. The rules adopted by the Geneva Conference are thus sufficiently flexible to permit of an equitable solution in all cases.' [Translation by the Registry.]
Consequently, the Parties should search for another method of delimitation which would produce a just and equitable result and, following the guidance given by the Court, should start new negotiations in compliance with their obligation laid on them by a rinciple of general international law. The Parties will then, as stated in Article 1, paragraph 2, of the Special Agreement, fix the boundaries by agreement among them.
I might say in conclusion that my opinion is that in this specific case the equidistance rule is not applicable, that there is no general customary law binding the Federal Republic to abide by the delimitation of its continental shelf as results from the lines drawn as a consequence of the ad hoc agreement made between its neighbours Denmark and the Netherlands; that the Parties should search for and employ another method, in conformity with equity and justice, and that the Parties should undertake new negotiations to delimit the continental shelf in the North Sea as between their countries by agreement, in pursuance of the decision given by the Court.
The arguments in favour of the applicability of the equidistance method in Article 6 of the Convention are as follows:
(a) that the Federal Republic of Germany took part in the deliberation of the Geneva Conference and signed the Convention without reservations to Article 6;
(b) that the Federal Republic informed the two Governments that its Government was preparing to ratify the Convention;
(c) that the Federal Republic in its Proclamation of 20 January 1964 invoked the Convention to assert sovereign rights to its continental shelf regarding the exploration and exploitation of its natural resources;
(d) that the principle of estoppel applies and the Federal Republic should not be allowed to deny the valid legal force of the Convention.
The equidistance method cannot be considered as a rule derived from fundamental principles of general acceptance.
*95 The new concept of the continental shelf expressed in the Truman Proclamation and in subsequent governmental proclamations; the existence of opinions that jurisdiction of the coastal State over the adjacent continental shelf was already part of customary international law; and finally the definition of the continental shelf as contained in Articles 1 to 3 of the Convention, are all points which count against the assertion that the equidistance method in Article 6 is a rule of customary international law.
The acceptance, recognition or invocation of the rights defined in the first three articles of the Convention (to which reservations are prohibited) by a State not party to the Convention, does not signify or imply an obligation to abide by the method of equidistance. It is not logical or right to affirm that if a party to the Convention may make reservations to Article 6, a State which is not bound by the Convention in a contractual manner could be in a worse situation than a party in respect to the rigid

application of Article 6.
(a) The argument that the Federal Republic took part in the deliberations at the Geneva Conference is not a valid one, nor is it prima facie an indication of consent or acceptance to be bound by the conventions concluded at such Conference. If mere attendance at an international conference could produce binding effects, no State would be willing to take part in any conference, the concrete results and implications of which are unknown.
It is not denied that the Federal Republic did sign the Convention on the Continental Shelf and did not make reservations to Article 6; but this signature is a preliminary step made ad referendum, subject to the express approval of the appropriate organ of a State by its own constitutional procedures. The Federal Republic did not ratify the Convention, is not a party to it and therefore cannot be contractually bound by its provisions.
(b) The fact that the Federal Republic informed the two Kingdoms that it was preparing to ratify the Convention cannot be considered as a legal and binding promise to do so.
Such information may be a manifestation of intention to perform in the future a certain act; the intention existing at a given moment might be changed later on and the party is free to change its mind.
As long as the act (in this case, ratification) is not actually performed, there cannot be a binding obligation; the consent cannot be implied or deduced from such information of intention.
(c) The fact that the Federal Republic in its Proclamation of 20 January 1964 invoked the Convention to assert sovereign rights to its continental shelf cannot be taken as an expression of consent to be bound by the Convention as a whole, nor does it mean that the Federal Republic accepted the method of equidistance. The Federal Republic by such *96 Proclamation claimed a right to its continental shelf as being a prolongation into the sea of its land territory, but it could have made that claim regardless of the Convention in the manner of the Truman Proclamation. Invoking the definition of the first three articles of the Convention, the Federal Republic of Germany asserted a right already in existence, recognized internationally before the framing of the Continental Shelf convention and inherent in the accepted doctrine of the continental shelf.
Claiming such a right and quoting its definition in the Convention does not imply an acceptance of the whole Convention as such, nor an acceptance of the rigid application of the principle of equidistance.
(d) The principle of estoppel cannot in this case be applied against the Federal Republic. It cannot be proved that the two Kingdoms changed their position for the worse relying on such acts of the Federal Republic as its 1964 Proclamation or its manifestation of its intention to ratify the Convention.
The first three articles of the Convention were intended to be broadly declaratory of existing customary international law, but it is essential not to extend the character of these articles to the rest of the articles in the same Convention, which are not at all declaratory of contemporary customary law, and which in general are of a pure technical character, which could be the subject of express reservations as is, especially, the method of equidistance. Whatever publicists have said regarding the doctrine of the continental shelf and its definition in the first three articles of the Convention, does not apply to the whole Convention, and by no legal reasoning could it be said that the method of equidistance in Article 6 embodies a rule of customary international law.
The number of ratifications and the instances where States by agreement have made use of the equidistance method do not give to that method the character of customary law.
There is agreement between the Parties to the effect that the Convention is not applicable to the Federal Republic as a contracting party; nor is Article 6 applicable to it as a principle of general international law. Even the States parties to the Convention are not bound to apply the equidistance method since-by the very terms of Article 6-they are free to agree to another method or manner of delimitation of their continental shelves.
A treaty does not create rights or obligations for a third State without its consent, but the rules set forth in a treaty may become binding upon a non- contracting State as customary rules of international law.
*97 Article 6 of the Convention and particularly the method of equidistance does not

constitute a rule which has been generally accepted as a legally binding international norm.
The acts of the Federal Republic which are invoked as evidence that it has gone quite a long way towards recognizing the Convention, cannot override the fact that it has consistently refused to recognize Article 6 and the equidistance method as an expression of a generally accepted rule of international law and has objected to its applicability as against itself.
The Federal Republic, like any other State, could assert its rights over the continental shelf without relying on the Convention. States have made such assertions long before the Geneva Conference took place (Truman Proclamation; Mexican Declaration of 29 October 1945 [FN1]) and may do so now and in the future regardless of the Convention.
The right of a coastal State to its continental shelf exists independently of the express recognition thereof in the first three articles of the Convention, and is based on the consideration that the continental shelf is the natural prolongation under the sea of the land territory pertaining to the coastal State.
A treaty may contain a clause allowing or prohibiting reservations to some of its provisions. A party making permitted reservations to a particular article is not bound by its text. The very purpose of a reservation is to allow parties to escape from the rigid application of a particular provision. No right is conferred to make unilateral reservations to articles which are declaratory of established principles of international law. Customary rules belonging to the category of jus cogens cannot be subjected to unilateral reservations. It follows that if the Convention by express provision permits reservations to certain articles this is due to *98* recognition of the fact that such articles are not the codification or expression of existing mandatory principles or established binding rules of general international law, which as such are opposable not only to the contracting parties but also to third States.
Article 6, among others, of the Continental Shelf Convention is of a technical nature; it is not the expression of a customary norm and is not opposable to the Federal Republic which has consistently refused to accept the application, without its consent, of the equidistance me hod.
The history of the Convention through the International Law Commission, the General Assembly and the Geneva Conference shows that the equidistance concept is not and was never intended to be the expression of an international legal rule of universal applicability. The fact that the Convention has not made compulsory the rigid application of the equidistance method does not mean that the Convention is incomplete or that it left the question of delimitation open. This question certainly arises but delimitation cannot be enforced by peaceful means except by agreement, arbitration or judicial decision.
The only principle of general international law implicit in Article 6 is the obligation to negotiate, since the delimitation between the continental shelves of adjacent States 'shall be determined by agreement between them'.
The fact that the equidistance method has been followed in several bilateral agreements between neighbouring States does not mean at all that those States were compelled by the Convention to use the equidistance method. It only means that there was agreement between them because they considered such method satisfactory, fair, equitable and convenient. They also departed from the equidistance method when they agreed to do that.
The bilateral agreement of 31 March 1966, made before the last part of the tripartite talks in Bonn in May, was founded on the assumption that the failure of the talks up to that time was conclusive and that in the absence of agreement they could proceed on the application of the equidistance method. The Federal Republic not being a party to such agreement refused to abide by it and consider it as res inter alios acta.
The lack of agreement in the negotiation was, nevertheless, not conclusive in the opinion of the Parties, as was shown by the fact that they decided to present the matter to the Court.

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In my opinion, paragraphs 71 to 75 of the Court's considerations contain-in their application to the present case-the statement of the *99 requirements which must be satisfied in order that a rule which in its origin is only a contractual one may become a rule of customary international law.
These requirements, which may be regarded as of general application, could be summed up as follows:
'It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law.' (Paragraph 72, first sentence.)
'With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of any States whose interests were specially affected.' (Paragraph 73, first sentence.)
'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of any States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition to the effect that a rule of law or legal obligation is involved.' (Paragraph 74.)

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I believe that the Judgment of the Court will guide and help the Parties in the further negotiations that they will undertake, in compliance with paragraph (2) of Article 1 of the Special Agreement, for the purpose of delimiting the continental shelf in the North Sea as between their countries.
The agreement among themselves made in accordance with the findings of the Court and conducted in fulfilment of the principles prescribed by the Charter of the United Nations, will result in the recognition of their respective legitimate interests in the continental shelves appertaining to each of them.
I believe furthermore that the Judgment of the Court in the North Sea Continental Shelf cases will also be a guide in other similar controversies, to help States settle by negotiation or other peaceful means of their own choice, their eventual differences in this respect.

(Signed) Luis PADILLA NERVO.

## *100 SEPARATE OPINION OF JUDGE FOUAD AMMOUN

[Translation]
1. The Legal Basis and the Definition of the Continental Shelf.

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Since the Court was called upon, under the Special Agreements by the notification of which it was seised, to state the principles and rules applicable to the disputes between the Federal Republic of Germany and the Kingdoms of Denmark and the Netherlands as to the delimitation of the areas of the continental shelf which makes up the whole of the North Sea which appertain to each of these countries, the Court had to establish in the first place the actual concept of the continental shelf the delimitation of which was in

issue.
Even up to the time of the Conference on the Law of the Sea held at Geneva in 1958, this concept was still subject to controversy [FN1]; and even last year, in 1968, in the course of the deliberations of the Ad Hoc Committee set up by the United Nations to study the peaceful uses of the seabed and the ocean floor, the limits, if not the definition, of the continental shelf provided material for discussion by the representatives of States, who apparently did not find the definition either sufficiently precise or sufficiently comprehensive [FN2]. What is more, in the course of the hearings in the present cases, the representative of the Federal Republic of Germany stated that 'it is not possible to speak of the continental shelf concept as an already fixed or completed concept [FN3]'. This observation, coming from one of the Parties, is fraught with consequences, in particular for the time when the Parties, on the basis of the Court's Judgment, come to exercise their rights over the area of continental shelf which has been recognized as appertaining to each of them. It will be sufficient in this connection to mention the differences of opinion, to which I shall refer later, as to the extension of the sovereignty of the coastal State over the continental shelf [FN4] and as to its outer limits [FN5].
*101 In fact the Court, not having faced the question directly as I have suggested, has been unable to avoid discussing a number of its aspects, and coming back to the point throughout its reasoning. The Court has in fact had to consider, with a view to the delimitation which is the subject of the present cases, whether the continental shelf is the natural prolongation of national territory under the sea, thus justifying the delimitation of the areas naturally appertaining to each of the coastal States and excluding the contention for a sharing out among such States; or whether it is dependent on the idea of contiguity, of which the corollary would be the equidistance rule, to be compulsorily applied to the delimitation in question [FN6]; or whether again delimitation on the equidistance basis is inherent in the concept of the continental shelf, or follows implicitly from the exclusive nature of the rights recognized as belonging to the coastal States [FN6].
Finally it was not without interest to ascertain whether the continental shelf has acquired the status of a rule of law by virtue of the said Convention, or as a result of custom, since its legal regime could differ according to which was the case.
All these are questions which should have been dealt with, in my opinion, from the very beginning, in order to clarify the reasoning and so as to leave no lurking uncertainty as to the scope and significance of the Judgment.
2. At all events there was no ground for accepting the opinion expressed by the Kingdom of the Netherlands, that the Court is not invited to pronounce on the question of what part of the bed of the sea and of the subsoil of the high seas should be considered, from the legal point of view, as constituting the continental shelf. It must be borne in mind that the integrity of the high seas, the freedom of which is hallowed by a general custom, is in issue, and all States, not merely the Parties to the disputes, are directly interested therein.
It goes without saying that the Court is bound by the Special Agreements just as much as the Parties. The quotations taken from the Judgments concerning the cases of the Lotus and of the Territorial Jurisdiction of the International Commission of the River Oder are relevant in this connection. It is nonetheless the case that the Court has the right, when appropriate, to interpret the special agreement by which it has become seised of a case, as it has to interpret any convention, following a settled line of decisions. And however restrictive such interpretation should be-in view of the sovereignty of States and the optional nature of the Court's jurisdiction-it is nonetheless abundantly clear that the Parties could not have asked the Court to state principles and rules which could have no application in law. A convention cannot be isolated from its legal context, which in the present case is the problem of the continental *102 shelf. If, for the sake of argument, this were not recognized in law, there could be no dispute as to its delimitation, and in the absence of a dispute there would be no reason to define principles and rules to resolve it. It is appropriate to recall the rule of interpretation stated by this Court in its Advisory Opinion of 3 March 1950 on the subject of the Competence of the General

Assembly for the Admission of a State to the United Nations, to the effect that the text should be recognized as authoritative, unless its terms are ambiguous or lead to an unreasonable result; for it would not be reasonable to abide closely by the letter of the Special Agreements and not to elucidate the whole tenor thereof or any implicit elements.

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3. When this has been said, the question with which the Court was faced first of all was whether there exists a general international convention, within the meaning of Article 38, paragraph 1 (a), of its Statute, which has modified the principle of the freedom of the high seas and sanctioned the concept of the continental shelf.

It should be sufficient to observe that the Geneva Convention of 29 April 1958 on the Continental Shelf has up to the present been ratified by only 39 States, out of a total of about 140 making up the international community. The Convention remains, by analogy with internal law of the nations, res inter alios acta, and could not bring about a modification erga omnes of the principle of the high seas, or limit the scope or legal consequences thereof. This interpretation, it should be added, indisputably applies to norm-creating treaties as well as to contract-treaties, particularly since the falling into disuse of the privilege which a limited number of Powers used to claim to legislate in the name of all the nations of the world, whether colonized or independent.

It is true that, in order to claim sovereign or exclusive rights over the continental shelf bordering on their respective territorial seas, the Parties rely on the provisions of Articles 1 and 2 of the Convention on the Continental Shelf mentioned above. The Kingdom of the Netherlands and the Kingdom of Denmark are obviously bound by the stipulations of that Convention. The Federal Republic of Germany, which has not ratified it, is nonetheless bound, by virtue of the principle of good faith in international relations, as is every State as a result of a unilateral declaration [FN7], by the statements made in the Memorial, affirmed in the course of the speeches of 4 November 1968, in which the Federal Republic declared that the definition of the continental shelf and the rights of the coastal States as determined by Articles 1 and 2 before referred to are generally recognized; it explained that it 'recognizes that the submarine *103 areas of the North Sea constitute a continental shelf over which the coastal States are entitled to exercise the rights defined in Article 2 of the Convention [FN8]'.

Although the Parties to the case are bound, each with regard to the other, by the obligations which they have assumed in the ways which have been mentioned, it is nonetheless the case that the definition and the rights mentioned above cannot be relied on, solely on the ground of the Convention mentioned above, as against States which have not ratified it, or have not declared that they accept its terms.

Consequently the affirmation is justified that the freedom of the high seas, settled by virtue of a custom of international law which is universally accepted, should be respected in principle and as to its consequences, and, in the absence of a convention of universal scope cannot be modified or limited except by a custom backed by a general consensus, or in the last analysis by a general principle of law.

It is now as well to enquire whether a modification of the principle of the freedom of the high seas has not in fact taken place by virtue of a new customary rule of universal scope. This will be the subject of the following question.

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4. Failing a general convention, as specified above, is there an international custom, as contemplated in paragraph 1 (b) of Article 38 of the Statute of the Court, which has modified the principle of the freedom of the high seas and sanctioned the concept of the continental shelf?

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Whereas the Geneva Convention of 29 April 1958 on the High Seas codifies certain rules of customary international law, and in particular the freedom of the high seas outside territorial waters, the question arises whether this is also the case with the Geneva Convention of the same date on the Continental Shelf; and if not, has a custom been formed subsequently which, modifying the custom establishing the freedom of the high seas, confers exclusive rights over stretches of these or over certain of their component parts?

It should of course be observed that the convention on the High Seas mentions, in its preamble, the intention of the parties to 'codify the rules of international law relating to the high seas'; whereas the Convention on the Continental Shelf says nothing of that kind. Furthermore, Article 1 of the latter Convention, when giving a definition of the continental shelf, limits it to the purposes of the articles of that Convention. It would not however be possible to use these considerations as an **104* argument for stating that the concept of the continental shelf as opposed to that of the freedom of the high seas, is not yet accepted in customary international law. Proof of the formation of custom is not to be deduced from statements in the text of a convention; it is in the practice of States that it must be sought. Indeed, custom, which Article 38, paragraph 1 (b), of the Statute of the Court takes as evidence of a general practice accepted as law, or which the teaching of publicists, following Gentilis [FN9], interprets rather as a practice capable of demonstrating its existence, requires the consent, express or tacit, of the generality of States, as was taught by Grotius with reference to the customary law of nations of the period. It is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but, as is quite clear from the above-mentioned Article, by the generality of States with actual consciousness of submitting themselves to a legal obligation.

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5. The facts which constitute the custom in question are to be found in a series of acts, internal or international, showing an intention to adapt the law of nations to social and economic evolution and to the progress of knowledge; this evolution and this progress have given impetus to the exploitation of the riches of the soil and subsoil of the sea at ever- increasing depths, and to the use of new means of communication and transport which develop unceasingly, and to the extension, sometimes ill-considered, of deep-sea fishing, which has its dangers for the conservation of marine species and, in general, of the biological resources which have become more and more necessary for the feeding of rapidly growing populations.

Such are the declaration of the Russian Imperial Government of 29 September 1916; the bilateral treaty between the United Kingdom and Venezuela of 26 February 1942; the Proclamation and Executive Order of President Truman of 28 September 1945; the subsequent chain of proclamations, those of Mexico in 1945 and 1949; of Cuba in 1945; of Argentina and Panama in 1946; of Peru, Chile, Ecuador and Nicaragua in 1947; of Costa Rica, of the United Kingdom on behalf of Jamaica and the Bahamas, and of Iceland in 1948; of British Honduras, Guatemala, Saudi Arabia, Abu Dhabi, Bahrain, Kuwait, Qatar, Ajam, Dubai, Sharjah, Ras al Khaimah, Umm al Qaiwain, and the Philippines in 1949; Brazil, El Salvador, Honduras, Nicaragua, Pakistan, and the United Kingdom on behalf of the Falkland Isles in 1950; of South Korea and Israel in 1952; of Australia in 1953; of Iran in 1955; of Portugal in 1956; of Iraq, Burma and Ceylon in 1957; and finally those of the States bordering on the North Sea, since natural gas and petroleum were **105* discovered there, namely: Royal Proclamation of Norway of 31 May 1963; Royal Decree of Denmark of 7 June 1963; Proclamation of the Federal Republic of Germany of 20 January 1964; Orders in Council of the United Kingdom of 15 April 1964 and 3 August 1965; Netherlands Law of 23 September 1965.

There should be added to these States some 30 others which, while not being numbered among the authors of unilateral declarations, have signed and ratified, or merely signed,

the Geneva Convention of 29 April 1958 on the Continental Shelf.
For if the said Convention, ratified up to the present day by 39 States, is not yet such as to modify by agreement the international custom concerning the high seas, it nonetheless constitutes, by the legal act of its ratification, and by the deliberate legal fact of its mere signature, a group of precedents which contribute, together with State practice, judicial and arbitral decisions, resolutions of legal conferences and of international bodies, as well as the positions there taken up, to the elaboration of the material element of custom.

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6. Not so long ago, an eminent jurist [FN10] could still write that the proclamations of States do not constitute more than a recital of facts in which it is difficult to 'trace an ethic widely accepted as constituting law, that is to say, embodying a concept of general interest or of equity'. He saw therein rather the contrary, discerning, of course, 'in the background, pretexts or anxieties as to the needs of humanity', but considering as by far the most dominant 'a concern for individual interests and, at the most, for national interest, which in the law of nations is no more than an individual interest'.
The representatives of certain countries echoed this doctrinal point of view at the Geneva Conference on the Law of the Sea in 1958 [FN11].
And in fact, up to the evc of that Conference, it could be claimed that the doctrine of the continental shelf was still no more than a custom in the process of formation.
Today it must be admitted that these encroachments on the high seas, these derogations from the freedom thereof, beginning with the Truman Proclamation of 28 September 1945, are the expression of new needs of humanity. From this it may be deduced that just as reasons of an economic nature concerning navigation and fishing justified the freedom of the high seas, reasons of the same nature which are no less imperative, concerning the production of new resources with a rich future, and their conservation and their equitable division between nations, may henceforward justify the limitation of the freedom. Thus the American Proclamation, **106* which deliberately cut the Gordian knot of the question whether the immense resources discovered under the high seas would remain, on the model of the high seas themselves, at the disposal of the international community, or would become the property of the coastal States, set the fashion, and was followed by a series of similar documents and by the support of legal writers, culminating in the Geneva Convention of 29 April 1958 on the Continental Shelf. The proposal of the Federal Republic of Germany for the exploitation of submarine riches for the benefit of the international community, which adopted an idea of P. Fauchille, received no support at the Conference, a number of countries being anxious to reserve their rights over the continental shelf or the epicontinental platform prolonging their coasts, and certain of them fearing in addition the enterprises of the industrialized nations, which were better equipped for a de facto monopoly of this exploitation.
This aggregate body of elements, including the legal positions taken up by the representatives of the majority of the countries at the Geneva Conference, even by those who expressed reservations [FN12], amounts here and now to a general consensus constituting an international custom sanctioning the concept of the continental shelf, which permits the Parties to lay claim to delimitation between them of the areas of the North Sea continental shelf appertaining to them, for the exercise of exclusive rights of exploration and exploitation of the natural resources secreted in the bed and subsoil of the sea.

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7. If the concept of the continental shelf has thus been definitively recognized, there remains a related question, namely the extent of the continental shelf or its outer limit. This is a question which is subject to controversy, and which caused the representative of the Federal Republic of Germany to say: 'a crucial question has not yet been settled-what are the outer limits of the continental shelf towards the open sea [FN13]?'

The interest of the question lies in the fact that a judgment stating the principles and rules applicable to the delimitation of the continental shelf should not allow it to be understood that the Court has accepted, without examination, the concept of the continental shelf.
It is possible to enquire whether the delimitation of the continental shelf appearing in Article 1 of the Convention has alone passed into customary law, or whether the latter does not imply-as in the case of historic waters-other outer limits of the area of the high seas subjected to the jurisdiction of the coastal State under the title of continental shelf or of epicontinental platform, or under some other denomination.

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8. It will in fact be observed that some of the acts mentioned above, forming part of State practice, had remained open to challenge as a result of the extension which those acts gave to the appropriation of the high seas. In particular, in the most western hemisphere, such were the laws, proclamations or decrees issued in 1946 by Argentina, in 1947 by Peru, Chile and Ecuador, in 1948 by Costa Rica, and in 1950 by Honduras and El Salvador; these acts extended the bounds of the continental shelf adjacent to the coasts of these States beyond the break in the slope occurring at a depth between 130 and about 550 metres [FN14], or, in the absence of a submarine prolongation of territory in the form of a shelf, replaced this with an area of the high seas, the continental slope or the epicontinental platform, limited by some of these acts to a minimum of 200 miles from the coast [FN15], and left by others without any limits whatever.
It is relevant to stress, in this connection, the guiding role played by Peru- a country which is almost without a continental shelf-as a result of the above- mentioned decisions of the United States, Mexico and Argentina, the last two of which already claimed, in addition to the continental shelf, exclusive areas of the epicontinental platform. How is it, it was emphasized in Peru, that the only States which can take advantage of a natural phenomenon which permits them to annex immense areas of subsoil and of the high seas, can profit from them exclusively, and can condemn those who are handicapped by geographical configurations to stand idly by in face of the immense riches secreted by their adjacent waters, and that to the profit of capitalist enterprises better endowed than their own and powerfully protected [FN16]. The immense riches disputed between the maritime Powers and Peru were the incalculable piscatory riches secreted by its epicontinental platform, which it was determined to preserve in order that the production of guano should not be prejudiced, in the interest of the national economy, which incidentally coincided with the interest of agricultural production throughout the world [FN17].
Thus a common declaration by Peru, Chile and Ecuador proceeded to reinforce this claim in the following terms:
*108 'Governments are bound to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy. It is therefore the duty of each Government to ensure the conservation and protection of its natural resources and to regulate the use thereof to the greatest possible advantage of its country. Hence it is likewise the duty of each Government to prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity and conservation to the prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential food and economic materials. For the foregoing reasons the Governments of Chile, Ecuador and Peru, being resolved to preserve for and make available to their respective peoples the natural resources of the areas adjacent to their coasts, ... declare as follows:
Owing to the geological and biological factors affecting the existence, conservation and development of the marine fauna and flora, ... the former extent of the territorial sea and contiguous zone is insufficient ... [for] those resources, to which the coastal countries are entitled ... [They] therefore proclaim as a principle of their international maritime policy that each of them possesses sole sovereignty and jurisdiction over the area of sea

adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast.
Their sole jurisdiction and sovereignty over the zone thus described includes sole sovereignty and jurisdiction over the sea floor and subsoil thereof ...' [English text by the United Nations Secretariat.]
In succession, Costa Rica, El Salvador and Honduras adopted this concept, against which the maritime Powers did not fail to protest [FN18]. But their opposition did not succeed in muting the interventions of the representatives of the States at the Geneva Conference, any more than it muted the voices of eminent jurists who pointed out, particularly on the International Law

 Commission, the injustice which would be suffered by countries which did not possess a continental shelf, or only possessed *109 one of a very small extent [FN19]. It is in fact necessary to consider whether these statements of position, particularly those of Peru, Chile and Ecuador, were not purely declaratory of an already established custom, and whether the objections of the maritime Powers were not in consequence belated.
In any event, the position of these States has been reinforced by two fresh facts.
In the first place, there is the Italian-Yugoslav Agreement of 8 January 1968 delimiting the whole breadth of the Adriatic Sea between the two parties [FN20]. It is of course there stated that the delimitation deals with the continental shelf; but it is unnecessary to concentrate on the wording when the facts are clear. The depths of the area delimited, on average about 800 metres, in fact attain 1,589 metres. There is therefore no question of a continental shelf in the sense of Article 1 of the Geneva Convention, to which Yugoslavia has acceded, since the delimitation line is not merely beyond the 200 metres depth line, but also beyond the depths which, in the present state of technology, permit of the exploitation of the natural resources of the seabed, and this has not yet reached 200 metres. It is only exploration that has gone further. It is with the epicontinental platform, on the model of the countries of Latin America, that the agreement between Yugoslavia and Italy therefore deals.
The second fact is the claim by Saudi Arabia over the depths of the Red Sea, which has just been announced [FN21]. The Red Sea had been kept *110 as a mare clausum under the authority of the Arabs and then of the Ottoman Empire up to the beginning of the 19th century. The Saudi Arabian declaration is said not to affect freedom of navigation. A correlation, from the geophysical point of view, between this sea, which has an average depth of 490 metres and reaches 2,359 metres, with the Adriatic Sea, is inescapable. A delimitation will undoubtedly be fixed by agreement between Saudi Arabia and the United Arab Republic which is opposite to it.

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9. A few extracts from the most outstanding statements made in the course of the Geneva Conference are appropriate to illustrate the problem with which we are dealing.
El Salvador, adopting a legal standpoint, accepted 'the rights of the coastal State, not only over the continental shelf, but also over an exclusive fishing zone, and its rights to regulate the conservation of natural resources in zones of the high seas adjacent to that exclusive fishing zone, in the conviction that that view constituted recognition of the legal unity of different aspects of the law of the sea [FN22]'.
Ghana intervened in turn to raise the question of the economic and social interests of certain smaller States, including its own, a young country, which possessed a very narrow continental shelf as a result of a sharp drop of the seabed near the coast, and which depended almost exclusively on fisheries for its protein supply. The definition adopted by the Conference, it concluded, 'might operate to the disadvantage of those

countries [FN23]'. It was observed at the same Conference that the Ivory Coast is in an almost identical situation. The cry of alarm by Ghana, on behalf of the smaller countries, remains as witness to a disturbing reality.
The United Arab Republic proposed a fixed limit, whatever the depth of the sea, in order that 'consideration should be given to the desire of countries without a continental shelf [FN24]'. Norway suggested that the limit should be based, not on the configuration of the seabed or the depth of the water, but on distance from the coast. Such a solution, 'in the light of the principle of State equality, would be fairer [FN25]'. Guatemala thought it advisable to 'provide for a new concept, which might perhaps be termed the 'continental terrace', comprising an area bounded by a line drawn at a given distance from the baseline of the territorial sea of the coastal State [FN26]'. Yugoslavia made a formal proposal for a limit situated 100 miles *111 from the coast, i.e., half that adopted by Peru, Chile and Ecuador, in order to avoid recourse to a double criterion, the 200-metres depth criterion and that of the possibility of exploitation [FN27].
The opinion of Panama was that 'the term 'continental base' would be more accurate than 'continental shelf', for the former referred to the continental shelf and the continental slope [FN28]'. Finally the Netherlands proposed, 'in line with statements made by several representatives, including the representative of Panama, ... that the whole of the 'continental terrace', which included both the continental shelf proper and the continental slope, should be covered by the articles [FN29]' of the Convention.
Finally, Chile, Ecuador and Peru made a common declaration confirming the one quoted above. In it they stated that 'In the absence of international agreement on sufficiently comprehensive and just provisions recognizing and creating a reasonable balance among all the rights and interests, and also in view of the results of this Conference, the regional system applied in the southern Pacific ... remains in full force' and they therein affirmed their resolve to assist 'in the establishment and extension of a more just regime of the sea [FN30]'.

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10. It seems however that the Geneva Conference took a step in the direction of an extension of the continental shelf when it stipulated, in Article 1, that this extends to the 200-metres depth line or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil.
This fictitious extension of the continental shelf, effected by the Geneva Convention at the expense of the high seas, weakens the case of those who, having adopted it, oppose the claims of States which nature has not endowed with a continental shelf and which are able, by a similar fictitious extension thereof, to find legitimate compensation in the resources of the waters adjacent to their coasts [FN31].
*112 Inasmuch as the basic motivation of the claims of all concerned is economic in nature, it is fair that the interests of all States should receive satisfaction on a basis of equality. Equality in freedom had for centuries been adopted as a notion peculiar to the law of the sea, before being definitively extended by the Charter of the United Nations to every domain of the life of nations and of individuals, thus linking the tradition with Roman law, which discerned the idea of equality in the concept of equity [FN32]. Should not this idea remain the foundation of the law of the sea, and of any modification made or to be made to that law: equality as to the high seas, equality concerning the natural dependencies of the land, both for the continental shelf and for the epicontinental platform; consequently, equality in the delimitation of areas of the continental shelf, which is the question to be resolved in the present proceedings.

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11. Moreover, the claims of the majority of these countries go back as far as, if not further than, the principle of the freedom of the high seas. This freedom, hallowed by custom in the west since the 17th century, was not entirely free from legal limitations.

There might be mentioned:
(a) Historic waters (gulfs, bays, etc.) such as the Gulf of Fonseca in Central America, assimilated to internal waters; the Gulf of the River Plate in Argentina; the Delaware and Chesapeake Bays in the United States; the Bays of Miramachi, Hudson and Chaleurs in Canada; the Gulf of Gascony and the Bay of Granville or of Cancale in France; the Bristol Channel in England; the Bay of Conception in Newfoundland; the Gulf of Manaar and the Bay of Polk in India; the Gulf of Finland; the Baie du Levrier in Africa; the Bays of Tunis and Gabes in Tunisia; the Bay of El Arab on the Mediterranean coast of the United Arab Republic; the Arabian- Persian Gulf and the Gulf of Aqaba in the Arab seas [FN33].
(b) Sedentary fisheries and fisheries with fixed equipment, the customary rules relating to which were adopted by the Geneva Convention of *113* 29 April 1958 on the High Seas. There might be mentioned, as examples, the fisheries of Ceylon and Bahrain (Arabian-Persian Gulf), the coral banks in the Mediterranean off the coasts of Algeria, Sicily and Sardinia, and lastly innumerable fisheries in the Red Sea and in the seas of the Far East [FN34].
(c) Preferential fishing zones possessed by or claimed by a certain number of States for special reasons of a vital economic nature, including Peru, Chile, Ecuador, United Arab Republic, Iceland, etc. [FN35].

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12. In fact, the States which claim rights of this kind, from the States of Latin America to those of Europe, Asia and Africa, rely, according to the case, on historic title or on regional custom, which could not and cannot be prejudiced by the establishment of the custom of the freedom of the high seas, by reason of the priority or effectiveness of the former; whereas rights over the continental shelf are considered to be exercised ipso jure, without the aid of effectiveness.
These States can consequently avail themselves of the adage quieta non movere [FN36], and take shelter behind situations consolidated by time [FN37] which have changed into rules of law, no longer admitting for the future of any possible protests [FN38]. The feeling of society, it must be concluded, *114* is in general favourable to the recognition of historic rights, whether such recognition be shown by the conduct of States, by judicial or arbitral decisions, or in the teaching of publicists. Furthermore the possibility is not excluded of similar legal situations coming to birth by the normal operation of legal creation.

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13. It must, of course, be added that the fact that Articles 1 to 3 of the Convention on the Continental Shelf are not subject to any reservations at the time of the signature or ratification of the Convention, does not involve any contradiction or incompatibility between the concept of the continental shelf and that of the epicontinental platform; the area of the platform would simply have to be added, when appropriate, to the area of the shelf. Thus the Declaration by Argentina of 9 October 1946 proclaims its sovereignty over both these areas simultaneously [FN39]. The Declaration by Mexico of 29 October 1945 claiming exclusive fishing zones beyond the continental shelf has been interpreted as expressing the same conception [FN40]. Similarly in the course of the Geneva Conference, proposals were formulated to join the continental slope to the shelf. To sum up, the situation is that the concept of the epicontinental platform does not constitute a derogation from the definition of the continental shelf in Article 1; the shelf and the platform are not mutually exclusive; in the present stage of development of law, they are called upon to supplement each other in order to meet factual situations differing in some ways and resembling each other in many others.
It will therefore be impossible henceforth to consider the concept of the continental shelf without having regard to the parallel or supplementary concept of the epicontinental platform.

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14. Two supplementary questions remain, which should be resolved in order to give a complete picture of the concept or the legal status of the continental shelf, satisfying the requirements of the arguments in the present case:
(a) Is the continental shelf referable to the concept of contiguity, or should it be considered rather as a natural submarine prolongation of the land territory of the coastal State?
(b) Does the continental shelf consist of an extension of territorial sovereignty, or does it simply confer rights, either sovereign rights or exclusive rights?

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*115 15. Is the continental shelf referable to the concept of contiguity, or should it be considered rather as a natural submarine prolongation of the land territory of the coastal State?

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The argument of contiguity put forward in the Counter-Memorials and in the course of the speeches made by the representatives of Denmark and the Netherlands, to the effect that the submarine areas nearest to a State are presumed to appertain to it rather than to another State, is claimed to follow from the actual definition of the continental shelf given in Article 1 of the relevant Convention and to be inherent in the idea that that State possesses ipso jure a title to these areas or exclusive rights over them, and thus a direct and essential link-in other words, a link that is inherent and not merely implicit-founded on the ratio legis of the fundamental concept of the continental shelf is said to have been established between that concept and the delimitation rule of Article 6.
This view would not seem to be accepted as a rule of international law, as is clear, in particular, from the Award dated 23 January 1925 in the Island of Palmas case. That Award, delivered by one of the three great Swiss arbitrators, M. Huber, stressed that 'it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the terra firma (nearest continent or island of considerable size)'. This decision, which is generally accepted, also, by analogy, resolves the case of submarine areas.
The line of argument advanced in the Counter-Memorials is also categorically refuted by previous judicial decisions inasmuch as, in the interpretation of the texts, it openly violates the natural meaning of the words, when it maintains that the term 'adjacent' which appears in Article 1 of the Convention on the Continental Shelf is the equivalent of the term 'equidistant', and proceeds to deduce therefrom that the said Article which defines the continental shelf at the same time determines the rule by which it is to be delimited, namely the equidistance rule. But if such had been the intention of the authors of the Convention, they would have expressed it, instead of allowing it to be deduced in such a laborious fashion. Further, nothing is to be found in the travaux preparatoires in support of this opinion, as the Court has shown by referring to the documents of the International Law Commission and the Committee of Experts. On the other hand, the use of the term 'adjacent' is naturally explained by an intention to confine the continental shelf to a limited part of the high seas, that part which prolongs the coast, to the exclusion of the open sea. It would moreover be difficult to accept that, contrary to good legislative technique, the subtleties and consequences of which were well known to them, the authors of the Convention used in the same *116 sense two absolutely different words. The term 'adjacent' refers only to the fact of the reciprocal situation of two territories or of two neighbouring maritime areas. The term 'equidistant', on the contrary, relates to a measurement to be determined between the two territories or the two adjacent maritime areas.

Finally, it would not be superfluous to stress the seriousness of the consequences which the acceptance of this argument would involve. It would justify territorial or maritime acquisitions repugnant to the fundamental principles of contemporary international law: for example the appropriation of large areas of the Arctic Ocean and the Antarctic Continent, an appropriation which also relies on the doctrine of sectors, which doctrine, in certain of its elements, is reminiscent of the abandoned concept of spheres of influence; for example also, the policy derived from the Berlin Treaty of 1885, which, having divided up Africa, considered as res nullius, permitted extension of sovereignty starting from the coast which had been effectively occupied. And should there not be added to these examples the doctrine of Lebensraum extending beyond the bounds of a country?

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16. The continental shelf is to be conceived, on the contrary, as a submarine prolongation of the territory: a natural prolongation, without breach of continuity. It is not therefore a question of a debatable legal fiction, but of geological reality.
It was this idea which was adopted as basis by the States which led the way in respect of claims over the continental shelf (United States) [FN41], or over the epicontinental platform (Mexico, Argentine, Peru) [FN42]. The authority of legal writers is generally favourable to it [FN43], and the International Law Commission made it its own.
This concept can also be deduced from the concept, universally recognized, of the territorial sea, which is itself a prolongation or extension of the national territory.
It is, however, necessary to make a reservation; namely that there must not be deduced from the unity of the territory and of the continental shelf or the platform, a unity of legal regime. The difference will appear in the course of examination of the following question concerning the rights of coastal States.
Judicial decisions support this reasoning, with a Judgment of this **117* Court itself, that of 18 December 1951 in the Anglo-Norwegian Fisheries case, according to the terms of which 'it is the land which confers upon the coastal State a right to the waters', which can just as well include the bed of the waters. It is moreover apparent that the Geneva Conference was guided by this Judgment in its conception of the continental shelf.

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17. Does the continental shelf consist of an extension of territorial sovereignty, or does it simply confer rights, either sovereign right or exclusive rights?

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The conduct of States is various and subject to change. Nonetheless three attitudes may be discerned which correspond to the three possibilities comprised in the last question raised, in order to round off the question of the legal status of the continental shelf: a North American attitude which holds fast to the notion of exclusiveness; a South American attitude claiming territorial sovereignty; and lastly the Geneva attitude, which culminated in the Convention sanctioning rights qualified simultaneously as sovereign and exclusive.

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The Truman Proclamation claimed an exclusive right over the continental shelf, and without claiming to exercise formal sovereignty thereover, nonetheless affirmed that the American Government regarded the natural resources of the subsoil and of the seabed and of the continental shelf, beneath the high seas and contiguous to the coasts of the United States, as oppertaining to it and subject to its jurisdiction and control.
The series of declarations which followed did not all refrain from proclaiming the

sovereignty of the coastal State over the bed and subsoil of the high seas. This was the case with the majority of the States of Latin America which extended their sovereignty for 200 nautical miles over the epicontinental platform, or beyond.
As for the Geneva Conference, after wavering between the concepts of exclusive rights and sovereign rights, it opted for the latter in Article 2, paragraph 1, of the Convention, and in paragraph 2 of the same Article, it described the sovereign rights as exclusive. The United States, mentioned above, ranged itself on the side of this latter concept by ratifying the Convention.

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*118* 18. Nonetheless, however varied State practice may be, it should be possible to make it subject to a dual criterion. The rights which coastal States can exercise over the continental shelf or the epicontinental platform are capable of being determined as a group by the economic objectives given for them, and by the consideration that the freedom of the high seas should not be affected except to the extent required for the realization of these objectives. In other words, since it is a question of a principle of the law of nations from which economic, social and political development, as well as scientific and technological progress, may bring about necessary derogations, the rights which the coastal State can exercise over the continental shelf or the epicontinental platform should be limited to those which can be justified from the standpoint of the realization of the ends for which they were instituted, that is to say, generally speaking, the exclusive exploitation, as against other States, of submarine resources in the one case, or of fishing in the other.
As to the sovereign character attributed to these rights, it would appear, in the three situations to which attention has been drawn, to be a case of a somewhat dismembered territorial sovereignty, of which certain attributes are exercised over the continental shelf or the epicontinental platform. The legal content of the sovereign rights remains limited to those acts which are strictly necessary for the exploration, exploitation or protection of the resources of the continental shelf, to the exclusion of the waters and of the area lying above them. In the same way, the legal content of what has been called sovereignty by the States of Latin America is limited to the objects mentioned above, to which is to be added fishing, excluding freedom of navigation and the right to lay and maintain cables and pipelines. There would thus be no question, in any case, of sovereignty in the form in which it is exercised over the territorial sea.

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19. The dual criterion of the economic objectives given for the rights of coastal States and of respect, to the necessary extent, of the freedom of the high seas, naturally excludes the use of the continental shelf, just as of the high seas, for military purposes. The freedom of the high seas, a principle of positive international law, remains sacrosanct so long as a rule of the same nature has not subjected it to restrictions by specifying individual rights which States would be empowered to exercise therein [FN44].

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20. It will hereinafter be established that the three Parties to the present case are bound by the provisions of the aforementioned Article 2 *119* of the Geneva Convention on the Continental Shelf, the Netherlands and Denmark by having ratified the Convention, and the Federal Republic of Germany by having acquiesced in the application to it of that same Article.

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21. The concept of the continental shelf being recognized, together with the rights exercised thereover, as forming part of customary international law, the request made of the Court by the Parties involves first of all the following question:
Does there exist a general or particular convention, within the meaning of Article 38, paragraph 1 (a), of the Statute of the Court, containing rules applicable to the delimitation between coastal States of the areas of the continental shelf of the North Sea which they claim?

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The Governments of the Kingdom of the Netherlands and the Kingdom of Denmark rely on the provisions of Article 6 of the Geneva Convention on the Continental Shelf of 29 April 1958 for the delimitation of the areas of the North Sea continental shelf.
The Government of the Federal Republic of Germany, which has not ratified the Convention, has also not recognized the relevant dispositions of Article 6, relied on by the Governments of the Netherlands and Denmark, as it has done in the case of the first two articles of the said Convention [FN45].

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The conduct of the Federal Republic and certain declarations made by it have however been interpreted by the opposing Parties as amounting to a commitment on its part to submit to the provisions of Article 6 of the Convention.
The Court, in its study of the effects of the declarations made by or the conduct of a State, concludes-'that only the existence of a situation of estoppel could suffice to lend substance to this contention [sc., that the Federal Republic of Germany is bound by its declarations]-that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice'.
*120 The Judgment does not take into account a well-settled doctrine that a State may be bound by a unilateral act [FN46].
As a consequence of its argument, the Judgment mentions in paragraph 31 that- 'it seems to the Court that little useful purpose will be served by passing in review and subjecting to detailed scrutiny the various acts relied on by Denmark and the Netherlands as being indicative of the Federal Republic's acceptance of the regime of Article 6'.
While agreeing with the Judgment that Article 6, as such, is not applicable to the delimitations envisaged in the present cases, I consider that the unilateral acts and the conduct of the Federal Republic should be analysed in order to clinch this conclusion.

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22. The Federal Government's delegation announced, as is mentioned in the minutes of the negotiations with the Netherlands Government dated 4 August 1964 [FN47], that its Government 'is seeking to bring about a conference of States adjacent to the North Sea ... in accordance with the first sentence of paragraph 1 and the first sentence of paragraph 2 of Article 6 of the Geneva Convention on the Continental Shelf' and that 'the Netherlands delegation has taken note of this intention'. But this commitment, expressly limited to two provisions of Article 6 concerning the advisability of preferably having recourse to agreements for the delimitation of the continental shelf, cannot be interpreted as a declaration referring to the whole of the provisions of that Article. The letter of the text is categorically opposed to such an interpretation. In particular, the provision concerning delimitation of the continental shelf by application of the equidistance rule remains outside this commitment.

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An attempt has nonetheless been made to see in the treaties of 1 December 1964 and 9 June 1965, between the Federal Republic of Germany on the one side and the Kingdom of the Netherlands and the Kingdom of Denmark on the other, an acquiescence in the application of the equidistance rule.

Acquiescence flowing from a unilateral legal act, or inferred from the conduct or attitude of the person to whom it is to be opposed-either by application of the concept of estoppel by conduct of Anglo-American equity, or by virtue of the principle of western law that allegans contraria non audiendus est, which has its parallel in Muslim law [FN48]-is numbered among the general principles of law accepted by international law as *121 forming part of the law of nations, and obeying the rules of interpretation relating thereto. Thus when the acquiescence alleged is tacit, as it would be in the present case inasmuch as it is inferred from the conduct of the party against whom it is relied on, it demands that the intention be ascertained by the manifestation of a definite expression of will, free of ambiguity.

But the Federal Government formally declared in the joint minutes of 4 August 1964, referred to above, that 'it must not be concluded from the direction of the proposed partial boundary that the latter would have to be continued in the same direction'. It was also mentioned in the Protocol to the German-Danish Treaty of 9 June 1965 [FN49], that 'as regards the further course of the dividing line, each Contracting Party reserves its legal standpoint'.

Considering that the negotiations which culminated in the treaty of 1 December 1964, as well as those which culminated in the treaty of 9 June 1965 and the annexed Protocol of the same date, constitute an indivisible whole, the Court cannot disassociate therefrom the declarations mentioned above of 4 August 1964 and 9 June 1965 which brought each set of negotiations to a close, and of which the meaning does not lend itself to any equivocation, and is such as not to allow any doubt to subsist as to the intention of the Federal Republic of Germany to exclude the application of equidistance pure and simple to the delimitation beyond latitude 54 degrees north. There is in fact no reason why, in the interpretation of unilateral declarations, the settled jurisprudence of the Court should not be followed, to the effect that the terms of the treaty should be interpreted 'in their natural and ordinary meaning [FN50]'. It should also be remarked that the German-Danish treaty allegedly includes only one equidistance point, the terminal of the partial boundary [FN51].

It would be no less incorrect to say, as a result of similar reasoning concerning the true intention of the Federal Government, that the latter, by its Proclamation of 20 January 1964 and the expose des motifs of the law on the continental shelf which it promulgated on 24 July of the same year, 'acknowledges the Geneva Convention as an expression of customary international law', as the other Parties to the case claim [FN52]. Nor is this in fact the case as regards the provisions of the 1958 Convention concerning the equidistance line, which could naturally not acquire, by means of a recognition which for the purposes of argument *122 we will suppose to be efficacious, the status of a customary law rule which it does not possess [FN53].

Furthermore, what legal effect should be attributed to the signature by the Federal Republic of Germany of the Protocol for Provisional Application of the European Fisheries Convention of 9 March 1964, Article 7 of which provides for recourse to the median line, every point of which is equidistant from the coasts of each of the adjacent or opposite parties? The commitment of the Federal Republic to the application of the equidistance line to fishing zones, which it confirmed by the aidememoire of 16 March 1967, is not open to argument. But does its scope, exceeding the object for which it was agreed, extend to the continental shelf? The reply is more than doubtful, because of the express opposition by the Federal Government to the application of the equidistance line, in the documents which have successively been discussed, dated 4 August 1964, 9 June 1965, 20 January 1964 and 24 July 1964. Such seems to be the interpretation to be given to the intention of the Federal Republic.

This being the case, the Court does not have to embark, in addition, on an enquiry into the private thoughts of the Federal Republic, as the Netherlands Government calls upon it to do, by asking in its Counter-Memorial why the Federal Republic stressed, in the minutes of 4 August 1968, that the boundary should be determined with due regard to the special circumstances prevailing in the mouth of the Ems, if it did not have in mind the terms of paragraph 2 of Article 6 of the Geneva Convention, i.e., the equidistance rule.
It is not therefore possible to interpret the treaties of 1 December 1964 and 9 June 1965, between the Federal Republic on the one side, and the Netherlands and Denmark on the other, in the light of the minutes of 4 August 1964 and the Protocol of 9 June 1965, nor the declaration of the Federal Government of 20 January 1964 and the expose des motifs of the law of 24 July of the same year, as an acquiescence in the application of the equidistance line as contemplated in the Convention of 29 April 1958 on the Continental Shelf.

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23. To sum up the delimitation between the Parties of the areas of the North Sea continental shelf over which they claim sovereign rights is not governed by the provisions of Article 6 of the Geneva Convention of 29 April 1958 on the Continental Shelf, which applies the principle of equidistance.
There is therefore no need to embark on the interpretation of the provisions of the said Article 6 as a legal text binding on the Parties. Nonetheless, we may subsequently return to this point, if the adoption of the concepts included in it could afford inspiration for a solution **123* drawn from another source of law, such as a general principle of law recognized by the nations.

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24. In the absence of an international convention establishing rules expressly recognized by the Parties to the dispute, do not principles or rules of customary international law exist which are applicable to the delimitation of the continental shelf?
And in the event of there being no general custom, might there be a regional custom peculiar to the North Sea?

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The Kingdoms of Denmark and of the Netherlands have contended that having fixed the boundaries of their parts of the continental shelf on the specific basis of the principles and rules of law generally recognized, those boundaries are not prima facie contrary to international law and are valid as against other States. They base their contention on the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, according to which, in the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is to be determined by application of the principle of equidistance from the baselines from which the breadth of the territorial sea of the adjacent States in measured.
The unilateral action on which the Danish and Netherlands Governments rely would have been opposable to other States and consequently to the Federal German Government, if the rule of delimitation to which they attribute an effect erga omnes had become a norm of positive international law binding States which, like the Federal Republic, are not parties to the 1958 Convention.
As has been seen, Articles 1 and 2 of the said Convention, which establish the institution of the continental shelf, were not the result of a codification of the international law in force, forming part of the lex lata, but the effect of the progressive development of the law, de lege ferenda, referred to in Article 13 of the Charter of the United Nations and Article 15 of the Statute of the International Law Commission. The case of the provisions

of Article 6, paragraph 2, could not be different, inasmuch as they apply the principle laid down in Articles 1 and 2.
Has this progressive development of the law reached the stage, in respect of what is stated in paragraph 2 of Article 6, of of settled custom, since the adoption of the equidistance method by the International Law Commission in 1953, and subsequently by the Geneva Conference in 1958, in both cases by a very large majority?
Admittedly, the notion of the continental shelf itself, which made its first appearance in State practice in 1945, took only a dozen years to *124 become a universally recognized custom. The voices of authoritative writers [FN54] and jurists of all kinds, at international conferences, were unable to stem the current of legal thinking resulting from unprecedented scientific progress and the rapid development of the economic and social life of the nations. That is to say that this recent rule of the law of the sea, under the pressure of powerful motives and thanks to State practice and the effect of international conventions, was within a short time converted into a customary law meeting the pressing needs of modern life.
Can the same be said of the concept of equidistance in Article 6 of the Geneva Convention?
It is necessary to ascertain, in a first limb of the discussion, what State practice has been, both before the date of the Convention of 29 April 1958 on the Continental Shelf and after that date.

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25. One prior question calls for resolution: what are the acts of delimitation which must be tabulated in order to select those which have contributed to the formation of the material element of custom, both with reference to the nature of the waters delimited, and with reference to the situation of the coastal States of those waters, adjacent States and opposite States.
The Court has considered that only delimitations concerning the continental shelf and made between adjacent States can be taken into account as precedents. It seems however that the acts which must be taken into account in this investagation are, with reference to the nature of the waters, all those pertaining to the delimitation of maritime waters of whatever kind: territorial seas, straits, contiguous zones, fishing zones, continental shelf, epicontinental platform-to which must be added lakes. The underlying concept common to all these stretches of water, which is decisive by way of analogy, is that they all proceed from the notion of the natural prolongation of the land territory of the coastal States [FN55]. Thus, the 1953 Committee of Experts, drawing no distinction in this connection between the territorial sea and the continental shelf, wrote in its report that it had 'considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves ...'.
On the other hand, it is obvious that boundary lines dividing rivers should not be selected as precedents. Moreover, such boundary lines *125 follow the thalwegs or the navigable channels much more frequently than the middle of the stream.
The acts of delimitation with reference to adjacent or opposite States require more detailed examination.
All such acts should be drawn on, again on the ground of their common underlying concept. The example has been set by the three conventions adopted at Geneva concerning respectively the territorial sea, the contiguous zone and fishing zones. All three take, in so many words, as their basis for delimitation 'the median line every point of which is equidistant from the nearest points on the baselines ...'. And those conventions laid it down that this provision was applicable to lateral delimitations just as to delimitations between opposite States [FN56].
Should not this assimilation between these two types of delimitation be reflected in the interpretation of Article 6 of the Convention on the Continental Shelf, even though the two different terms, median line and equidistance line, are there employed?

It is imperative in the present case to interpret the Convention on the Continental Shelf in the light of the formula adopted in the other three conventions, in accordance with the method of integrating the four conventions by co-ordination. For the four conventions, voted on the same day at one and the same meeting, constitute a body of treaties all falling within the same legal framework, that of the law of the sea. Thus they were drawn up by the International Law Commission of the United Nations and submitted to the Geneva Conference in a single document. Must it not consequently be agreed that, notwithstanding the differences of wording, or the disparity between the terminology noticed in the three conventions mentioned on the one hand, and the Convention on the Continental Shelf on the other, the same equidistance rule is applicable, according to the meaning of the four conventions, to lateral delimitations just as to median delimitations?
It will be noticed that the rule having been understood in this way in international circles, the 13 States which signed the Convention concluded in London on 9 March 1964 took over word for word from the three above-mentioned Geneva conventions their common formula for States lying opposite or adjacent to each other.
If nevertheless the text of the Convention on the Continental Shelf emerged from the deliborations of the conference with a wording different from that of the other three conventions, that fact is to be attributed to the contingencies of discussion at a meeting. Delimitations both between adjacent States and between States lying opposite each other formed the subject, before the International Law Commission, of a single form of words covering both situations. The fact that they were mentioned, in **126* the convention drawn up during the conference in separate paragraphs of Article 6, and that the two texts were drafted in somewhat different terms, is to be explained by the vicissitudes of discussion in two Committees, and does not permit of the deduction therefrom of a difference between a median line applicable to States lying opposite each other and an equidistance line for demarcating the boundary between adjacent States. The travaux preparatoires are no less explicit, in this respect, than the clarity of the terms employed in the four conventions concerning the law of the sea, which refer, as to a single whole, to the median line and equidistant points as applicable to adjacent States and States lying opposite each other. This amounts to saying, in short, that the notion of equidistance is the rule for both sorts of delimitation.

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26. The instruments prior to the Convention on the Continental Shelf, concerning the delimitation of maritime waters-territorial sea, straits, lakes, contiguous zone, fishing zones, continental shelf, epicontinental platform- could not be more varied in nature.
It will subsequently be seen that the proclamations and other pronouncements made in 1945 by the United States, in 1947 by Nicaragua, in 1949 by Saudi Arabia and the States of Kuwait, Bahrain, Qatar, Abu Dhabi, Sharjah, Ras al Khaimah, Umm al Qaiwain and Ajman, and in 1955 by Iran, all relied on justice or equity. This was the largest group of States.
The treaty of 27 September 1882 between Mexico and Guatemala, as well as the decree of the Government of Cambodia of 30 December 1957, adopted the method of a line perpendicular to the coast.
The method of extending the land frontier seawards was followed in the decree of the French Government of 25 May 1960, confirming the agreement between France and Portugal concerning Senegal and what is referred to as Portuguese Guinea. The same was done in respect of the boundaries laid down in 1953 under the Australian pearl fisheries legislation of 1952-1953.
The delimitation of the epicontinental platform between Chile, Ecuador and Peru followed geographical parallels of latitude.
The Agreement of 15 June 1846 between the United States and Canada, and the 1928 Act endorsing the Agreement of 19 October 1927 between Singapore and Johore both follow the channel between the two coasts.
A number of agreements were noted which opted for equal division, employing the

following expressions: 'equidistant from' or 'half-way between' the coasts, or along 'the middle line'. Such were, for example, the Agreement of 11 April 1908 between the United States and Great Britain, the Agreements of 28 September 1915 between Malaysia and Indonesia, of 28 April 1924 between Norway and Finland, the Peace Treaty of 4 January 1932 between Italy and Turkey, the Agreements of *127 30 January 1932 between Denmark and Sweden, and those of the Peace Treaty with Italy of 10 February 1947, delimiting the territorial waters of Trieste, and, finally, the Agreement of 22 February 1958 between Saudi Arabia and Bahrain.

Delimitations of lakes sometimes referred to the median line or the middle of the water, sometimes to the thalweg, and sometimes followed the banks of the lake or did not purport to be based on any method.

A rather special case was that of the Agreement of 25 February 1953 between France and Switzerland for the delimitation of the Lake of Geneva along '... a median line and two transversal arms ...', this line being 'replaced, for practical reasons by a six-sided polygonal line with a view to effecting a compensation as between the areas'.

Finally, a number of agreements and other instruments made no reference to any method whatsoever. This was the case with the Agreements of 1918 between China and Hong Kong and of 1925 between the United States and Canada; the 1942 treaty between the United Kingdom and Venezuela and the 1957 Agreement between the Soviet Union and Norway.

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27. It does not seem that any conclusion can be drawn from these extremely varied formulae which have been employed, unless it be that they constitute a set of methods to which States might freely have recourse in order to reconcile their respective interests. Accordingly, the use of one method or another, not excepting that which employs the median line, does not indicate any opinio juris based on the awareness of States of the obligatory nature of the practice employed.

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28. Since the above-mentioned acts adopting the median line or the equidistance line are not capable of creating a custom, it remains to be seen whether those which have occurred since the signature of the Convention on the Continental Shelf, by being added thereto, have had this effect.

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In order to resolve this question, the Court argues that a normcreating convention has, as such, an influence on the formation of custom. The function of State practice is envisaged, on this line of reasoning, as being appropriate cases to support the potentially norm-creating nature of the convention.

It appears to me that this reasoning is contrary to both the letter and the spirit of Article 38, paragraph 1 (b), of the Court's Statute, which *128 bases custom on State practice. The 1958 Convention, like any other convention, has therefore no other influence on the formation of custom than that which is conferred upon it by the States who have ratified it, or have merely signed it: the deliberate legal act of ratification, and the legal fact of signature, both constitute attitudes which count in the enumeration of the elements of State practice.

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29. Consequently, in order to draw up as complete as possible a current list of precedents of such a kind as to contribute towards the transformation of the equidistance method

into a rule of customary law, it would be necessary to tabulate:
(a) the deliberate legal acts of ratification of the aforesaid Conventions;
(b) the legal facts of signature of the Conventions;
(c) the various acts of delimitation of the territorial sea, the contiguous zone, fishing zones, straits, lakes, the continental shelf and the epicontinental platform.
States whose acts of delimitation have been referred to and which are included under sub-paragraphs (a) and (b) include: the Soviet Union, Finland, Australia, the United Kingdom, Sweden, Denmark, the United States and the Federal Republic of Germany. There is thus no need to include them once again among the total number of States which have carried out acts of delimitation.
In addition to the above-mentioned States, the Netherlands and Denmark mention in their Common Rejoinder those which have opted for the equidistance line.
So far as Kuwait is concerned, the representatives of the Federal Republic argued that its agreement with the concessionary company could not be regarded as a precedent, since it was not a convention between States.
Numerous concessions under public law have given rise to judicial precedents in various questions of international law. Nevertheless, an agreement concerning a concession by a State to a company does not, per se or as such, constitute an element of the practice which contributes to the creation of international custom. It is only by a legitimate assimilation of the position taken up by the State granting the concession, to a unilateral act, that the case of Kuwait might be considered. Nevertheless, the attitude which is attributed to it, like that attributed to Iran, demands careful thought. They might have been considered as precedents contributing towards the establishment of custom if those States had not refrained from referring to the equidistance method, although their legal advisers must assuredly have been aware of the discussions that had taken place at the Geneva Conference. The inmost thoughts of those States cannot be plumbed, so as to claim that an opinio juris attached to the **129* demarcations which they made without referring to a rule they believed themselves obliged to apply. The more so in that on account of the steps taken by each of them in drawing lines of demarcation of their continental shelves one cannot help looking back to their respective declarations of 1947 and 1955, in which they specified that they would rely in this connection on the notion of equity.
So far as Iraq is concerned, it was stated in the Rejoinder that that State 'automatically considered that the equidistance principle expressed in Article 6 of the Continental Shelf Convention would govern the delimitation of her continental shelf in the absence of an agreement or of special circumstances justifying another boundary line [FN57]'. But the declaration of Iraq was made on 10 April 1958, i.e., before the signature of the Geneva Convention; the reference to Article 6 thereof is consequently out of place. The Iraqi declaration can nevertheless be taken into consideration, like the Truman Proclamation, as starting a trend towards a new custom.
The Agreement between the United Kingdom and Norway, signed on 10 March 1965, which adopted the equidistance rule, constitutes another precedent. The same can be said of the Agreement of 8 December 1965 between Denmark and Norway, the Proclamation of 30 March 1967 by the President of the Republic of Tanzania concerning the delimitation of the territorial sea between Tanzania and Kenya, the Agreement of 20 March 1967 between Morocco and Spain dealing with the Straits of Gibraltar, and the Agreement of 24 July 1968 between Sweden and Norway.
But what view should be taken of the attitude of Belgium? Although it did not sign the Convention on the Continental Shelf, the Belgian Government, in a Note of 15 September 1965 from the Belgian Embassy to the Netherlands Ministry of Foreign Affairs, stated that 'the two countries are in agreement on the principle of equidistance and on its practical application'. Furthermore, the provisions of the Convention on the Continental Shelf were adopted in a bill, accompanied by an expose des motifs which was submitted to the Chamber of Representatives on 23 October 1967. The bill, while totally devoid of legal effect, nevertheless expresses the official point of view of the Government. It constitutes one of those acts within the municipal legal order which can be counted among the

precedents to be taken into consideration, where appropriate, for recognizing the existence of a custom. In any event, the attitude of the Belgian Government is expressed without any possible equivocation in the statement contained in the State to State communication of 15 September 1965, to which the character of precedent cannot be denied [FN58].
Furthermore, since the European Fisheries Convention of London of 24 March 1964 adopted the equidistance formula on the model of the *130 Geneva Conventions on the Territorial Sea, the Contiguous Zone and Fishing Zones [FN59], it should be noted that seven States which are not parties to those conventions signed the London Convention. They are to be added to those States, already mentioned, which have applied the equidistance method.
Thus, finally, in the course of the decade which has elapsed since the institution of the new rule by treaty, a dozen States not parties to the 1958 Convention on the Continental Shelf can be counted which have opted, in addition to the signatory States of that Convention, for the equidistance method.
However important these precedents may be, and despite the fact that those relating to all kinds of waters have been drawn upon, their number amounts to only about half of that of the international community. It is difficult to find in this elements capable of constituting the generally accepted practice of Article 38, paragraph 1 (b), of the Statute of the Court.

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30. There is a textual argument which is of all the more account in that if firmly confirms this view of the matter. It is that drawn from Article 12 of the Convention on the Continental Shelf, which makes a distinction between Articles 1 to 3 and all the other articles, by providing that to the former alone no reservations may be made. The Court has dealt extensively with this point, and I need only refer to it in order to add that the power to subject the implementation of the provisions of Article 6 to reservations implies the absence, in the minds of the signatories of the Convention, of the opinio juris sive necessitatis. The latter requires consciousness of the binding nature of the rule, and it is self-evident that a rule cannot be felt to be binding when the right not to apply it is reserved.
The conclusion cannot therefore be avoided that the equidistance method of Article 6 of the said Convention of 29 April 1958 has not acquired the nature of a customary rule which it did not have formerly.

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31. Nor are there to be found therein the elements which go to make up a regional custom. For while a general rule of customary law does not require the consent of all States, as can be seen from the express terms of the Article referred to above-but at least the consent of those who were aware of this general practice and, being in a position to oppose it, have not done so [FN60]-it is not the same with a regional customary rule, having *131 regard to the small number of States to which it is intended to apply and which are in a position to consent to it. In the absence of express or tacit consent, a regional custom cannot be imposed upon a State which refuses to accept it. The International Court of Justice expressed this clearly in its Judgment of 20 November 1950 in the Asylum case in the following terms: 'The Party which relies on a custom of this kind [sc., regional or local custom] must prove that this custom is established in such a manner that it has become binding on the other Party [FN61].'
Accordingly, the Federal Republic of Germany cannot be bound by a so-called regional customary rule which it rejects. It has expressly recorded its opposition to the rule in question; firstly in its Reply of 26 August 1963 to the note verbale from the Netherlands Embassy in Bonn; and subsequently in the Special Agreement of 2 February 1967, in which the Government of the Netherlands took formal note of this, as did the

Government of Denmark. Moreover, in its Proclamation of 20 January 1964, the Federal Government distinguished between the principle of the continental shelf itself and the rules concerning its delimitation [FN62].

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32. Consequently it cannot be accepted, as the Governments of the Kingdoms of Denmark and of the Netherlands maintain, that the rule in Article 6 of the Geneva Convention concerning the delimitation of the continental shelf has acquired the character of a general rule of international customary law or that of a regional customary rule.
The equidistance line having been rejected as a rule of positive law, recourse may be had to it, after the fashion of those States which have applied it voluntarily, as a method which can, subject to necessary rectifications in accordance with the circumstances, ensure an equitable delimitation.
Thus it is necessary in the last analysis to have regard to the general principles of law recognized by nations.

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However the Court has not considered that it should do this; it has taken the view that, failing a method of delimitation which the Parties are bound to use, they should be called upon to negotiate an agreement by the application of equitable principles.
*132 The equity which the Court recommends to the Parties' consideration would appear to be nothing other than justice: 'whatever the legal reasoning of a court of justice', says the Judgment, 'its decisions must by definition be just, and therefore in that sense equitable'. The Judgment arrives at the obvious truth that it is necessary to be just, and does not give much indication to the Parties, each of whom considers that its own position is equitable.
What is just is however not always equitable, witness the well-known adage: summum jus summa injuria. And it is in order to mitigate this inconvenience of strict justice that recourse may be had to equity whose role is to moderate the rigour of law.
The truth of the matter is that the principle of equity which must be applied is not the abstract equity contemplated by the Judgment, but that which fills a lacuna, like the principle of equity praeter legem, which is a subsidiary source of law. Contrary to the opinion of the Court, there is a lacuna in international law when delimitation is not provided for either by an applicable general convention (Article 38, paragraph 1 (a)), or by a general or regional custom (Article 38, paragraph 1 (b)). There remains sub-paragraph (c), which appears to be of assistance in filling the gap. The question which arises is therefore as follows:
33. Does there exist a general principle of law recognized by the nations, as provided for by Article 38, paragraph (c), of the Statute of the Court, from which would follow a rule to the effect that the continental shelf could, in case of disagreement, be delimited equitably between the Parties?

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It is important in the first place to observe that the form of words of Article 38, paragraph 1 (c), of the Statute, referring to 'the general principles of law recognized by civilized nations', is inapplicable in the form in which it is set down, since the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law [FN63].
The discrimination between civilized nations and uncivilized nations, which was unknown to the founding fathers of international law, the protagonists of a universal law of nations, Vittoria, Suarez, Gentilis, Pufendorf, Vattel, is the legacy of the period, now passed away, of colonialism, and of the time long- past when a limited number of Powers *133

established the rules, of custom or of treaty-law, of a European law applied in relation to the whole community of nations. Maintained and sometimes reinforced at the time of the great historical settlements-Vienna 1815, Berlin 1885, Versailles 1920, Lausanne 1923, Yalta 1945-European international law had been defended by jurists of indisputable authority in the majority of branches of international law, such as Kent, Wheaton, Phillimore, Anzilotti, Fauchille, F. de Markas, Westlake, Hall, Oppenheim, Politis: thus the last-mentioned writer's La morale internationale is striking by reason of the fact that it is centered on Europe alone and Europe's exclusive interests. However great and powerful the thinking of these renowned jurists may be, their concept of a family of European and North Atlantic nations is nonetheless beginning to be blurred by the reality of the universal community, in the thinking of the internationalists of a new age such as S. Krylov, M. Katz, W. Jenks and M. Lachs. What is more, the universalist jurists of Europe had been preceded by those of Asia and the Middle East: Sui Tchoan-Pao, Bandyopadhyoy, Rechid.

Whether the adepts in the notion of the law recognized by civilized nations assess degrees of civilization by reference to the competence of authority to preserve the rights of foreigners [FN64], or to its power to ensure the protection of the fundamental rights of the human person [FN65], it is impossible to avoid the thought that the colonial regime should not have been excluded from the factors of assessment belonging to one or other of these criteria, since the colonized were foreigners vis-a-vis the colonizers, and had been deprived of certain of their fundamental rights [FN66].

Moreover, the discrimination condemned by writers is in absolute contradiction with the provisions of the United Nations Charter, stipulating henceforward 'the sovereign equality' of all the Member nations, and for their participation both in the elaboration of international law in the organs of the United Nations, particularly the International Law Commission on which all nations are called upon to sit, and in the application, interpretation and to a certain extent the development and evolution of international law, by virtue of Article 9 of the Statute of the Court, according to which 'the electors shall bear in mind ... that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'.

Thus it is that certain nations, to whose legal systems allusion was made above, which did not form part of the limited concert of States which did the law-making, up to the first decades of the 20th century, for the whole of the international community, today participate **134* in the determination or elaboration of the general principles of law, contrary to what is improperly stated by Article 38, paragraph 1 (c), of the Court's Statute. The American delegate Root did well to suggest to the Committee of Jurists in 1920 that the Court should apply, besides treaty law and customary law, 'the universally recognized principles of law'. Nonetheless, under the influence of ideas borrowed from The Hague Conference of 1907, where the jurists of European allegiance were dominant, he substituted for this formula that which was to appear in Article 38, paragraph 1 (c), of the Statute, which has thus been inherited, as it were without beneficium inventarii, from concepts as anachronistic as they are unjustified. And over and above this, the particularly docile line taken by international decisions, understood by 'civilized nations' those composing the 'Concert of Europe', from whose systems of law alone they avowedly borrowed general principles of law by way of analogy [FN67].

If it is borne in mind particularly that the general principles of law mentioned by Article 38, paragraph 1 (c), of the Statute, are nothing other than the norms common to the different legislations of the world, united by the identity of the legal reason therefor, or the ratio legis, transposed from the internal legal system to the international legal system, one cannot fail to remark an oversight committed by arbitrarily limiting the contribution of municipal law to the elaboration of international law: international law which has become, in short, particularly thanks to the principles proclaimed by the United Nations Charter, a universal law able to draw on the internal sources of law of all the States whose relations it is destined to govern, by reason of which the composition of the Court should represent the principal legal systems of the world.

In view of this contradiction between the fundamental principles of the Charter, and the

universality of these principles, on the one hand, and the text of Article 38, paragraph 1 (c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been a political criterion,-power politics,-and anything but an ethical or legal one. The system which it represents has not been without influence on the persistent aloofness of certain new States from the International Court of Justice [FN68].

It is the common underlying principle of national rules in all latitudes which explains and justifies their annexation into public international law. Thus the general principles of law, when they effect a synthesis and digest of the law in foro domestico of the nations-of all the nations-*135 seem closer than other sources of law to international morality. By being incorporated in the law of nations, they strip off any tincture of nationalism, so as to represent, like the principle of equity, the purest moral values. Thus borne along by these values upon the path of development, international law approaches more and more closely to unity.

To conclude this account, it appears that the Court, when quoting, as necessary, paragraph 1 (c) of Article 38, could omit the adjective referred to, and content itself with the words 'the general principles of law recognized by ... [the] nations'; or could make use of the form of words used by Sir Humphrey Waldock in his address of 30 October 1968, namely: 'the general principles of law recognized in national legal systems'. One might also say, quite simply: 'the general principles of law'; jurists, and even law students, would not be misled. All this pending the revision of the Court's Statute, or certain of its provisions, being put in hand.

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34. The meaning of Article 38, paragraph 1 (c), of the Statute of the Court having thus been restored, it is possible to give an adequate reply to the question raised: Is there a general principle of law recognized by the nations from which would follow a rule to the effect that the continental shelf could be delimited equitably between the Parties?

In their addresses of 30 October 1968, the Netherlands and Denmark stressed that they were not aware of any decision supporting the idea of the application of a general principle recognized by national systems which was in contradiction with positive law. This objection has been amply answered by showing that the equidistance method does not constitute a rule of positive law. There is, in the circumstances, a lacuna which is to be filled praeter legem and not contra legem, by inferring a general principle of law recognized in national legal systems.

It cannot in fact be denied that an international court, by progressively diverging from the thesis of the formal or logical plenitude of international law, contributes to the remedying of its insufficiencies and the filling-in of its lacunae. It is true that the Court is bound, by virtue of Article 38 of the Statute, 'to decide in accordance with international law such disputes as are submitted to it'. But the law to which the text refers does not have the limited meaning, confined to treaties and custom, often given to the term 'law' [FN69]. The provision of the Article mentioned above, according to which the Court shall apply 'the general principles of law recognized by ... [the] nations' conflicts with the voluntaristic point of *136 view-which was that of the Judgment of the Permanent Court of International Justice of 7 September 1927 in the Lotus case-and expressly authorizes the Court, which it directs to use the method of analogy, to draw the legal norms from sources other than those founded on the express or tacit consent of States.

In a renewed effort by Romano-Mediterranean legal thinking, breaking the chrysalis of outgrown formalism which encompasses it, international law at the same time tears apart its traditional categories, though it be slowly and bit by bit, in order to open the door to political and social reality in a human society which no longer recognizes any exclusive domains.

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35. In order to pronounce on the propriety of the application of this or that method with a view to an equitable and just delimitation of the continental shelf, there would, failing a legal obligation requiring the use of one or other method, be need to have recourse ultimately to equity, State practice having referred thereto more than once.
For if there is a principle recognized by the municipal law of the community of nations which demands adoption by analogy into international law as a general principle of law, at least as much as so many others which it has already borrowed, it is clearly the principle which nominates equity as the basis of law and as the objective of its implementation.
The general principles of law are indisputably factors which bring morality into the law of nations, inasmuch as they borrow from the law of the nations principles of the moral order, such as those of equality, responsibility and faute, force majeure and act of God, estoppel, nonmisuse of right, due diligence, the interpretation of legal documents on the basis of the spirit as well as of the letter of the text, and finally equity in the implementation of legal rules, from which derive the principles of unjust enrichment and enrichissement sans cause [FN70], as well as good faith 'which is no more than a reflection of equity and which was born from equity [FN71]'.

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*137 36. It is not possible to have recourse simply to the concept of what is reasonable, in preference to what is equitable.
The idea of the reasonable saw the light as long ago as in the writings of the Romano-Phoenician jurisconsult Paul [FN72]. But the reasonable, if it excludes the equitable, does not completely satisfy the mind. In the way in which it is formulated, in time as in space, it has an element of subjectivity, or even of relativity, which contrasts with the objective nature of the equitable [FN73]. Furthermore it may be wondered whether the champions of the reasonable have in mind pure reason, or are referring to practical reason. There is a difference, worthy of notice, between the one doctrine and the other, namely that which separates the understanding from the moral law. Morality, it has been said, hovers around the law; and one may add, with N. Politis and following Ulpian and Cicero, that it should have dominion over it [FN74]. In turning away from it, international law condemns itself to sterility in face of a society bubbling over with life. The normative school and its pure theory of law, in rejecting the moral, social and political elements, described as metajuridical, become isolated from international realities and their progressive institutions: ubi societas, ibi jus.

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*138 37. Although international justice has generally not specified the municipal sources of the general principles of law which it has derived, when referring to a concept of such wide scope as equity, and one which permits of more than one interpretation, as we have just seen, it is important that the underlying elements thereof be specified: both in time, by going back to legal traditions which have continued up to our own day, and in space, by glancing rapidly over the various national contributions.
Thus it appears legitimate to recall that Greek philosophy, which has never been rejected by succeeding generations right down to our own, already conceived of equity as a corrective to law in general, as a form of justice better than legal justice, because the latter, in view of its general nature, cannot always correspond perfectly to all possible cases [FN75]. In the course of time, the concept of justice and equity has become associated with that of law, whether justice be defined, as by Ulpian of Tyre, as the intention to attribute to each what is rightfully his [FN76], or as the art of that which is good and equitable [FN77], or whether the law should draw inspiration from the idea of justice and tend to its realization [FN78].

The just and equitable solution, in the sense given by Ulpian's definition of law: jus est ars boni et aequi, is not to be confused with the faculty possessed by the Court by virtue of Article 38 in fine to decide a case, with the agreement of the parties, ex aequo et bono, in the sense which modern law gives to that expression. It is in this sense that it had already been taken in arbitration cases [FN79]. But above all it is appropriate to refer to the Judgment of 28 June 1937 by the Permanent Court of International Justice in the Diversion of Water from the Meuse case between the Netherlands and Belgium, as a precedent for the effective application of equity within the framework of law, affirmed, if there were need for this, by the individual opinion of Judge Manley Hudson [FN80]. The Permanent Court thus preserved the spirit which had presided over the preparation of its Statute, and which was expressed by the president of the Advisory **139* Committee of Jurists, Baron Descamps, in the statement which he made at the second meeting, on 17 June 1920, where may be found the following words: 'If it is the duty of the judge to apply the law, where it exists, we must not forget that equity is, in international as well as in national law, a necessary complement of positive law ...' [Translation by the Secretariat of the Advisory Committee.]
Thus it is necessary to make a distinction between the principle of equity in the wide sense of the word, which manifests itself, in the phrase of Papinian, praeter legem, as a subsidiary source of international law in order to remedy its insufficiencies and fill in its logical lacunae; and the settlement according to independent equity, ex aequo et bono, amounting to an extra- judicial activity, in the expression of the same jurisconsult, contra legem, whose role is, with the agreement of the parties, to remedy the social inadequacies of the law.

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38. Incorporated into the great legal systems of the modern world referred to in Article 9 of the Statute of the Court, the principle of equity manifests itself in the law of Western Europe and of Latin America, the direct heirs of the Romano-Mediterranean jus gentium; in the common law, tempered and supplemented by equity described as accessory [FN81]; in Muslim law which is placed on the basis of equity (and more particularly on its equivalent, equality [FN82]) by the Koran [FN83] and the teaching of the four great jurisconsults of Islam condensed in the Shari'a [FN84], which comprises, among the sources of law, the istihsan, which authorizes equity-judgments; Chinese law, with its primacy for the moral law and the common sense of equity, in harmony with the Marxist-Leninist philosophy [FN85]; Soviet law, which quite clearly provides a place for considerations of equity [FN86]; Hindu law, which recommends 'the individual to act, and the judge to decide, according to his conscience, according to justice, according to equity, if no other rule of law binds them [FN87]'; finally the law of **140* the other Asian countries, and of the African countries, the customs of which particularly urge the judge not to diverge from equity [FN88] and of which 'the conciliating role and the equitable nature [FN89]' have often been undervalued by Europeans; customs from which sprang a jus gentium constituted jointly with the rules of the common law in the former British possessions, the lacunae being filled in 'according to justice, equity and good conscience [FN90]; and in the former French possessions, jointly with the law of WesterN Europe, steeped in Roman law.
A general principle of law has consequently become established, which the law of nations could not refrain from accepting, and which founds legal relations between nations on equity and justice [FN91].

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39. A series of acts translates this concept onto the factual plane, so as to derive therefrom the rule governing the delimitation of the continental shelf. These are the Truman Proclamation, the proclamations of the numerous States of the Arabian-Persian Gulf, those of Saudi Arabia, Iran and Nicaragua. These States, with the exception of the

United States, did not form part of the Concert of Nations which used to monopolize the privilege of elaborating law for the whole of the international community. Their role in one of the most important problems of the law of the sea deserves to be taken note of. According to the terms of the American Proclamation, 'in cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles [FN92]'. Saudi Arabia, for its part, provided that the boundaries of the areas of the subsoil and seabed over which it proclaimed its sovereignty would be determined in accordance with equitable principles [FN93]. The Arab States of Bahrain, Qatar, Abu Dhabi, Kuwait, Dubai, Sharjah, Ras al Khaimah, Umm al Qaiwain, and Ajman refer for the delimitation of their areas in the Arabian-Persian Gulf, to the principle of equity and of justice [FN94]. Finally, for the Iranian Empire, 'if differences of opinion arise over the *141 limits of the Iranian continental shelf, these differences shall be solved in conformity with the rules of equity [FN95]'. [English translation from Reply, Annex, Section A. 16, p. 449.]
No State is to be found, on the other hand, whatever method of delimitation it may itself have used, which opposes this concept based on equity to resolve the problem of the determination of the boundaries of the continental shelf between adjacent or opposite States, and this throughout the whole pre-convention period, up to 1958, the date on which this same concept seems to have been accepted by the Geneva Convention.
It is true that Saudi Arabia and Bahrain, after having referred to the principle of equity in their respective proclamations of 28 May and 5 June 1949, had recourse, in an Agreement of 22 February 1958, to delimitation on the basis of the median line, taking into account, of course, the special geographic circumstances of the region. Nonetheless, the earlier declarations have not ceased to remain in force, and the Agreement of 22 February 1958 is to be considered as an application of the principle of equity upon which depends the solution of the problem of the delimitation of the continental shelf.

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Is not the conclusion therefore justified, to round off the enumeration of those international acts which refer to equity, that these acts constitute applications of the general principle of law which authorizes recourse to equity praeter legem for a better implementation of the principles and rules of law? And it would not be premature to say that the application of the principle of equity for the delimitation of the areas of the continental shelf in the present case would thus be in line with this practice

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40. In addition, the adoption by the Geneva Convention of the median line and the equidistance line, subject to possible special circumstances, appears to be a similar equitable solution, to which recourse was had in order to preserve the authority of the principle of equity by a sort of compromise, inspired in fact by the conclusions of the study undertaken by the Committee of Experts appointed in 1953 by the International Law Commission, concerning the regime of the territorial sea. The five solutions put in first place by this study were rejected for reasons which were not unconnected with concern for legal precision or for equity. When it began to discuss the equidistance rule, the International Law Commission had remarked that in certain cases it would not permit an equitable solution to be attained. It was thus that it was qualified by the *142 condition concerning special circumstances, and finally extended to delimitation of the continental shelf. The commentary of the Commission also explains that the equidistance rule may be departed from when this is necessitated by an exceptional configuration of the coast [FN96].

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41. The teaching of legal writers has not been any less loyal than State practice to this moral concept of law. The notion of justice and equity is to be found in the writings of the publicists [FN97], as also over the names of the numerous jurists in the travaux preparatoires of the Geneva Convention; to which should be added the proceedings of the Ad Hoc Committee set up in 1967 by the United Nations to study the peaceful uses of the seabed and ocean floor [FN98].
International decisions have in turn had occasion to refer to the principle of equity praeter legem [FN99].
Thus it is permissible to conclude that all these manifestations of legal thinking finally merge in the framework of a normative legal concept, the principle of equity.

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*143 42. The principle of equity having been accepted, there are two questions to be examined:
(a) Although the equidistance method has been discarded as not binding the Federal Republic of Germany either by agreement, or by the effect of an international custom, can the equidistance line, strictly applied, that is to say, without any modification whatsoever, as desired by the Kingdoms of the Netherlands and Denmark, constitute a solution of the case submitted to the Court as meeting the requirements of equity?
(b) In the case of a negative answer, what is the rule flowing from the principle of equity which would effect a just and equitable delimitation of the areas of the North Sea continental shelf appertaining to the Parties?

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43. Can the strict equidistance line be envisaged as an equitable method of delimitation as applied to the present issue?
The Federal Republic is justified in rejecting, as not in conformity with equity, the delimitation of its continental shelf according to the strict equidistance method.
That much has been demonstrated by the Federal Republic by pointing, on the one hand, to the map showing the delimitation of the three areas of the continental shelf in conformity with the equidistance method, based upon the baselines of the territorial seas of the Parties and, on the other hand, to the map showing the delimitation as it would result on the assumption that the equidistance lines took their departure from coasts free of irregularities. The junction of those lines, as occurring towards the middle of the North Sea, illustrates the considerable difference as between the two hypotheses. Expressed in figures, this demonstration, as appears from the text and figures 2 and 21 of the Memorial, would give something like 23,600 square kilometres in the first instance and 36,700 square kilometres in the second [FN100]. The Federal Republic adequately demonstrates that the share which would fall to it would thus be reduced to a small fraction of the continental shelf such as would not correspond to the extent of its territory's contact with the North Sea and would be out of all proportion to the respective lengths of coastal frontage of the Parties.
Let it be for an instant imagined, for the sake of argument, that the Federal Republic of Germany had had the possibility, like the Netherlands, of reclaiming areas from the high seas to such a point that the entire concavity of the coast had been filled in. Would not the equidistance lines have produced quite a different result, and one of which the Federal Republic would have had no reason to complain?
*144 Moreover, the Court cannot be averse to having recourse to the travaux preparatoires of an international document if they are such as to cast further light on the questions of international law which are to be resolved. An examination of the circumstances in which the equidistance method of Article 6 of the Convention on the Continental Shelf was adopted shows in fact that the strict equidistance line claimed by Denmark and the Netherlands has been judged to be inequitable in a number of cases. If

reference is made to the records of the 1958 Conference, and if one goes as far back as the report and minutes of the International Law Commission and the report of the experts appointed in this connection in 1953, the role of equity in the decision to couple the equidistance line with the mention of special circumstances which was taken by the States assembled in Geneva will become apparent.
It was in fact the consideration of certain factors which led the Committee of Experts, and subsequently the International Law Commission, to arrive at the notion of special circumstances, with a view to mitigating, if need be, the inequitable consequences of the equidistance method, based upon the baselines serving for the delimitation of the territorial sea, which they had decided to adopt. The Committee of Experts, remaining within its terms of reference, made a point, when introducing the notion of special circumstances, of drawing attention to the fact that the equidistance method could fail to produce an equitable solution. And, during the discussions at the Geneva Conference, there were many representatives of the countries taking part who stressed this view [FN101]. The Court cannot do otherwise.

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44. At the end of this reasoning, it should be recalled that the Federal Republic of Germany, after having asked the Court, in its written pleadings and oral arguments, to declare that the equidistance method is not applicable to the case and, as a subsidiary point, that there exist special circumstances which exclude its application, contended that the Court should therefore refer the Parties back to negotiate an agreement with a view to another delimitation, taking into account the guide-lines which it would supply. And the Federal Republic submitted that the delimitation on which the Parties are to agree is to be determined by the principle of the just and equitable share, by reference to the criteria applicable to the particular geographic situation of the North Sea.
The Kingdoms of the Netherlands and Denmark retorted that, in view of the terms of the Special Agreements, such a decision would be nothing more than a non liquet.
Explaining his line of thought more precisely, the representative of the Federal Republic said, during the second round of speeches, that he *145 was not asking what boundaries should be drawn, but that guide-lines be given concerning the principles to be applied. And the representative of Denmark stressed that the Federal Republic was leaving it entirely to the Court to find out what might be the consequence of the clause of special circumstances possibly being applicable [FN102].
In fact, after having excluded the application of the equidistance line pure and simple and having established the existence of special circumstances, to refer the Parties to the negotiation of an agreement which would attribute to each of them an equitable share of the continental shelf is not to determine the principles and rules applicable to the delimitation of the areas of the continental shelf, which are referred to in the Special Agreements. A decision limited in this way would amount to the determining of the objective aimed at, without any mention of the means of attaining it. It would not have satisfied the letter of the Special Agreements any more than the spirit thereof.

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45. Besides, to do no more than declare that agreement should be reached on an equitable delimitation is not to resolve the question, for the Parties may well be divided as to what is an equitable delimitation and as to the means of determining it. The Court should therefore, after having first excluded the application of the equidistance line as a rule of law, state the rule which is capable of being adopted by application of the principle of equity.
The Geneva Convention provided a rule embodying theequidistance-special circumstances method. It was for the Court, in rejecting this treaty rule in the relationships between the Parties, to replace it by another serving the same purpose, deduced from equity as a general principle of law. What the Convention did, the Court can do.

The Court could in addition refer, as a judicial precedent, to the Judgment which it gave on 18 December 1951 in the Anglo-Norwegian Fisheries case, which laid down the rule of straight baselines for the determination of the outer limit of the territorial sea. It will be seen subsequently that a solution also based on a straight baseline is the one which may constitute the rule to be derived from the principle of equity. By so doing the Court would not have overstepped the limits of its jurisdiction as already fixed by it.

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46. Furthermore it may be observed that the Federal Republic's claim for an apportionment-rather than a delimitation-of the areas of the **146* continental shelf between coastal States is not in accordance either with the letter of the Special Agreements, or with the definition of the continental shelf.
This idea is to be found, it is true in a treaty precedent, the agreement between France and Switzerland of 25 February 1953 on the delimitation of the Lake of Geneva. According to the terms of this agreement, the median line is replaced by a polygonal line 'with a view to effecting a compensation as between the areas'. But this is a unique case where free play was given to voluntary agreement. It does not fit in with the definition of the continental shelf, which rests, as has been stated [FN103] on the principle affirmed by the International Court of Justice in its Judgment of 18 December 1951 already referred to, to the effect that 'it is the land which confers upon the coastal State a right to the waters'. What is inherent in this definition is the right to the prolongation of the national territory under the waters. The idea of equity and justice is thus realized by taking into consideration, for each Party, the extent of the link between the land and the waters, the coastal State's right and the equitable limit of its claim being a function of the land factor.

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47. In the words of the Judgment, paragraph 85 (a): 'the Parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when one of them insists upon its own position without contemplating any modification of it ...'.
The Judgment justifies such a obligation in paragraph 86, by saying that 'not only ... the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also ... this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations'.
And the Judgment goes on, in paragraph 87: 'so far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 (a)'.
I dispute that there is such an obligation in the present case. It cannot be inferred from the Truman Proclamation, nor yet from Article 33 of the Charter, which concerns disputes the continuance of which is likely to endanger the maintenance of international peace and security, and is **147* the less imperative inasmuch as it empowers the Security Council 'when it deems necessary, [to] call upon the parties to settle their dispute by such means'.
In any event, a submission that there was an obligation to negotiate, and that the negotiations carried out 'were not meaningful', would amount to a prejudicial objection to the hearing of the case. The Judgment should therefore have followed its reasoning right through, i.e., the Court, after having drawn the attention of the Parties to the question in its legal and practical aspects, should give judgment on the objection before turning to

the merits.
However, I understand the Judgment as considering that the negotiations had simply been suspended in face of the difficulties which had been encountered, in order to be re-opened and completed in the light of the indications to be given by the Court.

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48. The strict equidistance method having been discarded because it does not constitute an equitable solution appropriate to all cases, and particularly to that submitted to the Court, one must enquire what rule should be deduced from the principle of equity with a view to the delimitation in question.

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49. One preliminary clarification is perhaps not unnecessary: the words principle and rule are no more synonymous in legal than in philosophical language. The Court has however not always made this distinction. Thus the wording of the Special Agreements, where these terms are used cumulatively, cannot be criticized as being tautological. It is from the principle, defined as being the effective cause, that the rules flow. It is therefore necessary, after having gone back to the principle, namely equity, to state what rules applicable to the matter can be deduced from it.

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50. Several methods were debated in the course of the proceedings.
The first, adopting as basis the notion of sectors converging to the approximate centre of the North Sea, presupposes that the three areas of the continental shelf of the south-west coast ought necessarily to reach the median line between the continent and the British Isles, which however is anything but proved. In fact, the question being that of determining the lateral boundaries between the areas of continental shelf of each of the Parties, the Court should confine itself to the solution of this question, without concerning itself with the question whether the demarcation lines thus ascertained will reach the median line, or will meet before reaching it.

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*148 51. The second method, which has been adopted by the majority of the Court in order to be proposed to the Parties simply as a factor for them to assess, is that based on the relationship between the length of the coast and the extent of the areas of continental shelf.
Although this does not refer to any sort of practice [FN104], it starts from the idea of natural prolongation of the land territory, and implies the realignment, in the form of a single straight baseline, of the concave coast of the Federal Republic of Germany.
It could nonetheless be criticized, in its practical application, for failing to avoid overlappings of one sector of the continental shelf over another at some distance from the coast. It would thus appear to entail acceptance of parts of the continental shelf constituting the prolongation of more than one territory. This hypothesis is vitiated by an internal contradiction, for an area of land can only be the prolongation of a single territory. Furthermore, for this common sector, the Court recommends division into equal shares. But is this not a return to the solution, which has already been rejected, of apportionment into just and equitable shares, according to the terms used by the Federal Republic of Germany?
Lastly, this method determines surface areas, but does not assist in drawing lateral boundaries, which are exactly the problem which is to be resolved: is their meeting-point to be shifted somewhat towards Denmark or towards the Netherlands?

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52. A third method, that of equidistance-special circumstances, is the one which seems to me to be the rule to be applied. This method, which was rejected as not being a rule of treaty law or customary law, may be re-adopted by virtue of a general principle of law, namely equity.
The explanations which follow will show that recourse can be had to the equidistance method if the application thereof is subordinated, in appropriate cases, with a view to the preservation of equity, to the effect of special circumstances. The question which will arise will therefore be whether there exist such circumstances in this case. In that event the equidistance-special circumstances rule deduced from the principle of equity praeter legem could be proposed to the Parties.

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53. Special circumstances have not been defined by a text of positive law; nor could they be listed exhaustively, in view of the extreme variety of legal and material factors which may be of account.
Nonetheless, if reference is made once again to the travaux preparatoires *149 which have been mentioned, there is nothing to show that the notion of special circumstances was limited in the way in which the representatives of Denmark and the Netherlands would have it. On the contrary, the International Law Commission, upon the report of the experts which it had appointed, stated in its commentary on Article 72 of the draft which it presented to the conference and which there became Article 6 that there might be '... departures (sc., from the equidistance rule) necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels ...' and the International Law Commission went on: '... This case may arise fairly often ...'
In short, a special circumstance affecting the equidistance method may be the effect of a particular legal situation: a treaty, or historic waters. It may also be the consequence of geographical considerations. On the basis of the map and measurements already mentioned [FN105], the configuration of the coast of the Federal Republic of Germany constitutes such a circumstance, which should be taken into account to avoid the inequitable application of the equidistance line pure and simple.
No mention was made, on the other hand, of economic objectives, such as the unity of deposits, with a view to the examination thereof by the Court. In any case, any consideration of submarine resources, referred to in the course of the proceedings, is irrelevant. To adopt as basis in order to draw up boundaries, among other factors, the riches secreted by the bed of the sea, would amount to nothing less than an apportionment of the continental shelf, whereas all that is in question is a delimitation of the areas originally appertaining to the coastal States, as has already been stated [FN106]. In addition, since potential riches will for a long time hence go on being discovered unceasingly, such delimitation, faced with a deposit overlapping two areas, would continually be subject to rectification. Consequently, if the preservation of the unity of deposit is a matter of concern to the Parties, they must provide for this by a voluntary agreement (by transfer or joint exploitation), and this does not fall within the category of a factor or rule of delimitation.

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In addition, the following passage from paragraph 69 of the Judgment should be stressed: 'Such a rule (sc., the equidistance-special circumstances rule) was of course embodied in Article 6 of the Convention, but as a purely conventional rule.' But if the equidistance-special circumstances method can, on the Court's own admission, amount to a rule of conventional law, it can also constitute such a rule, as a matter of logic, by virtue of the principle of equity. The Court, which is called *150 upon to state principles

and rules, after having adopted the principle of equity, should, in my opinion, therefore have deduced therefrom the rule of equidistance-special circumstances.

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54. The equidistance-special circumstances rule flowing from a general principle of law, namely equity, having been accepted, and it having been established that in the present case there exists a special circumstance, what would the effect of this circumstance be on the equidistance line?
The idea which would seem to constitute the point of departure is that which follows from the nature of the shelf: since this is geologically the prolongation of the territory, starting from the coastal front, as has already been explained in the considerations concerning the concept of the continental shelf [FN1], it is this front which forms the basis of the shelf extending under the high seas.
An attempt has been made to justify the contiguity criterion and thus the equidistance line as an imperative rule of international law by pointing out that the geographical realities of the actual coastline are the basis for the determination of the extent in space of the sovereign rights of the coastal State [FN108]. But what are these geographical realities, if they are not the actual coastline, or the coastal front, extending under the waters of the high seas, without the front or coastline being affected by the depressions in the surface which merely modify the line along which they break surface.
The front must thus not be understood as meaning the coast with its more or less pronounced bends on the waterline, these irregularities being the result of a subsidence or sloping of the land below the level of the sea. They are not such as should modify the line which the front would have followed if it had not been affected by such geological accidents. Consequently, the corrugations of the bases of the shelf must not influence the latter's natural configuration by modifying any co-ordinates thereon established.

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55. What would the front look like as thus understood?
It is by having recourse, by way of analogy, to the method of delimiting the territorial sea based on the straight baselines sanctioned by the Court's Judgment of 18 December 1951 in the Anglo-Norwegian Fisheries case, that the solution might be found. Such resort to analogy is justified on account of the identity of ratio legis, or again on account of the similarity of the essential elements in the two sets of circumstances, namely the *151 jagged and indented nature of the two coasts, and the economic factor which is present in both cases [FN109].
The solution envisaged would be no more contrary to the principles or rules of international law than the Norwegian Decree of 12 July 1935 delimiting the territorial sea on the basis of straight lines following the general direction of the coast and linking fixed points located on terra firma or on adjacent islands. However, the configuration of the German coast possessing, as it does, the form of a bay, it is the drawing, as in the case of open bays, of a single straight baseline along the coast that would be called for; its line of opening would not necessarily be restricted to a pre-ordained length, as the above-mentioned Judgment of the Court stipulated for bays in general. It will in this connection be recalled that there has been a proposal to apply this rule to indentations [FN110] and troughs [FN111] forming interruptions in the bed of the continental shelf.
This solution is all the more acceptable because it does not involve either internal waters or the teiritorial sea; it does not affect the configuration of the latter, as the waters seaward thereof but landward of the straight baseline will not cease to form part of the continental shelf and will remain subject to the regime governing the shelf.
As applied to the German coast, the straight baseline would extend from one of its extremities to the other and would thus completely obliterate its concavity.
The Netherlands and Danish coasts would be maintained as they are, in view of the fact

that, from the points of their respective intersections with the German coast, they follow a straight course free of disproportionate projections.

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56. The bases for the delimitation of the continental shelf as between the Parties having been determined, how should the lateral boundaries be fixed?
It was said above that the Geneva Convention on the Continental Shelf did not depart from the notion of equity in adopting the equidistance line accompanied by the condition referring to special circumstances.
It is therefore as a solution based on equity that recourse may be had to the equidistance-special circumstances rule for the purpose of determining the lateral boundaries of the continental shelf as between the Parties to the dispute.
It is all the more justifiable to recommend the application of the **152* equidistance rule, starting from straight baselines, in that Denmark and the Netherlands are parties to the 1958 Geneva Convention on the Continental Shelf and because the Federal Republic of Germany, without asking for the application of this method, has not rejected it to the extent that it ensures an equitable solution [FN112].
In a normal case, that is to say one not involving special circumstances, the equidistance lines would have been made up of the points nearest to the baselines from which the breadth of the territorial sea is measured. In the present case, it is by taking as the starting-point the intersection of the straight baselines marking the coastal fronts of the Federal Republic and Denmark, with due regard for the partial delimitation agreed upon, that the equidistance line between the respective continental shelf areas of those two States could be fixed; and it is by taking as the starting point the intersection of the said baseline of the Federal Republic and that of the Netherlands, that the equidistance line between the two latter States, again with due regard to the agreed partial delimitation, could be fixed. This would be done in two separate operations. The area appertaining to the Federal Republic would be contained between the two equidistance lines and would extend out to sea as far as their point of intersection.
Whilst bearing in mind the partial delimitations, reference may be made to the attached map upon which the coastal front is shown in the form of a straight baseline, the Danish and Netherlands coasts remaining as they are, and which the cartographer has completed by adding (thin full lines) the equidistance lines starting from the points of intersection B and C and converging to their junction at the point A before reaching the median line Great Britain- Continent.

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To sum up, I am in agreement with the majority of the Court in declaring that the equidistance method provided for in Article 6, paragraph 2, of the 1958 Convention, is not opposable as a rule of treaty-law to the Federal Republic of Germany, and that this rule has also not up to the present time become a rule of customary law.
On the other hand, I consider that recourse may be had to the equidistance method, qualified by special circumstances, as a legal rule applicable to the case and derived from a general principle of law, namely equity praeter legem.
Since the Court has, for the reasons which it has set forth, not considered that it should go as far as I have done, I have felt that I should, with all the consideration to which it is entitled, and while supporting the Judgment, append thereto the present separate opinion, covering the points on which my reasoning has been different, or on which I have come to a different conclusion.

(Signed) Fouad AMMOUN.
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

FN1 E.g., the cost for a fixed platform in 100 ft. of water has been estimated at

$3,500,000; in 500 ft. of water, at $14,250,000. Another estimate is for pounds sterling6,000 a day during drilling operations. The pipe-line from the productive wells on Leman Bank to the shore terminal in Great Britain, a distance of some 30-40 miles, is said to have cost pounds sterling7 million to pounds sterling8 million.

FN2 The United Kingdom and German orders, laws or decrees were not in effect until mid-1964 and final Dutch regulations were operative only in 1967. The Federal Republic faced difficulties like those encountered in the United States, that is to say, the respective rights of the Federal Government and of the separate States or Lander.

FN3 The citations could be supplemented by reference to the prestigious authority of Gidel (A/CN. 4/32 ), by Admiral Mouton's reiteration of his view in his article in Marineblad, January 1959 and in his Tehran lectures in October 1959, and by the opinions of Pearcy, Geographer of the United States Department of State and Commander Kennedy (IV Whiteman's Digest, 329 and 913).

FN4 In 1963 this co-operative arrangement was applied on a fifty-fifty basis to gas wells on the German side of the line near Groothusen and on the Dutch side near Bierum, according to Petroleum Press Service, 1963, p. 377 and 1964, p. 332. On the adjacent land areas, there is the great Groningen field in the Netherlands, and the large German resources found between the Netherlands frontier and the Ems and further eastward to the Weser.

FN5 Presumably Amoseas.

FN6 The Special Agreement between the United Kingdom and the Netherlands of 6 October 1965 concerning the exploitation of a single geological structure, is not mentioned.

FN7 The reserves in the Slochterenm gas field have been estimated at more than 40 million million cubic feet. It is probably the second or third largest field in the world.

FN8 The documents furnished in response to a request from the Court contain only excerpts from the governmental records.

FN1 Presidential Declaration with respect to continental shelf, 29 October 1945: '[The continental shelf] clearly forms an intergral part of the continental countries and it is not wise, prudent or possible for Mexico to renounce jurisdiction and control over and utilization of that part of the shelf which adjoins its territory in both oceans.
.....
For these reasons the Government of the Republic lays claim to the whole of the continental platform or shelf adjoining its coast line and to each and all of the natural resources existing there, whether known or unknown, and is taking steps to supervise, utilize and control the closed fishing zones necessary for the conservation of this source of well-being.
The foregoing does not mean that the Mexican Government seeks to disregard the lawful rights of third parties, based on reciprocity, or that the rights of free navigation on the high seas are affected, as the sole purpose is to conserve these resources for the well-being of the nationa, the continent and the world.' [Translation by the U.N. Secretariat.] See also Articles 27, 42 and 48 of the Mexican Constitution, as amended by Decree of 20 January 1960 (Diario Oficial, Vol. CCXXXVII, No. 16) 'The national territory comprises ... [inter alia] the continental shelf and the submarine shelf of the islands, keys and reefs' (Art. 42). [Translation by the U.N. Secretariat.]

FN1 See statements to the Conference made by the representatives of France, Greece, and the Federal Republic of Germany (Official Records, Vol. VI, p. 1 and pp. 5-7).

FN2 Report of the Ad Hoc Committee to the General Assembly of the United Nations, 1968.

FN3 Address of 5 November 1968.

FN4 Infra, para. 17.

FN5 Infra, para. 7.

FN6 Infra, para. 15.

FN7 As to the effects of the unilateral declaration, see infra, para. 21.

FN8 Memorial, para. 8.

FN9 A. Gentilis: The law of nations is '... the product of prolonged agreement between peoples, established by usage, which itself is revealed by history'.

FN10 G. Scelle, Plateau continental et droit international, 1955, pp. 35 and 36.

FN11 Supra, note 1, p. 100.

FN12 Supra, note 1, p. 100.

FN13 Address of 5 November 1968.

FN14 Geneva Conference, Preparatory documents, Vol. I, pp. 39-40.

FN15 The 200-mile limit is well within the extreme width of the continental shelf which in certain regions is as much as 1,300 kilometres.

FN16 Quoted by G. Scelle, op. cit., p. 46.

FN17 Cf. M. W. Mouton, The Continental Shelf, p. 80, who states as follows: 'Peru has an extra reason, because the fish form the food for guano birds, which are an economic asset to the country.'
The decisions of municipal courts of Peru have confirmed this view: judgment of the Tribunal of Piata of 26 November 1954, in the case of the ships, Olympic, Victor and others.

FN18 United States Protest Notes of 2 July 1948 to Peru, Chile and Argentina, of 12 December 1950 to El Salvador and 7 June 1951 to Ecuador; United Kingdom Notes of 6 February 1948 to Peru and Chile, of 9 February 1950 to Costa Rica, of 12 February 1950 to El Salvador, of 3 April 1951 to Honduras and of 14 September to Ecuador. France, which was adked by the United Kingdom to make its position known, in its reply of 7 April 1951 gave its support to the positions taken up by the two other great maritime Powers. However, the American Professor L. Henkin, concurring with the views of the Latin American countries, writes: 'The United States ... might consider also a declaration, alone or with others, that under the Convention (of Geneva) it claims a shelf out to the 600, 1,000, 2,000 or even 3,000 metres isobath, or out to 50, 100 or more miles from shore.' (The Mineral Resources of the Seas, pp. 38-39).
Professor Henkin reports furthermore that the United States has granted permits for exploitation on the high seas which he lists as follows: 'The U.S. has issued phosphate leases some 40 miles from the California coast in the Forty-Mile Bank area in 240 to 4,000 ft. of water ... Oil and gas leases some 30 miles off the Oregon coast in about

1,500 ft. of water; and ... (has) threatened litigation against creation of a new island by private parties on Cortez Bank, about 50 miles from San Clemente Island off the coast of California, or about 100 miles from the mainland. Each of the California areas is separated from the coast by trenches as much as 4,000 to 5,000 ft. deep. Additionally, the Department of the Interior has, by publishing OCS leasing maps, indicated an interest to assume jurisdiction over the ocean bottom as far as 100 miles off the Southern California coast in water depths as great as 6,000 ft.' (Op. cit., p. 38, note 117.)

FN19 At the 67th Session of the International Law Commission in 1950, J. L. Brierly said: '... if the Commission was of the opinion that the right of control and jurisdiction depended on the presence of the continental shelf, it was committing an injustice towards certain countries, such as Chile, that possessed no continental shelf.' G. Amado and J. Spiropoulos supported the same argument, and the former proposed a lineal limitation of waters 20 miles from the coasts. At the 117th Session of the I.L.C. in 1951, J. M. Yepes submitted a draft to this effect, 'with Peru and Chile in mind'.

FN20 Common Rejoinder, Annex 7.

FN21 Le Monde, 30 October 1968.
Beneath the Red Sea there are metalliferous muds, rich in copper, zinc, etc. ... In some of its deeps there are hot brines. The deposits in solution, as well as the geothermal energy associated with these hot brines offer resources that may become available in the not too distant future (Report of the Ad Hoc Committee mentioned on p. 100, note 2).

FN22 Geneva Conference, Vol. VI, p. 24, paras. 20 and 22.

FN23 Idem., p. 11, para. 22.

FN24 Idem., p. 27, para. 7.

FN25 Idem., p. 5, para. 21.

FN26 Idem., p. 31, para. 2.

FN27 Idem., p. 32, para. 7, p. 42, para. 15, and proposal (A/CONF.13/C.4/L.12).

FN28 Idem., p. 5, para. 24.

FN29 Idem., p. 35, para. 6.

FN30 Idem., p. 132, doc. A/CONF.13/L.50.
Attention should be directed also to the reservations made in 1968 by these three States and also by Argentina, Brazil and El Salvador on the occasion of the report of the Working Group to the Ad Hoc committee set up by the General Assembly of the United Nations to study the peaceful uses of the seabed and the ocean floor, 'understanding, in particular, that the conclusions reached by the Working Group in no way constitute a prejudgment concerning the legal aspects of the question'.

FN31 Cf. L. Henkin, The Mineral Resources of the Seas, p. 23: '... since geology was not crucial to the legal doctrine, it was difficult to resist claims of coastal States that had no geological shelf, whether in the Persian Gulf or in Latin America.'

FN32 Cf. C. del Vecchio, Philosophie du droit, p. 282, note 1.

FN33 The historic character of the Gulf of Aqaba was disputed in the General Assembly of the United Nations in February 1957. The United States declared however that, should

the case arise, it would accept the decision of the International Court of Justice (Memorandum of 11 February 1957 to Israel and Declaration by Secretary of State Dean Rusk of 5 March 1957). The former states that: 'In the absence of some overriding decision to the contrary, as by the International Court of Justice, the United States, on behalf of vessels of United States registry, is prepared to exercise the right of free and innocent passage and to join with others to secure general recognition of this right', and the latter states that: '... The United States view is that the passage should be open unless there is a contrary decision by the International Court of Justice.'

FN34 The pearl oyster fisheries of Ceylon and Bahrain had already received the attention of Vattel (The Law of Nations, 1758). P. C. Jessup (The Law of Territorial Waters, 1927, p. 15), also recalled that the pearl fisheries of Ceylon go back in history as far as to the sixth century B.C. Whilst those of the Arabian-Persian Gulf were, as is well known, mentioned about the year 1000 in the Arabian Nights.
M. W. Mouton was thus able to write: 'We believe, that prescriptive rights could develop quietly, and had existed long enough to be respected when people became conscious of the freedom of the seas' (op. cit., p. 145).

FN35 Cf. L. Henkin, op. cit., p. 26: 'Some writers saw in the cases on sedentary fisheries and submarine mining a basis in customary law for the Truman proclamation and for the later Convention on the continental shelf.'
Ibid., p. 27: 'Some of them (the cases cited against res communis) occurred before the freedom of the sea was established as a principle of the international law. In the few cases involving pearl or oyster fisheries the claims were based not on occupation, but on prescription or historic rights.'

FN36 See Arbitral Award of 13 October 1909 in the Grisbadarna case between Sweden and Norway, where it is stated that 'it is a settled principle ... that a state of things which actually exists and has existed for a long time should be changed as little as possible'. This is a principle of general law supported particularly by G. Gidel, Le droit international public de la mer, Vol. III, p. 634. It is also the case in Muslim law, Majallat El Ahkam, Art. 5.

FN37 The Arbitral Tribunal, in the North Atlantic Coast Fisheries case, recognized in its award of 27 January 1909 that 'conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays'.

FN38 Cf. Ch. de Visscher, Problemes d'interpretation judiciaire en droit international public, p. 176.

FN39 The said Declaration reads: 'It is hereby declared that the Argentine epicontinental sea and continental shelf are subject to the sovereign power of the nation.'

FN40 Cf. M. W. Mouton, The Continental Shelf, p. 74.

FN41 The Truman Proclamation provides in its fourth paragraph: '... since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it.'

FN42 These States used terms similar to those which appear in the Truman Declaration. The following wording is used: 'The continental shelf forms a single morphological and geological unity with the continent.'

FN43 Cf. the writers mentioned by M. W. Mouton, op. cit., p. 33.

FN44 This reasoning does not seem to be that followed by the Ad Hoc Committee set up by the United Nations to study the peaceful uses of the seabed and the ocean floor.

FN45 Supra, para. 3.

FN46 E. Suy, Les actes juridiques internationaux, 1962, pp. 148 and 152.

FN47 memorial, Annex 4.

FN48 Majallat El Ahkam, Art. 100.

FN49 Memorial, Annex 7.

FN50 Advisory Opinion of 28 May 1948 on Admission of a State to Membership in the United Nations; Advisory Opinion of 3 March 1950 on the Competence of the General Assembly for the Admission of a State to the United Nations; Judgment in the Asylum case of 20 November 1950; Advisory Opinion of 8 June 1960 on the constitution of the Maritime Safety Committee.

FN51 Reply, para. 29.

FN52 counter-Memorial of the Danish Government, para. 24 and Counter-Memorial of the Netherlands Government, para. 25.

FN53 Infra, paras. 24-30.

FN54 In particular, those of G. Scelle and A. de Lapradelle; the representative of the Federal Republic of Germany, Dr. Munch, still said of the continental shelf rule at the Geneva Conference that 'many authorities reject it de lege lata and de lege ferenda.'

FN55 Supra, para. 15.

FN56 convention on the Territorial Sea, Article 12; on the Contiguous Zone, Article 24; on Fishing and Conservation of the Living Resources of the High Seas, Article 7, which refers to Article 12 of the Convention on the Territorial Sea.

FN57 Rejoinder, para. 72.

FN58 Supra, para. 21, on the effect of unilateral declarations.

FN59 Supra, para. 22.

FN60 Thus the right of countries becoming independent, which have not participated in the formation of rules which they consider incompatible with the new state of affairs, is preserved.

FN61 In support of this opinion, cf. I.C.J., Asylum case, Judgment of 20 November 1950; and the Judgment of 27 August 1953 in the Rights of Nationals of the United States of America in Morocco case.

FN62 Counter-Memorial of the Netherlands and Denmark, Annex 10. Expose des motifs of the Germany Bill on the Provisional Determination of Rights over the Continental Shelf.

FN63 S. Krylov, in his dissenting opinion in the case of Reparation for Injuries Suffered in the Service of the United Nations, decided on 11 April 1949, omits the word 'civilized' when referring to the general principles of law. He does not however give reasons for this

omission. But in his course of lectures at The Hague Academy of International Law in 1947, he raised his voice against the arbitrary treatment given to the so-called native States (Recueil des Cours, 1947, I, p. 449).

FN64 Westlake and R. Y. Jennings.

FN65 A. Favre.

FN66 W. Jenks recalls that at an earlier period, the Latin American writers had had a similar reaction in face of the law of Europe (The Common Law of Mankind, p. 74).

FN67 See in particular the decisions of the Permanent Court of Arbitration of 11 November 1912 in the Russian Indemnity case and of 13 October 1922 in the Norwegian Shipowners' Claim case.

FN68 Cf. W. Jenks, The Common Law of Mankind, p. 79.

FN69 As was pointed out by the American-Norwegian Tribunal in 1922 in the Norwegian Shipowners' Claim case.

FN70 French case-law, which initiated the principle of non-misuse of right, clearly drew inspiration from equity. See Judgment of the Cour de Cassation of 18 January 1892 which refers to 'the action ... based on the principle of equity which forbids enrichment at the expense of another'.
The case-law of the Lebanon, before enrichissement sans cause appeared in its new code of obligations, deduced the concept from the rules of equity of Majallat el Ahkam, the Muslim code of civil law which was there in force.

FN71 Expression of K. Strupp, Course at The Hague Academy of International Law, Recueil des Cours, 1930, Vol. III, p. 462.
cf. M. P. Fabreguettes, La logique judiciaire, p. 399, who writes: 'In a higher legal sense, equity (from aequitas, from aequis, equal), is distributive justice, which forbids any respecting of persons, or being guided by reasons other than those of law.'
Cf. also Ch. de Visscher, Theory and Reality in Public International Law (trans. P. Corbett, Princeton, 1957), p. 357, who in turn stresses that 'it is significant that in the ... cases in which members of the Court have expressly invoked 'the general principles', they have done so under cover of some of the most elevated and most general categories of the legal order, such as 'justice' or 'equity'.'
See decision of 11 November 1912 of the Arbitral Tribunal in the Russian Indemnity case, which refers to equity in order to ssess the responsibility of a State, and its implementation.

FN72 P. Roubier, former Director of the School of Law of Beirut, Theorie generale du Droit, p. 129.

FN73 It should be recalled that Plato and Aristotle, who were so to speak reason personified, offered justification for slavery, against all equity, and it was not definitively condemned in the name of equality between man and man until the coming of Christianity. Even then it was tolerated as reasonable up to the French Revolution.
Let it not be overlooked also that colonialism, so inequitable as between nations, was considered reasonable by great Western jurists right up to very recent times. The same could be said of the social and economic inequalities existing at all times and in all places. finally public feeling in many very developed countries still finds it reasonable that there should be inequality between wife and husband in the enjoyment or exercise of certain civic, civil or family rights.

FN74 N. Politis, in La morale internationale, p. 26, recalls the saying of Cicero, quid leges sine moribus, and relates the moral basis of modern international law back to Ulpian of Tyre, who was himself inspired, as P. Roubier observes (ibid., p. 128, note 1) by that other Phoenician, Zeno, the founder of the stoic school, and his disciples Seneca and Marcus Aurelius, p. 51: honeste vivere, alterum non laedere, suum cuique tribuere.

FN75 Aristotle, Nicomachean Ethics, quoted by G. del Vecchio, Philosphie du droit, p. 282. See also K. Strupp, Course at The Hague Academy of International Law, Recueil des Cours, 1930, Vol. III, p. 462.

FN76 Ulpian: Justitia est constans et perpetua voluntas jus suum cuique tribuendi.

FN77 Ulpian following Celsus: Jus est ars boni et aequi. Equity was in fact no stranger to the jus civile: cf. P. Arminjon, B. Nolde and M. Wolff, Traite de droit compare, p. 528.

FN78 Since Accarias.

FN79 The Award of 25 June 1914 by the arbitrator C. E. Lardy, in the dispute concerning the boundaries in the Island of Timor, in which the arbitrator was requested by the arbitration agreement to decide on the basis of the treaties and the general principles of international law, stated as follows: 'If one takes the point of view of equity, which it is important not to lose from view in international relations ...'

FN80 Judge Hudson said '... under Article 38 of the Statute, if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply'.

FN81 See K. Strupp, Course at The Hague Academy of International Law, Recueil des Cours, 1930, Vol. III, p. 468.

FN82 Equity, as a principle of equality already perceived by the Phoenician- Roman jurisconsults, is to be found even in the terminology of the law of Islam. English law in turn was to say that 'Equality is equity'.

FN83 Among others, Sura IV, verse 61 and Sura V, verses 42 and 46: 'If thou judge, then judge with fairness and equity.'

FN84 See Majallat el Ahkam, Arts. 87 and 88, which implement the principle of equality mentioned in the note above.

FN85 Cf. Chan Nay Chow, La doctrine du droit international chez Confucius, emphasizing the virtue of equity in the social, economic and judicial field, as well as on the international level, pp. 50, 51, 55, 56 and 60. Cf. also Rene David, Les grands systemes de droit contemporain, pp. 534 and 540.

FN86 Rene David, ibid., p. 122.

FN87 Ibid., p. 152.

FN88 Cf. T. O. Elias, The Nature of African Customary Law, p. 272; and M.

FN89 Rene David, Les grands systemes de droit contemporain, p. 572.

FN90 Ibid., p. 568. This formula has been interpreted by English judges as referring to the common law.

FN91 Cf. Sir Hersch Lauterpacht, The Development of International Law by the International Court, p. 213: 'Adjudication ex aequo et bono is a species of legislative activity. It differs clearly from the application of rules of equity in their wider sense. For inasmuch as these are identical with principles of good faith, they form part of international law as, indeed, of any system of law.'

FN92 Proclamation of 28 September 1945.

FN93 Royal pronouncement of 28 May 1949.

FN94 Successive proclamations of 5, 8, 10, 12, 14, 16, 17 and 20 June 1949.

FN95 Decree of 10 May 1949 and Act of 19 June 1955.

FN96 Report of the International Law Commission on the proceedings of its eighth session, p. 24, commentary 1 on Article 72, which became Article 6.

FN97 One might quote among others: B. S. Murty, in Manual of International Law, edited by M. Sorensen, p. 691: 'Equity, in the sense of general rules dictated by fairness, impartiality and justice, may be said to form part of international law, serving to temper the application of strict rules, and a tribunal may include equity, in this sense, in the law it applies, even in the absence of express authorization.'
Ch. de Visscher, Theory and Reality in Public International Law (trans. P. E. Corbett, Princeton, 1957), p. 336: 'Equity can be something other than an independent basis of decision, as when, in a decision which in other respects is founded on positive law (infra legem), the judge chooses among several possible interpretations of the rule the one which appears to him, having regard to the particular circumstances of the case, most in harmony with the demands of justice. ... Clearly the requirement of special agreement between the Parties does not refer to this necessary function of equity.'
Also C. W. Jenks, The Prospects of International Adjudication, 1964; Bin Cheng, 'Justice and Equity in International Law', in Current Legal Problems, 1955, pp. 185 ff.; O'Connel, International Law, 1965, Vol. I, p. 14, cited in the Reply.

FN98 report of the Ad Hoc Committee to the General Assembly, pp. 18, 46-47, 63-64.

FN99 The Anglo-Turkish Arbitral Tribunal, in the case of W. J. Armstrong & Co. Ltd. v. Vickers Ltd. (1928) placed on the basis of rules of equity the general principle of law, accepted by international law, forbidding unjust enrichment.
The Franco-Venezuelan Mixed Commission, in the Frederick & Co. case (1902), assimilating equity with equality under the inspiration of Roman law, expressed itself as follows: 'If the conditions on both sides are regarded as producing an equilibrium, justice is done.' This is also a concept of Muslim law (supra, note 1, p. 136).

FN100 Memorial, para. 91, subject to the sector theory and its effect on the area. Figure 2, p. 27. figure 21, p. 85.

FN101 Memorial, para. 70.

FN102 Hearing of 8 November 1968.

FN103 Supra, para. 16.

FN104 In particular the precedents mentioned in para. 26.

FN105 Supra, para. 43.

FN106 Supra, para. 46.

FN107 Supra, para. 15.

FN108 Address of 31 October 1968 on behalf of the Netherlands.

FN109 Article 4 of the Geneva Convention on the Territorial Sea, which concerns straight baselines, is based upon economic interests, which are even more prominent in the case of the continental shelf. Cf. L. Cavare, Droit international public, Vol. I, p. 231.

FN110 Geneva Conference, Prep. docs., p. 44, para. 37.

FN111 R. Young, cited by L. Cavare, Droit international public, Vol. II, p. 235.

FN112 Reply, paras. 49, 65-67, 71, 74-76.

*154 DISSENTING OPINION OF VICE-PRESIDENT KORETSKY

To my great regret, I am unable to concur in the Court's Judgment, for the reasons which I state below.

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The Judgment denies the possibility of applying Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf to these cases on a purely conventional basis. It is a fact that the Federal Republic of Germany has not ratified the Convention. Therefore, despite the Federal Government's having recognized the doctrine of the continental shelf as embodied in Articles 1 to 3 of the Convention, despite its reliance thereon in proclaiming its sovereign rights over the continental shelf, despite its having announced a bill for ratification, and despite its conclusion with the Netherlands and Denmark of respective treaties that fix partial continental shelf boundaries following 'to some extent ... the equidistance line' or adopting a 'seaward terminus ... equidistant from' the coasts concerned (Memorials, para. 60) and are thus more than consistent with paragraph 2 of Article 6, the Federal Republic of Germany has disputed the possibility of regarding that provision as binding upon it. It may be noted that, during the negotiations which took place with the Netherlands and Denmark, the Federal Republic contested this possibility only after a certain delay, and that it was not consistent in doing so, since it even assumed as an alternative possibility in its final Submissions that the rule contained in the second sentence of paragraph 2 of Article 6 could be applicable between the Parties, adding that 'special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case'. In this Submission (No. 2) the Federal Republic linked the principle of equidistance (though calling it a 'method') with the 'special circumstances' rule, and it may be recalled that, during the oral proceedings, Counsel for Denmark and the Netherlands had combined them in the form of the 'equidistance/special-circumstances' rule.

The Judgment acknowledges that 'such a rule was embodied in Article 6 of the Convention, but as a purely conventional rule' (paragraph 69). However, as the Federal Republic has not ratified the Convention, the *155 Judgment considers that 'qua conventional rule ... it is not opposable to the Federal Republic of Germany' (ibid.). It may be regretted that the Judgment did not deal fully with the question as to whether

'special circumstances' could in fact be established with regard to the maritime boundaries between the Federal Republic and the Netherlands, and between the Federal Republic and Denmark, respectively.
In its first finding, the Judgment uses the following words in respect of each case: '(A) the use of the equidistance method of delimitation not being obligatory as between the Parties.' It thus disjoins the equidistance principle from the other two components of the triad: agreement-special circumstances-equidistance. These three interconnected elements are embodied in the Convention, as also in the Convention on the Territorial Sea and the Contiguous Zone, and have entered into the province of the general principles of international law, being consolidated as a combined principle of customary international law. Each of these three elements plays its part in the determination of a boundary line between two maritime areas, such as areas of the continental shelf in particular.
Agreement is deemed to constitute the principal and most appropriate method of determining the boundaries of the areas of any continental shelf. This is confirmed by the practice of States. The Convention itself gives it pride of place, and this was quite natural, as the issue was one concerning the geographical limits of the sovereign rights of States. It was unnecessary to prescribe at that stage any directives as to the considerations on the basis of which parties ought to arrive at agreement. Provided there is no encroachment on the sphere of the sovereign rights of any other State, parties are free to agree on whatever terms they wish for the delimitation of boundaries, bearing in mind, generally, both legal and non-legal considerations: relevant political and economic factors, related considerations of security and topography, the relations ('good-neighbourly' or otherwise) between the States concerned, and whatever imponderables may escape hard and fast classification. The assessment of such considerations is a political and subjective matter, and it is not for the Court as a judicial organ to concern itself with it unless the parties submit to it a dispute on a question or questions of a really legal character.
The next element of the triad-the 'special circumstances' situation-is, however, an objective matter, concerning as it does, for instance, the unusual geographical configuration of the coastline to either side of a frontier, and a disagreement as to whether or not a certain situation could be regarded as a case of 'special circumstances' justifying an appropriate boundary line would be a justiciable dispute.
And it is only after the failure of these two elements of the triad, in the event of a deadlock, that the third element-the equidistance principle-makes its appearance as the last resort, offering a way out of the impasse in a geometrical construction which introduces a mathematical *156 definitude and a certainty of maritime boundaries. The Judgment itself agrees that 'it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application' (paragraph 23).

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If it be held that the principles and rules inseparably embodied in paragraph 2 of Article 6 of the Convention are no more than treaty provisions and are not, as such, opposable to the Federal Republic, then one may ask whether these principles and rules are or have become an institution of international law, either as general principles developed in relation to the continental shelf, or as an embodiment of international custom. There are sufficient grounds for considering them to qualify in both these ways, but I am inclined to consider them rather as principles of general international law, seeing that established doctrine lays much stress on the time factor as a criterion of whether a given principle belongs to customary international law: by and large, customary international law turns its face to the past while general international law keeps abreast of the times, conveying a sense of today and the near future by absorbing the basic progressive principles of international law as soon as they are developed.
Contemporary international law has developed not only quantitatively but more especially

qualitatively.
There has been far-reaching development of the work of the codification of international law which has been organized in the United Nations on a hitherto unknown scale. In the first stage, drafts of international multilateral conventions were prepared by the International Law Commission, composed of jurists 'of recognized competence in international law', which in response to its request, received numerous comments and observations from almost all governments. There followed, upon the themes of those drafts, an increased amount of special literature (books or articles) and the work of universities and research institutes, including the Institute of International Law, and various learned societies (e.g., the International Law Association). Then came the discussions in the General Assembly of the reports and drafts prepared by the International Law Commission. This preparatory work led finally to the convocation of special intergovernmental conferences in which the great majority of States participated. The scale and thoroughness of this process for the forming and formulation of principles and rules of international law should lead to the consideration in a new light of what is accepted as the result of such work of codification.
Where it used to be considered indispensable, for determining certain *157 general principles of international law, to gather the relevant data brick by brick, as it were, from governmental acts, declarations, diplomatic notes, agreements and treaties, mostly on concrete matters, such principles are now beginning to be crystallized by international conferences which codify certain not inconsiderable areas of international law. Elihu Root, the well- known jurist and statesman, one of the framers of the Statute of the Permanent Court of International Justice, wrote (in his Prefatory Note to the Texts of the Peace Conferences at The Hague, 1899 and 1907, Boston 1908):
'The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward. Not only the conventions signed and ratified, but the steps taken towards conclusions which may not reach practical and effective form for many years to come, are of value.'
Elihu Root wrote this in connection with the Peace Conferences of 1899 and 1907. Certain principles which were embodied in The Hague Conventions at that time have been acknowledged as principles of general international law, though States have been slow to put them into practice.
The 1958 Conference on the Law of the Sea, with the Conventions adopted there, among them the Convention on the Continental Shelf, introduced substantial definitude in this field of international law; and the principles and rules of the international law of the sea formulated therein have become the general principles of that law with almost unprecedented rapidity.
The rapid technical progress in the exploration and exploitation of submarine oil and gas resources has entailed the necessity for corresponding legal principles and rules. The practice of States has predetermined the course of development of the doctrine as also of the principles and rules of international law relating to the continental shelf.
The Anglo-Venezuelan Treaty Relating to the Submarine Areas of the Gulf of Paria, 1942 (U.N. Legislative Series: Laws and Regulations on the Regime of the High Seas, Vol. I (1951), p. 44) was followed in a comparatively short time by numerous unilateral governmental acts, such as the Presidential Proclamation concerning the policy of the United States with respect to the natural resources of the subsoil and seabed of the continental shelf (1945), the Presidential Declaration (of Mexico) of the same year with respect to the continental shelf, and decrees, laws and declarations by almost all the other Latin American States (in the period 1946-1951), and by the Arab States, Pakistan and others (U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, ST/LEG/SER.B/1).
As a result of the inclusion in the work of the United Nations of the task of determining the principles and rules of international law relating *158 to the continental shelf, the general principles of the law of the continental shelf had already taken shape before the Conference, though not in a finally 'polished' form, on the basis of governmental acts, agreements and scientific works. The Geneva Conference of 1958, in the Convention on

the Continental Shelf which was adopted, gave definite formulation to the principles and rules relating thereto. These were consolidated in subsequent practice in a growing number of governmental acts, international declarations and agreements (as mentioned in the written and oral proceedings), which in most cases referred to the Convention or, when they did not do so, made use of its wording. All this has led to the development, in great measure organized and not spontaneous, of the general principles of international law relating to the continental shelf, in not only their generality but also their concreteness. Thus, by a kind of coalescence of the principles, a genuine communis opinio juris on the matter has come into being. States, even some not having acceded to the Convention, have followed its principles because to do so was for them a recognition of necessity, and have thereby given practical expression to the other part of the well-known formula opinio juris sive necessitatis.

And this conclusion might be reached also by deducing these principles as 'direct and inevitable consequences' of the premises and considering their binding force to be that of historically developed logical principles of law (see Lotus, Dissenting Opinion by Judge Loder, P.C.I.J., Series A, No. 10, p. 35).

This finds confirmation in the doctrine which regards the continental shelf as being an actual continuation of the submarine areas of the territorial sea, which, in its turn, is a continuation of the mainland of the coastal State. The United States Presidential Proclamation of 1945, asserting the right of the United States to exercise jurisdiction over the natural resources of the subsoil and seabed of the continental shelf, regarded that shelf 'as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it'. In 1946 an Argentine decree stated: 'The continental shelf is closely united to the mainland both in a morphological and a geological sense.' The Peruvian Presidential Decree of 1947 stated that 'the continental submerged shelf forms one entire morphological and geological unit with the continent', and the decrees of almost all other Latin American countries employ virtually identical expressions. (U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, ST/LEG/SER.B/I). The Judgment also recognizes that the submarine areas of the continental shelf' may be deemed to be actually part of the territory over which the coastal State already has dominion-in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea' (paragraph 43).

*159 But what conclusion can be drawn from this premise-in relation to principles and rules of international law which govern or should govern the delimitation of a given part of the continental shelf? Bearing in mind that the continental shelf constitutes, as is stated in the operative part of the Judgment, under (C) (1), 'a natural prolongation of' each Party's 'land territory into and under the sea' (including, may I add, the territorial sea appertaining to the same coastal State), the question might be asked as to whether there exist, for the delimitation of the continental shelf as between 'adjacent' States, any special principles and rules different from those which have been established (in State practice, treaties, agreements, etc.) in relation to the delimitation of such maritime areas as the territorial sea. Concerning any possible connection between the conceivable principles-whether similar or different-governing the delimitation, respectively, of the territorial sea and of the continental shelf, it may be noted, in the first place, that the sovereign rights of a coastal State over its territorial sea and over the continental shelf are different in scope.

In relation to the territorial sea three 'strata' (to use that term) may be distinguished: (a) the maritime area, (b) the seabed and its subsoil and (c) the air-space. The sovereignty of a coastal State extends to all three of these strata with regard to the territorial sea adjacent to its coast.

In relation to a contiguous zone the coastal State has certain rights in connection with a delimited maritime area.

In relation to the continental shelf, that is to say, to the seabed and subsoil of submarine areas adjacent to a given coast, but outside the area of the territorial sea (ergo, submarine areas of the contiguous zone included), the coastal State has 'sovereign rights for the purpose of exploring it and exploiting its natural resources', not affecting 'the legal

status of the superjacent waters as high seas, or that of the airspace above these waters'.

Thus, there has occurred some kind of bifurcation of the legal regimes of the territorial sea and of the continental shelf. The maritime and air 'strata' over the continental shelf are outside the sphere of the rights of a given coastal State. But the continental shelf itself is within the sphere of the special territorial (though limited) rights of the coastal State to which it is appurtenant, on the ground of the close physical relationship of the continental shelf with the mainland (via the submarine area of its territorial sea), as being its natural prolongation, as was recognized by the Court and has become the generally recognized concept of international law. Although Bracton might have considered the sea coast 'quasi maris accessoria', which was historically understandable, not only the territorial sea but also the continental shelf may now be considered as 'accessories' of or, in the words of the Judgment in the Fisheries case, as 'appurtenant to the land territory' (I.C.J. Reports 1951, p. 128; in French, more explicitly, 'comme accessoire du territoire *160 terrestre') [FN1]. To apply the old adage accessorium sequitur suum principale, this appurtenance may be considered as entailing common principles for the delimitation of maritime spaces, that is to say for both the territorial sea and the continental shelf.

This explains why, in the International Law Commission, almost from the beginning, it was frequently said that the question of the delimitation of the continental shelf is, in the words of M. Cordova, a former Judge of the International Court, 'closely bound up with the delimitation of territorial waters' (I.L.C. Yearbook, 1951, Vol. I, p. 289).

The starting-point for determining the boundaries of a continental shelf is formed by the definitive boundaries of the territorial sea of a given State (Article 1 of the Convention on the Continental Shelf defines the continental shelf, as has been recalled, as adjacent to the coast but outside the area of the territorial sea), and it was for that reason that Professor Francois, the rapporteur of the International Law Commission, was able to state as follows in 1951:

'It seems reasonable to accept, as demarcation line between the continental shelves of two neighbouring States, the prolongation of the line of demarcation of the territorial waters' (A/CN. 4/42 , p. 717).

The Committee of Experts, which was composed not of mere draftsmen but of very experienced specialists acquainted with the practice of States in the matter of the determination and delimitation of maritime boundaries, who were the representatives of cartography as a science within the field of political geography which is intimately connected with 'public law', stated in their report, in answer to, inter alia, the question of how the lateral boundary line should be drawn through the territorial sea of two adjacent States:

'The committee considered it important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf' (A/CN. 4/61 , Add. 1, Annex, p. 7).

It will be observed that the two Geneva Conventions of 1958-that on the Territorial Sea and the Contiguous Zone and that on the Continental *161 Shelf-formulated very similar and, in substance, even identical principles and rules for the delimitation of both the territorial sea and the continental shelf [FN2]. It is particularly noteworthy in this respect that Article 6 of the Soviet/Finnish Agreement concerning boundaries in the Gulf of Finland actually provides for the boundary of the territorial sea to constitute that of the continental shelf (U.N. Treaty Series, Vol. 566, pp. 38-42).

If both the territorial sea and the continental shelf are regarded as a natural prolongation of a given mainland and if, in this sense, it is considered that they have a territorial character, it must be still borne in mind that their delimitation should be effected not in accordance with the principles and rules applicable to the delimitation of land territories themselves, but in accordance with those applicable to the delimitation of maritime areas covering such a prolongation of a territory.

Until recently, attention was mainly directed to the delimitation of the territorial sea and

contiguous zone and, to some extent, of the continental shelf, in a seaward direction, since the complexities of inter-State relations and contradictions gave rise to problems concerning the correlation of the freedom of the high seas with the sovereignty of coastal States over their territorial sea and, associated therewith, problems of navigation, innocent passage, fisheries, etc. Questions of policy and, in the words of Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, questions concerning the prevention of infringements of a given State's customs, fiscal, immigration or sanitary regulations, committed within its territory, or within its territorial sea, gave rise to certain problems concerning lateral boundaries. When the exploitation of the natural resources of the subsoil of the sea became a real possibility, and the problems connected with the delimitation of the continental shelf area not only in a seaward direction but more especially between neighbouring States whose continental shelf is adjacent to their coasts, became more acute, the character of the 'territoriality' of the sovereign rights of a coastal State called for more certainty and more definiteness and almost, indeed, for mathematical precision.

Inevitably, the definition of the boundary of a given part of the continental shelf must be effected not on the shelf itself but on the waters which cover it. This entails the application to the delimitation of the continental shelf of principles and rules appropriate to the delimitation *162 of sea areas and accordingly of the territorial sea, the boundaries of which can be described as mathematically, geometrically constructed in a manner that is as simple as is permitted by the configuration of the coast or by the baselines.

Article 6, paragraph 2, of the Convention envisages cases where the same continental shelf is adjacent to the territories of two adjacent States. It follows that when it is a question of delimiting the boundary of the continental shelves of two coastal States in conformity with existing principles and rules, and even if the presence of special circumstances is observed and confirmed, those special circumstances can only justify a deviation from the normal line if they are located comparatively near to the landward starting-point of the boundary line of the continental shelf adjacent to the territories of the two (and only two) adjacent States. Moreover, the boundary line will generally be constructed with reference to the baselines of the territorial sea, in the drawing of which due allowance will already have been made for certain irregularities of configuration. At all events, the factors concerned should be considered only in relation to the determination of a single boundary line between two adjacent States, while the influence of any special circumstances on both must be taken into account. All 'macrogeographical' considerations are entirely irrelevant, except in the improbable framework of a desire to redraw the political map of one or more regions of the world.

If 'special circumstances' were recognized to exist in relation to a given part of the continental shelf, in what way would they affect the application in these cases of the general principles governing the delimitation of the boundary line? The Federal Republic of Germany maintains that, within the meaning of the 'special circumstances' rule, that rule would exclude the application of the equidistance method. But the absence of any mention of another principle to be regarded as alternative to the one specified might be interpreted to mean that the equidistance principle would not be eliminated, excluded or replaced, but rather modified or inflected. This is to say that there may be a certain deviation from the strict mathematical course of an equidistance line or that, still taking the equidistance principle as the basis of the delimitation, the direction of the boundary line, after initially taking the equidistant course, may be changed after an appropriate point.

Thus the presence of special circumstances might introduce a corrective or might only amend the principle which serves as the starting-point. It is conceivable that in the middle, or towards the end-but not at the beginning-of a boundary line, a change of direction, corrective of the line, may be effected under the influence of special circumstances. This could be the case if there were some geographical hindrance to continuing the line in the same direction, so that a devi tion in some section of the line arose in conformity with the very nature of the special circumstance involved. The

possibility is not excluded of exercising a certain flexibility *163 in the actual drawing of the line but without, of course, substituting an alternative basis of delimitation.

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The Judgment attaches special significance to the fact that, under Article 12 of the Convention, any State may make a reservation in respect of Article 6, paragraph 2, from which it concludes that Article 6, paragraph 2, comes within the category of purely conventional rules and that therefore the principles and rules embodied in it are excluded from the province of the general principles and rules of international law and from that of customary international law. The Judgment states this while reasoning that the use of the equidistance method for the purpose of delimiting the continental shelf which appertains to the Parties is not obligatory as between them.

It must be noted once more that Article 6, paragraph 2, embodies not only the principle of equidistance, but also two other principles concerning respectively the determination of the boundary of the continental shelf by agreement (and it would be impossible to imagine that anyone could oppose this principle or wish to make a reservation with regard to it) and the 'special circumstances' clause as a corrective to the equidistance principle. These three elements of Article 6, paragraph 2, are, as I have already noted, intimately interconnected in constituting a normal procedure for the determination of a boundary line of the continental shelf as between adjacent States. It is therefore impossible to apply to this provision the logical method of separability, just as it is impossible to separate the principles and rules of Article 6, paragraph 2, from the general doctrine of the continental shelf as enshrined in the first three articles of the Convention.

From a consideration of the reservations-comparatively few in number-which were made by governments to Article 6, paragraph 2, it will be seen that not one of the governments opposed in any general way the principles and rules embodied in this Article. They stated only (as in the instances of Venezuela and France) that, in certain specific areas off their coasts, there existed 'special circumstances' which excluded the application of the principle of equidistance.

Thus, for instance, the Government of the French Republic stated that:

'In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it: ... if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning *164 of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French Coast' [translation by the Registry] (Status of Multilateral conventions in respect of which the Secretary-General performs depositary functions; ST/LEG/SER.D/l).

And the Government of Yugoslavia made a reservation in respect of Article 6 of the Convention which can easily be understood in view of its positive attitude to the principle of equidistance [FN3]. In its instrument of ratification, the Government of Yugoslavia stated: 'In delimiting its continental shelf, Yugoslavia recognizes no 'special circumstances' which should influence that delimitation' (idem).

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What are, in effect, the principles and what has been the practice, with regard to the delimitation of the territorial sea?

Sovereign rights over the territorial sea, like all territorial rights, have an inherent spatial reference, and every such right is subject to certain limits which are determined by historically developed principles. The territorial sea as a maritime space is inseparably connected with the land territory of which it is an appurtenance.

As recalled above, the question of the boundaries of the territorial sea arises mainly in connection with the measurement of its breadth, but the lateral boundaries (as they have not given rise to the kind of serious dispute so common in regard to the breadth, so that

not all the documentation on them has been published) are usually, as far as we know, determined in treaties, conventions, or in administrative agreements concerning, particularly, customs jurisdiction and fisheries.
It has been estimated that there are some 160 places where international boundaries have been extended from the coast, but the documentation in this connection is scant. It is clear however, that there has been a very general tendency in defining these boundaries to employ, for the sake of clarity and certitude, virtually mathematical concepts expressed in the use of geographical co-ordinates, parallels of latitude, geometrical constructions, charts showing points connected by straight lines, perpendiculars, **165* produced territorial boundaries, and even in such straight-forward visual means as the alignment of topographical features. There has also been a tendency to apply the principle of equidistance [FN4], which as a result had historically evolved. The principles and methods for delimiting the territorial sea have become-to use the expression of a well-known specialist on boundary questions, S. Whittemore Boggs-implicit in the concept of the territorial sea. These principles and methods are summed up in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone, which premises the baseline from which the breadth of the territorial sea of each of the two States concerned is measured, the different questions connected with the method of determining baselines having been dealt with in Articles 3 to 9 of the same Convention.

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The Judgment (paragraphs 88 ff.) refers to the 'rule of equity' as a ground for the Court's decision, and apparently understands the notion of equity in a far wider sense than the restricted connotation given to it in the Common Law countries. It states: 'Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable' (paragraph 88). Any judge might be pleased with this statement, but the point it makes appears to me purely semantic. The International Court is a court of law. Its function is to decide disputes submitted to it 'in accordance with international law' (Statute, Article 38, paragraph 1), and on no other grounds. It is true that the Court may be given 'power ... to decide a case ex aequo et bono', but only 'if the parties agree thereto' (ibid., paragraph 2). It might be held that in such circumstances the Court would be discharging the functions of an arbitral tribunal, but the measure of discretion which the ex aequo et bono principle confers upon a court of law as such is at all events something which the International Court of Justice has never enjoyed. This principle is accordingly nowhere to be found in the decisions either of the present Court or of its predecessor, because there never has been any case in which the parties agreed that the Court might decide ex aequo et bono. **166* This negative fact seems to indicate that States are somewhat averse to resorting to this procedure [FN5] and it was not on this basis that the Court was asked to give a decision in the present case. The Court itself states in its Judgment that 'There is ... no question in this case of any decision ex aequo et bono' (paragraph 88); nevertheless it may be thought to have tended somewhat in that direction.
The notion of equity was long ago defined in law dictionaries, which regard it as a principle of fairness bearing a non-juridical, ethical character. Black, for example, cites: 'Its obligation is ethical rather than jural and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law' (4th edition, 1951, p. 634) [FN6]. The science of ethics has been and still is the subject of somewhat heated debates and of ideological differences concerning the content and meaning of equity and of what is equitable. I feel that to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court. Thus the question of the actual size of the area of continental shelf which would fall to the Federal Republic on application of the equidistance principle is not in itself relevant for the present cases, where the issues raised are, in the words of

Lord McNair, 'issues which can only be decided on a basis of law' (Fisheries, dissenting opinion, I.C.J. Reports 1951, p. 158).
To demonstrate the necessity for applying the rule of equity, reference has been made to the United States Presidential Proclamation of 1945, which stated that: 'In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles', but here this means nothing more than calling upon neighbouring States to conclude agreements.
Certain other proclamations, while stating that boundaries will be determined in accordance with equitable principles, use qualifying terms. For example, the Royal Pronouncement of Saudi Arabia (1949) affirms *167 that the boundaries 'will be determined in accordance with equitable principles by Our Government [FN7] in accordance with other States ... of adjoining areas'; the Proclamation of Abu-Dhabi (1949) places more emphasis on the unilateral character of the delimitation: the Ruler proclaims that the boundaries are to be determined '... on equitable principles, by us after consultation [FN7] with the neighbouring States' (U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, ST/LEG/SER.B/I).

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The Court, rejecting the application of the equidistance method [FN8] in these cases and observing that there is no other single method of delimitation the use of which is in all circumstances obligatory [FN9], has found that 'delimitation is to be effected by agreement in accordance with equitable principles' (Judgment, paragraph 101 (C) (1)) thus envisaging new negotiations (even though, before they requested the Court to decide the dispute between them, the Parties had already carried on somewhat protracted but unsuccessful negotiations).
At the same time, the Court has considered it necessary to indicate 'the factors to be taken into account' by the Parties in their negotiations (paragraph 101 (D)). The factors which have been specified could hardly, in my opinion, be considered among the principles and rules of international law which have to be applied in these cases. The word 'factor' indicates something of a non-juridical character that does not come 'within the domain of law'. The Court has put forward considerations that are, rather, economico-political in nature, and has given some kind of advice or even instructions; but it has not given what I personally conceive to be a judicial decision consonant with the proper function of the International Court.
It may be appropriate to recall in this connection the observation made by Judge Kellogg in the Free Zones case to the effect that the Court could not 'decide questions upon grounds of political and economic expediency' (P.C.I.J., Series A, No. 24, 1930, p. 34). Interpreting Article 38 of the Statute, he noted that 'it is deemed impossible to avoid the conclusion that this Court is competent to decide only such questions as are susceptible of solution by the application of rules and principles of *168 law' (ibid., p. 38); and he cited the statement which was made by James Brown Scott in his address at The Hague Peace Conference of 1907: 'A court is not a branch of the Foreign Office, nor is it a Chancellery. Questions of a political nature should ... be excluded, for a court is neither a deliberative nor a legislative assembly. It neither makes laws nor determines a policy. Its supreme function is to interpret and apply the law to a concrete case... If special interests be introduced, if political questions be involved, the judgment of a court must be as involved and confused as the special interests and political questions [FN10].'

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Although I feel obliged to disagree with the whole of section (C) of the operative part of the Judgment, I consider it necessary to refer here only to sub-paragraph (2) of that section; in which the Court, envisaging a case where 'the delimitation leaves to the Parties areas that overlap', decides that such areas 'are to be divided between them in

agreed proportions or, failing agreement, equally [FN11]'. Here, the Judgment goes beyond the province of questions relating to the delimitation of the continental shelf and enters upon that of questions of distribution, despite the fact that the Court itself has earlier stated that 'its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned' (paragraph 18) [FN12]. To draw a boundary line in accordance with the proper principles and rules relating to the determination of boundaries is one thing, but how to divide an area with an underlying 'pool or deposit' is another thing and a question which the Court is not called upon to decide in the present cases.

It may be sufficient to recall that Article 46 of the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning Arrangements for Co-operation in the Ems Estuary (Ems-Dollard Treaty signed on 8 April 1960) stated:

'The provisions of this Treaty shall not affect the question of the course of the international frontier in the Ems Estuary. Each Contracting Party reserves its legal position in this respect' (United Nations Treaty Series, Vol. 509, pp. 94 ff.).

*169 And the Supplementary Agreement to this Treaty, signed on 14 May 1962 (ibid., p. 140), which was concluded with a view to co-operation in the exploitation of the natural resources underlying the Ems Estuary, leaves the existing frontiers of both parties intact. And, naturally, for the exploitation, even in common, of a given part of the continental shelf it is necessary first to know the boundaries of the continental shelf of each of the parties. I need scarcely say that common exploitation does not create common possession of the continental shelf, or common sovereign rights in a given area. Generally speaking, such agreements are in fact concluded with a view to preserving the sovereign rights of the individual parties in a given area of the continental shelf. Only in the unthinkable contingency of its being desired to internationalize an entire continental shelf would a departure from this standpoint appear apposite.

It would be as well to cite, in addition, Articles 4 of the two agreements concluded by the United Kingdom with, respectively, Norway and Denmark, concerning the delimitation of the continental shelf as between each pair of countries (United Nations Treaty Series, Vol. 551. A/AC. 135/10 ; reproduced in Memorials, Annexes 5 and 12). Article 4 of the Anglo-Norwegian Agreement reads:

'If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned' (United Nations Treaty Series, Vol. 551, p. 216).

Here we have a special rule which is concerned with relations between licensees and with the possibility of bringing them together in a working- arrangement, but not a rule concerning the actual boundary of a given part of the continental shelf or the possibility of changing that boundary.

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In sum, I consider that the principles and rules of international law enshrined in Article 6, paragraph 2, of the Convention on the Continental Shelf ought to be applied in these cases at least qua general principles and rules of international law.

But even if one does not agree that this provision is applicable in these cases in its entirety or in part, it is nevertheless necessary that the principles *170 and rules which are applied in the delimitation of a lateral boundary of the continental shelf should have a natural connection with the three interconnected principles and rules-agreement, special circumstances, equidistance-which determine the boundaries of a territorial sea. For, considering that it is a continuation, a natural prolongation of the territorial sea (its bed and subsoil), the continental shelf is not unlimited in extent, whether seaward or

laterally, but lies within limits consistently continuing the boundary lines of the territorial sea in accordance with the same principles, rules and treaty provisions as provided the basis for the determination of the territorial sea between the two given adjacent States; that is, in these cases, between the Netherlands and the Federal Republic of Germany on the one hand and between Denmark and the Federal Republic of Germany on the other.

(Signed) V. KORETSKY.

## *171 DISSENTING OPINION OF JUDGE TANAKA

### I

In spite of my great respect for the Court, I am unable, to my deep regret, to share the views of the Court concerning some important points in the operative part as well as in the reasons of the Judgment.

What is requested of the International Court of Justice by virtue of the two Special Agreements (Article 1, paragraph 1) is to give a decision on the question:

'What principles and rules of international law are applicable to the delimitation as between the Partie of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial [boundaries] determined [in the previous agreements concluded by them namely: the Convention of 9 June 1965 between the Kingdom of Denmark and the Federal Republic of Germany and the Convention of 1 December 1964 between the Federal Republic of Germany and the Kingdom of the Netherlands]?'

From the Special Agreements it is clear that what is requested constitutes the 'principles and rules of international law' applicable to the said delimitation of the continental shelf and nothing else.

The cases before the Court are concerned with disputes relative to the delimitation of the continental shelf in the North Sea areas. The fact that such disputes arose and the decision of the Court was asked indicates the following fact. An originally geological and geographical concept, i.e., that of the continental shelf, by reason of its intrinsic economic interests (natural resources, particularly minerals such as oil, gas from the subsoil of the seabed) which have become susceptible of exploration and exploitation as the result of recent technological development, has been vested with legal interest and presents itself as a subject-matter of rights and duties subject to the rule of law and constituting an institution belonging to international law.

It is beyond the slightest doubt that this original field of international maritime law involves many new and difficult questions. The fact that after the 'Truman Proclamation' of September 1945 there followed a succession of unilateral declarations, decrees and other acts issued by coastal States declaring their exclusive sovereign rights over the adjacent continental shelves was without the slightest doubt a main motive for starting the legislative work of the Geneva Conference on the Continental *172 Shelf prepared by the International Law Commission of the United Nations. By the Geneva Convention of 1958, the system of the continental shelf definitively acquired the status of a legal institution.

As to the idea and the fundamental principle which govern the continental shelf as a legal institution, it is evidently the realization of harmony between the two interests: the one the interest of individual coastal States for exploration of their continental shelves and exploitation of natural resources; the other the interest of the international community, particularly the safeguarding of the freedom of the high seas.

In this context one point must be emphasized, namely that the institution of the continental shelf adopts as fundamental principles that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources, that these rights are exclusive and that these rights do not depend on occupation, effective or notional, or on any express proclamation (Article 2, paragraphs 1-3, of the Geneva Convention). It must be noted that this fundamental concept of the continental shelf, being established as customary international law, exercises an

important influence upon the decision of the question of delimitation of the continental shelf, as we shall see below.
The necessity for legal regulation on the matter of delimitation of the continental shelf between coastal States can naturally be understood from the fact that boundary disputes between them as a result of extending their jurisdiction over areas of the continental shelf may involve a serious threat to international peace, as in case of disputes over land boundaries. On the contrary, peaceful co-existence of well-ordered activities of exploration and exploitation of the seabed and subsoil natural resources by the States concerned would enormously contribute to the welfare of mankind.
From the above-mentioned viewpoint it becomes clear that the matter concerning the delimitation of the same continental shelf between two or more opposite States or between two adjacent States plays a very important role-the question which is provided in Article 6, paragraphs. 1 and 2, of the said Convention. In the present cases this question is involved. In respect of the delimitation of the continental shelf, as well as of the continental shelf as a whole, rule of law and not anarchy must prevail.

II

On the matter of the delimitation, the opinions of the Parties, one the Federal Republic of Germany and the other the Kingdoms of Denmark and the Netherlands, are radically opposed. The former denies the application of equidistance to the present cases; the latter approves its *173 application. The core of the present cases constitutes the question of the opposability or non-opposability to the Federal Republic of Article 6, paragraph 2, which provides for the principle of equidistance.
It is evident that the 1958 Convention on the Continental Shelf, particularly its Article 6, is not opposable as such to the Federal Republic for the reason of absence of her consent. It is true that she positively participated in the work of the Convention and became one of the signatory States on 30 October 1958, but she did not ratify the Convention. This lack of ratification is the reason for the denial of her contractual obligation regarding the Convention as a whole or in part, and therefore makes it unopposable to her. Although the Geneva Convention of 1958, as a kind of 'law-making' treaty, has a great number of States parties, still it cannot bind outsiders to the Convention, among which the Federal Republic belongs.
The fact that the two Kingdoms on the contrary ratified the Convention does not alter this unopposability vis-a-vis the Federal Republic. This is not contested by the two Governments. Therefore it seems unnecessary to deal with this matter further. Still I consider it to have some significance in relation to other contexts.
The following circumstances, namely in addition to the afore-mentioned German positive participation in the work of the Convention and its signature, are to be noted:
The Government Proclamation of 20 January 1964, the expose des motifs to the Bill for the Provisional Determination of Rights over the Continental Shelf of 15 May 1964, and the conclusion of the two 'partial boundary' treaties between the Federal Republic and the Netherlands of 1 December 1964 and between the Federal Republic and Denmark of 9 June 1965; in particular, the Proclamation of 20 January 1964 is extremely significant in the sense that the Federal Republic expressly recognized the Geneva Convention as the basis for the exclusive sovereign rights on her continental shelf. Furthermore, the conclusion of the last two treaties regarding the delimitation of the continental shelf, seems to approve the provision of Article 6, paragraph 2, of the Geneva Convention. These circumstances, operating as a whole, contribute to justification of the binding power of the equidistance principle provided in Article 6, paragraph 2, vis-a-vis the Federal Republic should she be bound by a ground other than contractual obligation, namely by the customary law character of the Convention.
As to whether a situation of estoppel exists or not, I hesitate to recognize this latter because there is no evidence that Denmark and the Netherlands were caused to change position or suffer some prejudice in *174 reliance on the conduct of the Federal Republic, as is properly stated by the Court's Judgment.

If, in the first place, the Geneva Convention, including Article 6, paragraph 2, is as such not opposable to the Federal Republic, the Court, in the second place, is confronted with the task of examining the contention put forward by the two Kingdoms as to the existence of the customary law character (Article 38, paragraph 1 (b), of the Statute) of the Convention as a whole or the equidistance principle of Article 6, paragraph 2, of the Convention. If the customary law character of the Geneva Convention and the principle of equidistance is established, the latter principle can be applied to the present cases, and that will be the end of the matter.

The history of the continental shelf as a legal institution indicated by the above-mentioned Truman Proclamation of 28 September 1945, does not appear to be long enough to have enabled more or less complete customary international law to have been formulated on this matter. The practical necessity of regulating a great number of claims of coastal States on their adjacent continental shelf so as to avoid a chaotic situation which may be caused by competition and conflict among them, seemed to be a primary consideration of the international community. In 1949 the International Law Commission, representing the main legal systems of the world, took the initiative by appointing the Committee of Experts for the question relating to the territorial sea including the continental shelf. This Committee of Experts terminated its Report, to which reference has been made above, in 1953.

Parallel with the efforts of the International Law Commission, various governmental and non-governmental, as well as academic organizations and institutions, contributed to promoting the legislative work on the continental shelf by study, examination and preparation of drafts.

The efforts of the International Law Commission were crowned by the birth of the Convention on the Continental Shelf adopted on 26 April 1958 by the Geneva Conference which was attended by 86 delegations.

That 46 States have signed and 39 States ratified or acceded to the Convention is already an important achievement towards the recognition of customary international law on the matter of the continental shelf.

To decide whether the equidistance principle of Article 6, paragraph 2, of the Convention can be recognized as customary international law, it is necessary to observe State practice since the Geneva Convention of 1958. In this respect it may be enough to indicate the following five Agreements as examples of the application of the equidistance principle concerning the North Sea continental shelf:

(a) United Kingdom-Norway of 10 March 1965;

(b) Netherlands-United Kingdom of 6 October 1965;

(c) Denmark-Norway of 8 December 1965;

*175 (d) Denmark-United Kingdom of 3 March 1966;

(e) Netherlands-Denmark of 31 March 1966.

I must also mention the two partial boundary treaties concluded by the Federal Republic already indicated.

It must be noted that Norway, who is a party to two of these Agreements, acted on the basis of the equidistance principle notwithstanding the fact that she has not yet acceded to the Geneva Convention, that the Netherlands adopted the equidistance principle in her Agreement with the United Kingdom at a time when she had not yet ratified the Convention and that Belgium had recently adopted the equidistance principle for the delimitation of her continental shelf boundaries, although she is not a party to the Convention (23 October 1967 'Projet de Loi', Art. 2).

It is not certain that before 1958 the equidistance principle existed as a rule of customary international law, and was as such incorporated in Article 6, paragraph 2, of the Convention, but it is certain that equidistance in its median line form has long been known in international law for drawing the boundary lines in sea, lake or river, that, therefore, it is not the simple invention of the experts of the International Law Commission and that this rule has finally acquired the status of customary international law accelerated by the legislative function of the Geneva Convention.

The formation of a customary law in a given society, be it municipal or international, is a

complex psychological and sociological process, and therefore, it is not an easy matter to decide. The first factor of customary law, which can be called its corpus, constitutes a usage or a continuous repetition of the same kind of acts; in customary international law State practice is required. It represents a quantitative factor of customary law. The second factor of customary law, which can be called its animus, constitutes opinion juris sive necessitatis by which a simple usage can be transformed into a custom with the binding power. It represents a qualitative factor of customary law.

To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances. Nor is the situation the same in different fields of law such as family law, property law, commercial law, constitutional law, etc. It cannot be denied that the question of repetition is a matter of quantity; therefore there is no alternative to denying the formation of customary law on the continental shelf in general and the equidistance principle if this requirement of quantity is not fulfilled. What I want to emphasize is that what is important *176 in the matter at issue is not the number or figure of ratifications of and accessions to the Convention or of examples of subsequent State practice, but the meaning which they would imply in the particular circumstances. We cannot evaluate the ratification of the Convention by a large maritime country or the State practice represented by its concluding an agreement on the basis of the equidistance principle, as having exactly the same importance as similar acts by a land-locked country which possesses no particular interest in the delimitation of the continental shelf.

Next, so far as the qualitative factor, namely opinion juris sive necessitatis is concerned, it is extremely difficult to get evidence of its existence in concrete cases. This factor, relating to internal motivation and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification or other State acts. There is no other way than to ascertain the existence of opinion juris from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement.

Therefore, the two factors required for the formation of customary law on matters relating to the delimitation of the continental shelf must not be interpreted too rigidly. The appraisal of factors must be relative to the circumstances and therefore elastic; it requires the teleological approach.

As stated above, the generation of customary law is a sociological process. This process itself develops in a society and does not fail to reflect its characteristic upon the manner of generation of customary law. This is the question of the tempo which has to be considered.

Here can be enumerated some sociological factors which may be deemed to have played a positive role in the speedy formation of customary international law on the subject-matter of the continental shelf, including the principle of equidistance.

First, the existence of the Geneva Convention itself plays an important role in the process of the formation of a customary international law in respect of the principle of equidistance. The Geneva Convention constitutes the terminal point of the first stage in the development of law concerning the continental shelf. It consolidated and systematized principles and rules on this matter although its validity did not extend beyond the States parties to the Convention. Furthermore, the Convention constitutes the starting point of the second stage in the *177 development of law concerning the continental shelf. It has without doubt provided the necessary support and impetus for the growth of law on this matter.

The coming into existence of the Geneva Convention itself would psychologically and politically facilitate the adherence of non-party States to the Convention or the introduction of the equidistance principle into their practice.

The role played by the existence of a world-wide international organization like the United Nations, its agency the International Law Commission, and their activities generally do not fail to accelerate the rapid formation of a customary law. It is similar to the way in which a customary commercial law speedily evolves from a standard contract drafted by experts of business circles to a universal commercial custom. The Geneva Convention of 1958 on the Continental Shelf, first lex ex contractu among the States parties, has been promoted by the subsequent practice of a number of other States through agreements, unilateral acts and acquiescence to the law of the international community which is nothing else but world law or universal law.

Secondly, the legal, scientific and technical, and less political character of the Convention, and the fact that its birth is mainly due to the activities of the International Law Commission composed of highly qualified internationally well-known legal scholars representing the main legal systems of the world in collaboration with a group of experts, would not fail to exercise rapidly a positive influence for the formation of opinion juris sive necessitatis in the international community.

Thirdly, the urgent necessity of avoiding international conflict and disorder which may be feared to occur between coastal States in proportion to the rapidly increasing economic necessity of the exploration and exploitation of natural resources in the subsoil of submarine areas, has become a matter of serious preoccupation not only to coastal States, but to the whole international community in which consciousness of solidarity is more than ever intensified.

Fourthly, it can be recognized that the speedy tempo of present international life promoted by highly developed communication and transportation had minimized the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years.

Fifthly, the circumstance that with regard to the continental shelf, including the equidistance principle, there had been no legal system in existence, either written or customary law, and that therefore a legal vacuum had existed, has certainly facilitated the realization of the Geneva Convention on the Continental Shelf and customary law on the *178 same matter. Similar circumstances can be recognized in the fields of air law and space law.

In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process. We must not scrutinize formalistically the conditions required for customary law and forget the social necessity, namely the importance of the aims and purposes to be realized by the customary law in question.

The attitude which one takes vis-a-vis customary international law has been influenced by one's view on international law or legal philosophy in general. Those who belong to the school of positivism and voluntarism wish to seek the explanation of the binding power of international law in the sovereign will of States, and consequently, their attitude in recognizing the evidence of customary law is rigid and formalistic. On the other hand, those who advocate the objective existence of law apart from the will of States, are inclined to take a more liberal and elastic attitude in recognizing the formation of a customary law attributing more importance to the evaluation of the content of law than to the process of its formation. I wish to share the latter view. The reason for that is derived from the essence of law, namely that law, being an objective order vis-a-vis those who are subject to it, and governing above them, does not constitute their 'auto-limitation' (Jellinek), even in the case of international law, in which the sovereign will of States plays an extremely important role.

In this context, I venture to quote the statements of two eminent writers which appear to be valuable for the affirmative conclusion on the formation of customary international law concerning the matter of the continental shelf.

J. L. Brierly, in The Law of Nations, 6th edition, 1963, page 62:
'The growth of a new custom is always a slow process, and the character of international society makes it particularly slow in the international sphere. The progress of the law therefore has come to be more and more bound up with that of the law-making treaty. But it is possible even today for new customs to develop and to win acceptance as law when the need is sufficiently clear and urgent. A striking recent illustration of this is the rapid development of the principle of sovereignty over the air.'
*179 D. P. O'Connell, in International Law, I, 1965, pages 20-21:
'Much of the traditional discussion of customary law suffers from the rigidity and narrow-mindedness of nineteenth-century positivism, which was itself the product of a static conception of society. The emphasis that the positivist places on the will of the State ov r-formalises the law and obscures its basic evolutionary tendency. He looks to positive practice without possessing the criteria for evaluating it, and hence is powerless to explain the mystical process of lex ferenda, which he is compelled to distinguish sharply, and improperly, from lex lata ...'

III

In the event that the customary law character of the principle of equidistance cannot be proved, there exists another reason which seems more cogent for recognizing this character. That is the deduction of the necessity of this principle from the fundamental concept of the continental shelf.
The starting point is the concept of the continental shelf. This concept is clearly expressed in Articles 1-3 of the Geneva Convention.
Before we examine this concept, we shall clarify its nature, namely its customary law character.
There is no doubt that Articles 1-3, which constitute the fundamental concept of the continental shelf, are mainly formulated on the basis of the State practice established since President Truman's Proclamation of September 1945, and that, accordingly, they have the character of customary law. Therefore, even those States which have not ratified or acceded to the Convention could not deny the validity of these provisions against them. Denying the principles enunciated in Articles 1-3 would deprive the non-contracting States of the basis of all rights over their continental shelves.
The fundamental principle upon which the institution of the continental shelf is based constitutes the recognition of the sovereign rights of the coastal State for the purpose of its exploration and the exploitation of its natural resources (Article 2, paragraph 1, of the Convention). These sovereign rights are exclusive in the sense that if the coastal State does not explore or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State (Article 2, paragraph 2, of the Convention). These rights of the coastal State do not depend on occupation, effective or notional, or on any express proclamation (Article 2, paragraph 3, of the Convention).
The fact that the coastal State exercises over the continental shelf exclusive sovereign rights, and that these rights do not depend on occupation *180 or any express proclamation, explains eloquently the legal status of the continental shelf as an institution. First, the continental shelf does not constitute res nullius which is susceptible of occupation by any State-not only an adjacent coastal State but any other State. Next, the continental shelf does not constitute a res communis of the coastal States which must be jointly exploited or divided by them. The continental shelf belongs exclusively to the coastal State according to the principle fixed by law which gives the definition of the continental shelf. According to Article 1 of the Convention, the term 'continental shelf' is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast. By this provision the law prescribes the only condition for a coastal State to be able to have sovereign rights over the continental shelf. This condition is of a geographical nature; the existence of the relationship of adjacency between the continental shelf and the coastal State is required.

The criterion of adjacency-or proximity, propinquity, contiguity-seems a most reasonable one if one adopts the principle of the sovereign rights of the coastal State, excluding the regime of res nullius or res communis. The idea that the continental shelf constitutes the natural continuation or extension of the coastal State is most natural and reasonable from the geographical and economic viewpoints.

The principle which governs the delimitation of the continental shelf and which is provided for in Article 6 is the corollary of the concept declared in Articles 1 and 2. The present cases are related to Article 6, paragraph 2. This stipulates:

'In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.'

The equidistance principle which is incorporated in Article 6, paragraph 2, flows from the fundamental concept of the continental shelf as the logical conclusion on the matter of the delimitation of the continental shelf. The equidistance principle is integrated in the concept of the continental shelf. The former is inherent in the latter, being inseparably connected with it. Therefore, if the law of the continental shelf were devoid of the provision concerning delimitation by means of the equidistance principle, satisfactory functioning of the institution of the continental shelf could not be expected.

The Federal Republic denies the opposability of the Geneva Convention as a whole, and consequently denies the opposability of its part, namely Article 6, paragraph 2. However, the Federal Republic has not the slightest doubt that she exercises sovereign rights over the continental shelf of the disputed area. But on what title can she exercise such rights? *181 There should be no other possibility of justification other than by customary law on the matter of the continental shelf. And indeed she recognizes the applicability of Articles 1-3 of the Geneva Convention vis-a-vis herself on a customary law basis. Can the Federal Republic deny the application of Article 6, paragraph 2, concerning the delimitation of the continental shelf which she claims as her own? The answer is in the negative.

The viewpoint of the Federal Republic is to consider the question of delimitation separately from the fundamental concept of the continental shelf. However, the rule with regard to delimitation by means of the equidistance principle constitutes an integral part of the continental shelf as a legal institution of teleological construction. For the existence of the continental shelf as a legal institution presupposes delimitation between the adjacent continental shelves of coastal States. The delimitation itself is a logical consequence of the concept of the continental shelf that coastal States exercise sovereign rights over their own continental shelves. Next, the equidistance principle constitutes the method which is the result of the principle of proximity or natural continuation of land territory, which is inseparable from the concept of continental shelf. Delimitation itself and delimitation by the equidistance principle serve to realize the aims and purposes of the continental shelf as a legal institution. The Federal Republic, in so far as she insists upon her rights on the continental shelf, cannot deny the application of its delimitation by means of the equidistance principle. As I have said above, the equidistance principle provided for in Article 6, paragraph 2, of the Convention, is inherent in the concept of the continental shelf, in the sense that without this provision the institution as a whole cannot attain its own end.

The doctrine that the equidistance principle is inherent in the institution of the continental shelf would certainly make a highly controversial impression. However, even if Article 6, paragraph 2, did not exist or is not opposable to the Federal Republic, the interpretation of Articles 1-3 would produce the same conclusion. Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court. The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law. Even if the Federal Republic recognizes the customary law character of only the fundamental concept incorporated in Articles 1-3 of the Convention, and denies it in respect of other matters, she cannot e cape from the application of what is derived as a logical conclusion from the fundamental concept,-a

conclusion which, in respect of the delimitation of the continental shelf, would reach the same result as Article 6, paragraph 2, of the Convention.

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*182 The Federal Republic, referring to the right of the States parties to the Convention to make reservations to articles other than to Articles 1-3 (Article 12 of the Convention), argues in favour of the non-applicability a fortiori of Article 6 to the Federal Republic, which is not a State party to the Convention. This question has been very extensively discussed. However, if a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary international law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognized as jus cogens. It is certain that this institution cannot properly function without being completed by some method of delimitation provided by law. It is obvious that a State party to the Convention cannot exclude by reservation the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty. The possibility of reservation could apply to the application of the special-circumstances clause, but not to that of the equidistance principle, which, as indicated above, constitutes an integral part of the continental shelf regime. In short, a reservation to Article 6, paragraph 2, so far as the application of the equidistance principle is concerned, is not permissible, because it would produce a legal vacuum and thus prevent normal functioning of the institution of the continental shelf.

The Danish and Netherlands Governments have sought to establish their claim to apply the equidistance principle either by way of the applicability of Article 6, paragraph 2, of the Convention, or by way of direct inference from the fundamental concept of the continental shelf which is supposed to be inherent in Articles 1 and 2 of the Convention.

For the reasons mentioned above, the contention of the Danish and Netherlands Governments as to the customary law character of the equidistance rule applicable to non-contracting States of the Convention, including the Federal Republic, is well-founded.

The equidistance principle provides a method of delimiting the continental shelf which must be deemed most practical and appropriate. Specifically, concerning a boundary matter, it is desirable that the method be objective and clear. This is the requirement from the standpoint of the international community's need for certainty.

In this connection I would like to make some observations on the logical relationship between law and technique for the purpose of considering the nature of the equidistance rule.

We have before us a technical norm of a geometrical nature, which is called the equidistance rule, and may serve a geographical purpose. This norm, being in itself of a technical nature, constitutes a norm of *183 expediency which is of an optional, i.e., not obligatory character, and the non-observation of which does not produce any further effect than failure to achieve the result it would have rendered possible. This technical norm of a geometrical nature can be used as a method for delimiting the continental shelf. The legislator, being aware of the utility of this method for legal purposes, has adopted it as the content of a legal norm.

Thus the equidistance method as a simple technique is embodied in law, whether in Article 6, paragraph 2, of the Geneva Convention or in corresponding customary international law. By being submitted to a jurisdical evaluation and invested with the character of a legal norm, it has acquired an obligatory force which it did not have as a simple technical norm.

The incorporation of the equidistance rule as a geometrical technique into a legal norm exemplifies an extremely widespread phenomenon which can be observed in regard to several kinds of extra-legal, social and cultural norms and in such fields as usage, ethics and technique which has drawn the attention of Professor Gustav Radbruch, who

characterizes it as the investing of one and the same material with a dual axiological character (Umkleidung desselben Materials mit doppelten Wertcharakter: Rechtsphilosophie, 3rd ed., 1932, p. 43). He has also described the same phenomenon as 'naturalization'. In the case of the equidistance principle, a technical norm of geometrical nature, after being submitted to juridical evaluation has become incorporated or naturalized in law as a legal norm vested with obligatory force.

This distinction between the rule of equidistance as a mere technique and as a norm of law is very important in relation to the correct discharge by the Court of the task laid upon it by the Special Agreements.

In the present context, I would like to add that there is a wider possibility of applying scientifico-technical methods to the delimitation of territorial sea and continental shelf areas than in the case of frontier-demarcation on land. This is because in the former the particular and individual features in the historical, ethnological, social and cultural sense, which are usually to be found in the latter, do not exist. Here technique can have full play, as in the case of the delimitation and division of newly discovered and uninhabited territories, which permit of automatic demarcation by the drawing of geometrical lines. Therefore technique, particularly geometrical technique, can have particular importance for the delimitation of the territorial sea and continental shelf. It is understandable that in the maritime field the relation between law and techniques should be more intimate than in the field of the delimitation of land territory, that elements of uniformity and abstraction should be prevalent, and that the role of technique utilized by law should be an outstanding one.

**184* In short, law can be more consistent with its idea of objectivity and certainty in maritime international law than in other fields of law.

The following opinion of Lord McNair in the Fisheries case (I.C.J. Reports 1951, p. 161) may be appropriately cited in justification of the applicability of the equidistance principle in the present cases:

'The method of delimiting territorial waters is an objective one and, while the coastal State is free to make minor adjustments in its maritime frontier when required in the interests of clarity and its practical object, it is not authorized by the law to manipulate its maritime frontier in order to give effect to its economic and other social interests. There is an overwhelming consensus of opinion amongst maritime States to the effect that the baseline of territorial waters, ... is a line which follows the coastline along low-water mark and not a series of imaginary lines drawn by the coastal State for the purpose of giving effect, even within reasonable limits, to its economic and other social interests and to other subjective factors.'

IV

Article 6, paragraph 2, of the Geneva Convention provides:

'2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.'

This provision determines the application of the equidistance principle. However, this application is not absolute and immediate. It presupposes the existence of two negative conditions: namely the absence of agreement and the absence of special circumstances. The one is of a procedural, the other of a substantive nature.

The boundary of the continental shelf shall in the first place be determined by agreement between the two States before recourse to other means. The principle thus recognized by the said provision is fully in the spirit of the Charter of the United Nations, Article 33 (1) of which lays down that 'the parties to any dispute ... shall, first of all, seek a solution by negotiation', it is also appropriate from the psychological and political viewpoint. Besides, the validity of an agreement concerning delimitation as between two States can be

circumstances clause constitutes an expression of the just and equitable principle, and it is sought to deny the relationship of major principle and exception existing between the equidistance principle and the special circumstances clause.
It is certain that the equidistance principle, being of a technical nature, does not possess in itself a moral qualification such as j stness or equitableness. However, when this principle was incorporated in the Convention as a legal norm, it must have been the intention of the legislator that in ordinary cases the automatic application of this principle would bring a just and equitable result. Accordingly, it would not be very far from the truth if we say that the consideration of just and equitable apportionment is inherent in the equidistance principle. But this does not mean that there is no need of an exception which constitutes the special circumstances clause.
The special circumstances clause presents itself as a manifestation of the same spirit of the main principle. This clause implies some degree of correction or, as I have said above, adaptation intended to attain what is really sought by the equidistance principle. The special circumstances clause, therefore, does not abolish or overrule the main principle, but is intended to make its functioning more perfect.
In short, the special circumstances clause in Article 6, paragraph 2, second sentence, does not signify an independent principle which may compete with the equidistance principle on an equal footing, but constitutes an exception recognized in concrete cases to correct the possible harsh effect which may be produced by the automatic application of the equidistance method. This conclusion is clear from the wording of Article 6, **187* paragraph 2, second sentence which provides '... and unless another line is justified by special circumstances' [Italics added.] This only means correction in special, individual cases by drawing another line and not the substitution of another principle in place of the equidistance principle.

V

If what has been said above is correct, and the equidistance principle is, on a customary law basis, binding vis-a-vis the Federal Republic, this is the end of the matter and there would be no need to examine certain other questions which were energetically discussed during the course of the written and oral proceedings. Among these questions, two must be considered. The first question is doncerned with the alternatives of delimitation and just and equitable apportionment or share. The second question is concerned with the indivisibility of the two cases before the Court and the combined effect of the two Danish-German and German-Netherlands boundary lines.
Although to answer these questions is not absolutely necessary for the purpose of deciding the present cases, I consider it to be significant to deal with them, because they are fundamentally related with the German contention that the application of the equidistance principle should be replaced by just and equitable apportionment in the present cases and therefore their consideration assists in the understanding of the intrinsic value of the equidistance principle.
First, we shall consider the question of whether the present cases are concerned with the question of delimitation or that of just and equitable apportionment.
The two Kingdoms take their stand on delimitation by the equidistance principle. The Government of the Federal Republic on the other hand, advocates the principle of just and equitable apportionment.
As we have seen above, delimitation by the equidistance principle constitutes a logical conclusion derived from the fundamental concept of the continental shelf provided in Articles 1-3 of the Geneva Convention. It is aimed at the delimitation, namely the drawing of a boundary line, between the continental shelves already belonging to two States, and not to division.
It can be said that delimitation constitutes an act of a bilateral nature. If more than two States are interested in the same continental shelf and participate in the common negotiation, the solution must be not of a multilateral nature but of a bilateral nature, namely a combination of bilateral relationships.

Consequently, the delimitation is individualistic in the sense that it is made between two parties without regard to a third party. If it is carried out by the application of the equidistance principle, delimitation would be effected in an automatic and neutral way in so far as special circumstances do not exist.

*188 On the other hand, the alleged principle of just and equitable apportionment which is contended for on behalf of the Federal Republic seems to be collectivistic. It implies the concept that delimitation is not demarcation of two sovereign spheres already belonging to two different States, but an act of division, or sharing among more than two States of res nullius or res communis. Therefore, the concept of apportionment is necessarily constitutive and multilateral. It requires some criteria for the purpose of the apportionment of the continental shelf among the States concerned. It can be said abstractly that the apportionment should be just and equitable; however, it is not easy to demonstrate in what way apportionment is, under given circumstances, in conformity with justice and equitableness.

That the present cases are not concerned with the apportionment of the continental shelf but its delimitation, is derived from the fundamental concept of the continental shelf. Besides, the Special Agreements request from the Court a decision on the principles and rules of international law applicable to delimitation and not to apportionment.

The Judgment of the Court is right in rejecting the argument of the Federal Republic which maintains the viewpoint of apportionment and not delimitation.

It is to be noted that the Federal Republic complains of the unjust and inequitable consequences of delimitation by the equidistance principle applied to the present cases; she does not limit herself to the correction of the alleged injustice and inequitableness resulting from such delimitation, but puts forward a quite new claim for just and equitable apportionment, which belongs to an entirely different concept from delimitation, as I have indicated above.

First, it is necessary to examine whether the application of the equidistance principle to the present cases would really produce injustice and inequitableness at the expense of the Federal Republic, as she argues.

What are the reasons why the application of the equidistance principle would result in an inequitable effect on the German part in the delimitation of the continental shelf in the North Sea and why is the Federal Republic opposing the application of this principle to the present cases?

The reasons may be summarized as follows:

First: The German part of the continental shelf would be reduced, by the effect of the two equidistance lines, to a small fraction of the whole North Sea area, not corresponding to the extent of its contact with the North Sea (Memorial, p. 73, figure 18).

Secondly: The German part would extend only half-way to the centre of the North Sea, where the parts of Great Britain, Norway, Denmark and the Netherlands meet (Reply, p. 430, figure 5).

Thirdly: The area of the German part compared with the Danish or the Netherlands part would amount only to roughly 40 per cent. of the area of Denmark's or the Netherlands' part respectively. This would be *189 out of proportion to the breadth of their respective coastal front facing the North Sea (Hearing of 23 October 1968). The shares of the Federal Republic, Denmark and the Netherlands would be in the ratio 6:9:9 respectively if they are measured by the breadth of contact of the coast with the sea-the country's coastal frontage (Memorial, para. 78, p. 77).

Are these reasons put forward on behalf of the Federal Republic well-founded?

I consider that the German contention is a simple assertion without foundation because the German part constitutes a consequence of the natural configuration (concavity) of the coastline, namely the rectangular bend in the Danish-German- Netherlands coastline that causes both equidistance lines to meet before the German coast thereby limiting the German share.

Furthermore, such a geographical configuration cannot be considered as causing this case to constitute an example of the application of the special- circumstances clause provided in Article 6, paragraph 2, of the Convention.

Examples are not lacking of a large State, because of being given too small a window on the open sea as a result of a special geographic configuration, getting a very small portion of the continental shelf quite disproportionate to its large land territory (for instance, Syria, Congo, Guatemala, Romania). (Sketch map E, submitted by the Agent for Denmark, Hearing of 7 November 1968.)

Moreover, the alleged proportionate smallness of the German part compared with the Danish or the Netherlands part is not to be considered as the result of the two equidistance lines only, but is caused by other factors: relations on the one hand between Denmark and Norway (Agreement of 8 December 1965), and on the other hand between the Netherlands, Belgium (Projet de Loi of 23 October 1967, Article 2 determining Belgium's boundary with the United Kingdon and France and the Netherlands), and the United Kingdom (Agreement of 6 October 1965). The treaties on the delimitation of the continental shelf between these States are not concerned with the present cases. Accordingly what seems to make the Danish and the Netherlands parts bigger in comparison with the German part largely comes from elsewhere, not at the cost of German sacrifice.

For the above-indicated reasons, the contention on behalf of the Federal Republic that the application of the equidistance principle to the delimitation of the continental shelf in the present cases produces injustice and inequitableness, is not, I consider, well-founded. The Federal Republic however, on the hypothesis that delimitation on the basis of the equidistance principle is unjust and inequitable, put forward a contention for the replacement of this principle. This is the idea of just and equitable apportionment or sharing.

*190 It is not clear whether the Federal Republic presses this idea consistently or whether she would be satisfied simply to replace the equidistance principle by some other methods. At any rate, she proposes first the socalled coastal frontage, namely a straight baseline between the extreme points at either end of the coast concerned, taking into account the special configuration of the German coast. Then the sector principle is proposed in consideration of the particularity of the North Sea.

It seems that these proposals are intended indirectly or directly to realize the principle of just and equitable apportionment. However, so far as the coastal frontage is concerned, this imaginary line cannot be recognized as a basis for the delimitation of the continental shelf of the States concerned, the sea area being unable to be treated identically with a solid land-mass from the concept of the continental shelf, namely the natural prolongation or continuation of the land territory of the coastal State. So far as the sector principle is concerned, this idea seems directly derived from the principle of just and equitable apportionment, and involves the re-examination and rewriting of boundary agreements on the continental shelf of the North Sea, not only between the States parties to the present cases but between them and third States. Such consequences cannot be tolerated.

The standpoint which conceives the delimitation of the continental shelf as a bilateral relationship independent of the relationship with a third State and recognizes the effect thereof, may certainly be exposed to the criticism that it would result in prior in tempore, potior in jure. Of course every agreement between States on boundary matters must be in conformity with international law, therefore it cannot infringe the rights of a third party. However, since boundary demarcation of the continental shelf can be made by bilateral agreement, there is no reason to deny that the agreements concluded between Denmark or the Netherlands and a third State, or between third States on matters of delimitation of the continental shelf in the North Sea should be prima facie valid erga omnes. For the sake of the security of the international legal order, the situation must be avoided whereby the validity of an earlier agreement might be questioned because it would produce an unsatisfactory effect from the point of view of a third party effecting a subsequent act. Such unsatisfactory effect must be tolerated so far as the present system of delimitation of the continental shelf is based on the principle of the priority of agreement by negotiations on this matter (Article 6, paragraphs 1 and 2).

In the event of the principle of just and equitable apportionment instead of the

justified on the ground that the interests involved are of a disposable nature between them.

*185 For the settlement of a dispute on delimitation, therefore, the regime of the continental shelf requires, as a necessary step for the application of the principle of equidistance, an agreement between the parties to the dispute. This agreement must be preceded by negotiations.

This requirement is evident. If we adhere too closely to the wording of the Article, the conclusion would be that the simple fact of the nonexistence of agreement would always authorize the application of the equidistance principle. But this mere parsing of the words is surely insufficient to elicit the real meaning of the provision. It is a precondition that genuine negotiations must have taken place and that, notwithstanding, no agreement was reached.

Regarding the present cases, no difference of view appears to exist concerning the above-mentioned interpretation of the phrase 'in the absence of agreement' and the prior holding of effective negotiation between the States concerned.

The second condition for the application of the equidistance principle is the absence of special circumstances justifying another boundary line.

The raison d'etre of this provision is that the mechanical application of the equidistance principle would sometimes produce an unpalatable result for a State concerned. Hence the necessity of supplementing the prescription of the equidistance principle with a clause that provides for special circumstances and constitutes an exception to the main principle of equidistance.

It is argued on behalf of the Federal Republic that the special-circumstances clause does not constitute an exception to the principle of equidistance, but that these two rules are valid on an equal footing, so that the equidistance principle has no priority over the special-circumstances clause. However, it may be submitted that it could not have been the intention of the legislator to leave the matter in a legal vacuum, to be decided by the nebulous criteria of justice and equitableness, but that, to ensure certainty and stability, he would have prescribed some precise rule to be applied in principle for so long as the existence of exceptional circumstances did not exclude its application.

It follows from the foregoing that the condition of the non-existence of special circumstances for the application of the equidistance principle has quite a different significance from that of the condition of the absence of agreement. The latter condition is a sine qua non for the application; therefore the absence of agreement despite genuine negotiations must be proved by the party wanting to rely on the equidistance principle; it is not, on the contrary, necessary that such party prove the former condition, namely the non- existence of special circumstances, because the equidistance principle is available to immediately and automatically fill the gap produced by the absence of agreement.

From what is stated above, the limit and scope of the application of the special-circumstances clause should be apparent. The Federal Republic, *186 minimizing the significance of the equidistance principle, advocates a broad interpretation of this clause, covering the case where a so-called 'macrogeographical' configuration would give rise, on the equidistance basis, to an unjust and inequitable apportionment. On the other hand, it is argued on behalf of the two Kingdoms that the application of this clause should be limited to such cases as the existence of insignificant islands, promontories, etc., which should be ignored in drawing the equidistance line. This view seems well-founded. The clause does not constitute an independent principle which can replace equidistance, but it means the adaptation of this principle to concrete circumstances. If for the foregoing reasons the exceptional nature of this clause is admitted, the logical consequence would be its strict interpretation. Exceptiones sunt strictissimae interpretationis. Accordingly, the configuration of the German coastline which by application of the two equidistance lines would produce unsatisfactory consequences for the Federal Republic, cannot be recognized as special circumstances within the meaning of Article 6, paragraph 2, of the Convention.

It is maintained on behalf of the Federal Republic, from the viewpoint of just and equitable apportionment on which her arguments are based, that the special

delimitation by the equidistance principle being applied, what would be the criteria for dividing the continental shelf among the coastal States of the North Sea? Besides the above-mentioned principles of the coastal frontage and sector many other factors could enter into consideration, for instance, length of the coastline, continuation of the land frontier, vertical line drawn on the general direction of the coastline *191 proportion of size of land territories of the States concerned, etc. Finally the distribution of subsoil natural resources and the unity of the deposit might also become an important factor for consideration. The reconsideration and rewriting of the existing continental shelf boundary lines between the North Sea States are a very complicated matter. It is the same with the three States Parties to the present cases. Consequently, the application of the principle of equidistance can be highly appreciated even from the standpoint of its negative function, namely the avoidance of complications which might be produced by the introduction of the idea of apportionment.

For the above-mentioned reasons, the German contention that the delimitation of the continental shelf between the Parties in the North Sea should be governed by the principle of just and equitable apportionment is not well- founded.

From what is said above, the following questions, which presuppose the application of just and equitable apportionment or at least the just and equitable principle, are to be set aside from the examination as irrelevant for the purpose of deciding the present cases:

(a) Questions which are concerned with the boundary agreements on the continental shelf concluded between Denmark or the Netherlands and a third State, i.e., the United Kingdom or Norway.

(b) Questions which are concerned with the validity of the boundary agreement on the continental shelf between Denmark and the Netherlands.

(c) Questions which are concerned with the details of the definition of the continental shelf, and its outer limits.

(d) Questions which are concerned with the particularity of the North Sea continental shelf.

(e) Questions which are concerned with the nature and the location of natural resources of the seabed and subsoil of the North Sea.

(f) Questions which are concerned with the joint exploitation of a deposit situated on both sides of the boundary of the States concerned.

VI

The second question which is now to be considered is related to the indivisibility of the two cases before the Court and the combined effect of the two Danish-German and German-Netherlands boundary lines, or whether the two cases should be considered separately.

First, it must be noted that this question is essentially linked with the foregoing one, namely the question of delimitation as against just and equitable apportionment. If the answer to the latter question is in favour of delimitation, the answer to the former must be the recognition of the divisibility of the two cases. If the answer to the latter is in favour of the apportionment, the answer to the former must be the recognition of the combined effect.

*192 It is evident that two cases are pending before the Court: one between Denmark and the Federal Republic and the other between the Federal Republic and the Netherlands. They are concerned with different areas of the North Sea continental shelf. They were brought before the Court simultaneously but by separate Special Agreements. However, the questions at issue in these cases are legally identical, and Denmark and the Netherlands are in the same interest. That is the reason that the Court ordered (26 April 1968), in implementation of the tripartite Protocol, the joinder of the proceedings in the two cases and the appointment of one Judge ad hoc by the Governments of Denmark and of the Netherlands.

But the joinder of the two cases from the viewpoint of procedural expediency does not imply that there is from the substantive viewpoint one case instead of two cases. There is

not one and the same case as occurred with the South West Africa cases.
In reality the two cases with which the Court has to deal are concerned with two different boundary lines, namely the Dano-German and the German-Netherlands lines. The result of this is that, in dealing with the merits of the two cases, the Court should not take into consideration the simultaneous existence and mutual relationship or 'combined effect' of the two lines which from a procedural point of view does not exist.
Nevertheless, the arguments on behalf of the Federal Republic, which constitute the contention of unjustness and inequitableness, are based on the doctrine of the combined effect. What the Federal Republic complains of is concerned with an area which is delimited by the two equidistance lines and which seems to be unsatisfactory to her.
We must pay attention to the fact that there was no necessity for simultaneous presentation of the two cases to the Court. If the two Governments could have foreseen that their procedural co-operation might produce, by reason of the 'combined effect', an unfavourable result, they would have preferred to adopt the procedure of postponing for some years the presentation of one case to the Court or presenting the two cases with some interval between them.
For the reasons mentioned above, the two cases must not be considered, from a substantive viewpoint, as one and the same case, but be conceived as separate and independent ones.

VII

One of the issues which I consider as important is concerned with the hierarchical relationship between two kinds of legal norms, namely that between natural law and positive law. It may be worth while to draw the attention of students of law to the fact that this time-honoured academic theme has found its way into the written pleadings and oral arguments as a contention on behalf of the Federal Republic.
*193 The Federal Republic denied, in the first place, the opposability of the equidistance principle incorporated in Article 6, paragraph 2. Next she sought to deny also its character as customary international law. Finally, she tried to attain the same effect from legal-philosophical considerations concerning the two kinds of norms: natural law and positive law.
According to the contention of behalf of the Federal Republic, the application of Article 6, paragraph 2, of the Convention, which incorporates the equidistance principle, should be subordinated to a higher norm of law which is nothing but the principle of just and equitable apportionment deriving from the idea of 'distributive justice' (justitia distributiva) (Memorial, para. 30, p. 30), 'the general principles of law recognized by civilized nations' (Article 38, paragraph 1 (c)) and the so-called natural law of nations (Hearing of 5 November 1968).
Briefly, the Federal Republic seems to deny the application of Article 6, paragraph 2, of the Convention for the reason that this would produce a harsh effect and insists that the norm of just and equitable apportionment be applied overruling the equidistance principle. This contention reminds us of an appeal to the mitigating role of equity versus common law in English law. In the present cases the Federal Republic appeals to the corrective or complementary function of natural law with regard to positive law.
However, from the viewpoint of traditional natural law doctrine, the overruling of a positive law rule by a natural law principle does not seem to include such issue in question. Natural law does not venture to interfere with positive law except in the case that positive law rules are manifestly immoral and violate the principles of natural law. Such a case cannot occur in the matter of the equidistance principle. Natural law should not very easily permit the validity of positive law rules to be contested by invoking natural law to the effect that such rules are not in conformity with the idea of justice and equity, and therefore contrary to natural law. It should not open a door to all subjective and arbitrary contentions denying the validity of positive law at the expense of security and expediency. If a positive law rule is supposed to produce a harsh or inconvenient effect, the correct course is not to deny the validity of this rule on account of its

unjustness and inequitableness, but to propose its amendment.
In the present cases the application of the equidistance principle produces neither injustice nor inequitableness as is argued on behalf of the Federal Republic. In reality, the question regarding the equidistance principle is concerned with that of expediency, namely what method is more practical and convenient for the purpose of delimitation of the continental shelf and therefore it is of a technical character and not of a character subject to moral evaluation and overruling by a natural law *194 principle. Of course, the application of the technical rule of equidistance may produce an unjust and inequitable result. The Federal Republic insists on the existence of such a result in the present cases. However, as it has been indicated above, such unjust and inequitable result cannot be recognized in the application of the equidistance principle to the delimitation of the present cases.
Incidentally, one of the three Aristotelean justices, justitia distributiva which was referred to on behalf of the Federal Republic, appears to have only very slight association with her cause. Justitia distributiva is to govern the relationship between a corporate body and its members, namely the obligation of a corporation versus its members. If we wish to apply some category of justitia, it would be the justitia commutativa which prevails in the relationships between individual members in a corporate body, because the issue is concerned with justice between individual States in the international community and not an obligation in the international community versus individual States as its members.
In short, the reference by the Federal Republic to natural law or distributive justice as a basis for the principle of just and equitable apportionment does not mean more than asserting the idea: jus est ars boni et aequi.
The Federal Republic puts forth an argument, namely the principle of just and equitable delimitation, as an alternative to the principle of just and equitable apportionment for the purpose of denying the exclusive application of the equidistance principle. It seems to me that the difference between the two alternatives is only nominal in the sense that just and equitable delimitation implies in itself the idea of apportionment. We can see it from the fact that in both cases the factors to enter into consideration to achieve justness and equitableness are identical. Therefore, I venture to say that the above-stated reasons denying the principle of just and equitable apportionment advocated on behalf of the Federal Republic can be mutatis mutandis applied to the principle of just and equitable delimitation.
In this context we must recall that the Judgment has categorically rejected the principle of just and equitable apportionment. However, so far as the Judgment recognizes the factors to be considered which were put forth by the Federal Republic under the said principle, there is no substantial difference from recognizing that principle itself. The principle of just and equitable delimitation does not mean more than the repetition of the idea of law.
Next the same can be said concerning the Federal Republic's reference to Article 38, paragraph 1 (c), as a basis for the principle of just and equitable apportionment in the sense that this principle being vague and abstract cannot offer any criterion for the decision of the present cases.
The character of 'general principles of law' is more notably to be *195 recognized in the principle of equidistance than in the alleged principle of just and equitable apportionment. I consider that the legislative process of the Geneva Convention and, parallel with it, the formation of customary international law on the matter of the equidistance principle indicate the existence of a principle or method of a technical, therefore universal character on this matter as a common denominator for conventional law and customary law.
My conclusion is that the application of the principle of equidistance is not overruled by the principle of just and equitable apportionment or delimitation. The reference of the Federal Republic to natural law doctrine or the general principles of law is out of place.

***

For the reasons indicated above, my conclusion is as follows:
1. The first principle of international law to be applied to the delimitation as between the Parties of the areas of the continental shelf in the North Sea is that of obligation to enter into negotiations with a view to arriving at an agreement as I stated above. Accordingly, I agree on this point with the view of the Court, which is incontrovertible. This conclusion cannot be denied by the fact that the presentation of the two Special Agreements was preceded by detailed negotiations between the Governments of the States Parties. The repeated effort to arrive at agreement by effective negotiation is not excluded at this stage, but is obligatory.
2. The priority of negotiation and agreement is a principle of a procedural nature. A question arises concerning what kind of substantive principle must prevail in the matter of delimitation of the continental shelf: the equidistance principle or the equitable principle?
I regret that, contrary to the Court's decision, I share the view in favour of the equidistance principle instead of the equitable principle for the reasons indicated above. Particularly, I cannot agree with the Court's view of the application of the latter principle to the present cases by the reason that it amounts to the following three points:
First, the Court recognizes that delimitation by the application of the equidistance principle would produce in the present cases an unjust and inequitable effect detrimental to the Federal Republic of Germany, which is not the case, as stated above.
Secondly, on this hypothesis, the Court admits in favour of the Federal Republic an appeal to higher ideas of law such as justice, equity or equitableness, and reasonableness, which are self-evident but which, owing to their general and abstract character, are unable to furnish any **196* concrete criteria for delimitation in the present cases. Reference to the equitable principle is nothing else but begging the question.
Thirdly, the factors which may be taken into consideration to carry out the equitable principle are of diverse nature and susceptible of different evaluations. Consequently, it appears extremely doubtful whether the negotiations could be expected to achieve a successful result, and more likely that they would engender new complications and chaos.
It may be said that the Court's answer amounts to the suggestion to the Parties that they settle their dispute by negotiations according to ex aequo et bono without any indication as to what are the 'principles and rules of international law', namely juridical principles and rules vested with obligatory power rather than considerations of expedienc -factors or criteria- which are not incorporated in the legal norm and about which the Parties did not request an answer.
It may be said also that the Court seems, by this decision, to be making a legislative consideration on the apportionment of the continental shelf which is not of declaratory but of constitutive nature contrary to the concept of the delimitation and which has been denied by it.
The important matter in connection with the present cases is that the Parties should have a guarantee of being able to terminate the possibly endless repetition of detailed negotiations by the final application of the equidistance principle. Another important matter should be that, the Court by according the equidistance principle the status of a world law would make a contribution to the progressive development of international law.

(Signed) Kotaro TANAKA.

## **197* DISSENTING OPINION OF JUDGE MORELLI

[Translation]
1. The two Special Agreements asked the Court to indicate 'what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them ...'. It is quite clear that the principles and rules that the Court was called upon to establish could only be principles and rules which were binding for each of the two parties to each Special

Agreement vis-a-vis the other party. It follows that the principles and rules which had to be the subject of the finding requested of the Court were the principles and rules of general international law and not the principles and rules contained in the Geneva Convention on the Continental Shelf of 29 April 1958 (and in particular in Article 6 thereof), which Convention, not having been ratified by the Federal Republic, was not as such binding upon it.

On this point I entirely share the opinion of the Court. Unlike the Court, however, I think that in order to find the principles and rules of general international law concerning the delimitation of the continental shelf it might be useful, whenever the circumstances so require, to take account of the Convention as a very important evidential factor with regard to general international law, because the purpose of the Convention is specifically, at any rate in principle, to codify general international law and because this purpose has been, within certain limits, effectively realized.

In connection with the Convention it may be observed that it was signed by the Federal Republic. This means that the Federal Republic participated in a technical operation which, to the extent of the Convention's avowed purpose of codification, consisted in the establishment of general international law. By its signature the Federal Republic expressed an opinion which, within the limits indicated above, may be qualified as an opinio juris. But it was a mere opinion and not a statement of will, which could only be expressed by ratification. For it is only by ratification that the States signatories to a Convention express their will either to accept new rules or, in the case of a codification convention, to recognize pre-existing rules as binding.

The statement that the purpose of the Geneva Convention was, at least in principle, to codify general international law is not contradicted, in my view and contrary to the opinion of the Court, by the fact that *198 Article 12 of the Convention recognizes the possibility of reservations (including reservations to Article 6). For the power to make reservations is entirely compatible with the codification character of a convention or of a particular rule contained in a convention. Naturally the power to make reservations affects only the contractual obligation flowing from the convention; that obligation, that is to say the obligation vis-a-vis the other contracting parties to consider the rule in question as a customary rule, is excluded in the case of the State making the reservation. In this connection, sight must not be lost of the fact that the ambit of any codification is necessarily subjectively limited: i.e., limited to the States parties to the codifying convention. It is quite conceivable for a particular provision of the convention, through the effect of reservations, to be affected by a further limitation, in the sense that the obligation to accept the codification is, in relation to that provision, excluded for some of the parties, i.e., for those States which formulate the reservation. This circumstance in no way constitutes an obstacle to considering the provision open to reservation as a codification of general international law.

It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified. The inadmissibility of the reservation is not to be deduced from this, seeing that the reservation is intended to operate solely in the contractual field, i.e., in relation to the obligation, arising out of the convention, to recognize the rule in question. For this same reason, no importance can be attached to the fact that those States which do not ratify the convention, and which consequently remain completely outside the contractual bond, have no possibility of formulating a reservation.

Having clarified my point of view so far as concerns the value to be ascribed to the Geneva Convention as evidence of general international law, I shall now consider matters from the point of view of the latter, i.e., from the same point of view as that adopted in the Judgment of the Court. I shall mention the Geneva Convention only in order to note in Article 6 it is, in substance and within certain limits, in conformity with the rules of general international law with regard to the delimitation of the continental shelf.

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2. I think it convenient to start from a point which is generally recognized, and which is not disputed by any of the Parties, namely the existence of certain rights the subject-matter of which is the continental shelf. It is not necessary, for the purposes of the present cases, to determine the nature, the content and the limits of those rights, which Article 2 *199 of the Geneva Convention (which Article reflects, it would seem, customary international law) qualifies as 'sovereign rights [over the continental shelf] for the purpose of exploring it and exploiting its natural resources'.

The rights in question belong to the various States considered individually. The continental shelf cannot be conceived of, in the same way as can the high seas, as something common to all States. It is necessary in the first place to rule out any idea of a community participated in by all States and having as its object the continental shelf in general.

But the idea of a community must also be excluded with reference to any given areas of the continental shelf, as a community limited to certain States alone, those which have a given relationship with the area in question. This is of course subject to the possible effect of an agreement whereby two or more States might decide to make their respective areas of the continental shelf common as between themselves.

Apart from this hypothetical case, which is perfectly conceivable, there is no community between two or more States, the object of which is a given area of the continental shelf. Without doubt a situation can exist which gives rise to a problem of delimitation, namely the problem of ascertaining how a certain area of the continental shelf is already apportioned among two or more States. This operation of delimitation has nothing to do with the sharing out, among two or more States, of something common to those States. In particular it must be denied that the North Sea continental shelf, despite its geological unity, constitutes, or constituted, something common to all the coastal States. It is quite obvious that to affirm the existence of a community in this connection would impeach the legitimacy of the bilateral delimitations, on an equidistance basis, carried out not merely between Denmark and the Netherlands, but also between the United Kingdom and the Netherlands, between the United Kingdom and Denmark, between the United Kingdom and Norway, and between Denmark and Norway. It should also be observed, with reference to these last two delimitations, that the parties did not confine themselves to applying the equidistance criterion, but did something more than that. By the application of the equidistance criterion in relation to the coastlines of the contracting States, leaving out of account the geological feature of the 'Norwegian Trough', the effect of which is that the continental shelf of Norway would, from the geological point of view, be made up of a very narrow strip along the Norwegian coast, what was in substance finally effected was a transfer of certain areas of the continental shelf in favour of Norway. It is only by rejecting the idea of something held in common that those areas, having regard to the said geological feature, could be considered as appertaining to the other two contracting States, to the United Kingdom and Denmark respectively.

If it is to be excluded that the North Sea continental shelf taken as a *200 whole constitutes or constituted something held in common, such a regime must, a fortiori, be excluded in respect of the south-eastern sector of the North Sea (the sector bounded by the equidistance lines between Norway and Denmark, and between the United Kingdom and the continent). Even supposing an initial community to have existed among all the coastal States of the North Sea in respect of the continental shelf of that Sea, it is not clear how such a community could have been dissolved merely in part, to give place to an objectively and subjectively narrower community; and all this as a result, not of a collective agreement between all the States participating in the community, but rather of a series of bilateral agreements as between certain of those States, excluding the Federal Republic.

3. Once the existence of a rule of general international law which confers certain rights over the continental shelf on various States considered individually is admitted, the necessity must be recognized for such a rule to determine the subject-matter of the rights which it confers. This means, seeing that those rights are conferred on the

different States individually, that the rule in question must necessarily indicate the criterion upon the basis of which the continental shelf is divided between the different States.

It is quite possible to speak of a 'rule' concerning the apportionment of the continental shelf; but sight must not be lost of the fact that it is not an independent rule but rather an integral part of the same rule which confers upon different States rights over the continental shelf. It follows that failure to indicate the criterion according to which the continental shelf is apportioned would not constitute a true lacuna. A lacuna proper consists in the absence of any legal rule governing a given relationship. In the matter with which we are concerned, on the other hand, a legal rule is admitted to exist: that rule is precisely the one which confers upon different States, considered individually, certain rights over the continental shelf. Now if that rule did not indicate the criterion for apportionment, it would be an incomplete rule. But, unlike other incomplete rules which no doubt exist in the international legal system, this rule is one the incomplete nature of which would have a most particular importance, because it is the determination of the very subject-matter of the rights conferred by the rule that would be omitted. Such an omission would totally destroy the rule.

However this may be, I am of the view that a criterion for apportionment is really provided by the law; as will be seen, it is a criterion which it is possible to deduce from the very rule which confers on different States certain rights over the continental shelf. The rule, or, more correctly, the criterion for apportionment, can only be a rule or criterion which operates automatically, so as to make it possible to determine, upon the basis of such criterion, the legal situation existing at any given moment. This requirement could not be satisfied by the rule which the Court declares as the only rule governing the matter, a **201* rule that would oblige the States concerned to negotiate an agreement in order to delimit the continental shelf between themselves. Such a rule, for so long as the agreement which it contemplates has not been concluded, would allow a situation of uncertainty to persist with regard to the apportionment of the continental shelf.

It must be pointed out in this connection that it would not be what might be termed a subjective uncertainty, an uncertainty inherent in almost all disputes; an uncertainty that can retroactively be dispelled by a judgment delivered on the basis of the law in force. It would, on the contrary, be an objective uncertainty, which it would not be possible to dispel upon the basis of the law in force because such law would not contain, in this connection, any immediately applicable material rule. For that it would be necessary to wait until a special rule was created by agreement between the States concerned. In the absence of such an agreement, no State could treat the continental shelf area in question as pertaining to itself.

4. The title upon which the right of a State over a certain area of the continental shelf is based is the contiguity (or adjacency) of that area to the territory of the State concerned. Since, as is also stated by Article 1 of the Geneva Convention, the continental shelf is made up of the seabed and subsoil of the submarine areas outside the area of the territorial sea, and since, furthermore, the territory of a State comprises not merely the dry-land territory but also the territorial sea, to speak of the contiguity of an area of the continental shelf to the territory of a given State signifies the contiguity of that area to the outer limit of the State's territorial sea. This clarification is important, not only, as will be seen, for the purposes of delimitation, but also for the case of the existence of a 'trough', contained, for its whole breadth, within the bounds of the territorial sea of a State. Such 'trough' does not prevent the continental shelf lying beyond the 'trough' from being considered as adjacent to the State's territory.

In this connection there may be noted a certain illogicality in the wording of the Geneva Convention. Article 1 refers to 'submarine areas adjacent to the coast but outside the area of the territorial sea'; the same Article goes on to refer to 'similar submarine areas adjacent to the coasts of islands'. It is not clear how areas which are outside the territorial sea can properly be qualified as adjacent to the coast. Probably this is an inexact form of words employed to indicate, in fact, adjacency, not to the coast, but rather to the outer limit of the territorial sea. More correctly, Article 6 refers to adjacency

'to the territories' of two or more States.

5. The notion of contiguity points to a contact by the continental shelf with the territory of a State: more precisely, a contact with the line which marks the boundary of the territory of the State toward the high *202 seas, a line which is identical with the outer limit of the territorial sea. It is from that line that the continental shelf appertaining to the State commences.

The criterion for determining the extent of the continental shelf which, starting from that line, appertains to a State, by comparison with the continental shelves appertaining to other States, can only be inferred indirectly from the concept of contiguity itself. This concept postulates the coincidence of the line of the boundary of the territory of a State toward the high seas, and the line from which the continental shelf of the State commences. Consequently, the criterion of contiguity cannot, in itself, be used to determine points which do not fall on the said line, being situate beyond it. Nevertheless it is possible, for the determination of these, to infer from the criterion of contiguity another criterion: that of proximity. On the basis of this criterion, there must be considered as appertaining to a given State all points on the continental shelf which, although not situated on the line delimiting the territory of the State, are nearer to that line than to the line delimiting the territory of any other State. In my view, there is nothing arbitrary about this deduction; it is, on the contrary, a wholly logical one.

From the criterion of proximity, the passage is almost automatic to that of equidistance, so that it could be said that the two criteria merge. The criterion of proximity determines points constituting a surface. But there are some points with respect to which the criterion of proximity does not operate, and that because these points are not nearer to the territory of one State than to the territory of another State, because they are equidistant from the territories of the two States. These points form the equidistance line, the line which constitutes the boundary between the continental shelves of the two States. Points situate on one side of this line, and consequently nearer to the territory of one of the two States, are part of the continental shelf of that State; for the same reason, points situate on the other side of the line appertain to the continental shelf of the other State.

6. As will be observed, I consider the rule of general international law prescribing the equidistance criterion for the delimitation of the continental shelves of various States to be a necessary consequence of the apportionment effected by general international law on the basis of contiguity. I am therefore of the opinion that it is not necessary to ascertain if a specific custom has come into existence in this connection. State practice in this field is relevant not as a constitutive element of a custom which creates a rule, but rather as a confirmation of such rule. Confirmation of the rule is also provided, within certain limits, by the provisions of the Geneva Convention.

So far as State practice is concerned, it should be observed that delimitations effected by different States unilaterally have a greater importance than bilateral acts of delimitation. The latter, whether they conform to the rule or diverge from it, may simply amount to a manifestation *203 of contractual autonomy in a field in which the contracting States have freedom of disposition. Thus their evidentiary value for or against the rule is very limited.

7. The criterion of equidistance is employed in Article 6 of the Geneva Convention. The first paragraph of that Article refers to the case of two or more States whose coasts are opposite each other, in which case the equidistance line is more specifically characterized as a median line. Paragraph 2 follows the same equidistance criterion for the case of two adjacent States. Nothing is said as to the relationship between two States which, like Denmark and the Netherlands, are not adjacent, and which cannot be considered to be opposite either.

It should be observed in this connection that the equidistance criterion is in itself capable of being used in all conceivable situations, even in the relationship between two States in the situation of Denmark and the Netherlands. Consequently, it is this general employment of the criterion which, taking into account the reasons which justify it, should be considered as contemplated by the rule of general international law which

refers to that criterion.
So far as Article 6 of the Geneva Convention is concerned, interpretation of that Article can, in my opinion, only lead to a similar conclusion. In other words, it must be considered that Article 6 of the Convention too uses the equidistance criterion in a general way, even though, according to its terms, it does not expressly indicate anything more than two possible applications of that criterion.
With reference to the distinction between the case of opposite States and the case of adjacent States, which is often made use of, and which is the inspiration of Article 6 of the Convention, it should be added that this is a distinction which is very much a relative one. There are many cases, actual or simply imaginable, with reference to which it would be difficult to say whether they were cases of opposite States or adjacent States.
8. Article 6 of the Convention, both in paragraph 1 and paragraph 2, refers, in order to determine equidistance, to 'the nearest points of the baselines from which the breadth of the territorial sea ... is measured'. It appears from the travaux preparatoires of the Conference that other proposals had been made in this connection, consisting of reference either to the low-water mark or to the high-water mark. These two methods, as well as that finally adopted by the Convention, consisting of referring to the baselines, are no more than different methods of determining what constitutes the coast of a State. However, I consider that, for the delimitation of the continental shelf, it is not correct to relate equidistance to the coast, whether this is determined in the way indicated in Article 6, or in some other way. (Of course, quite a different problem is that of the delimitation, between two States, of the territorial sea itself.) Consequently I consider that on this particular *204 point the Convention has diverged from general international law.
For, according to general international law, since the territory of a State extends up to the outer limit of its territorial sea, which is the line from which begins the continental shelf appertaining to that State, it is necessarily to that line, as well as to the outer limit of the territorial sea of another State, that reference must be made to determine the equidistance line which constitutes the boundary between their respective continental shelves.
It is quite possible that the application of this method might lead to a result different from that produced by the method adopted in Article 6 of the Geneva Convention, which consists in referring to the baselines from which the breadth of the territorial sea is measured. The difference in the results obtained from the two methods is quite obvious, for example, where there are two States lying opposite each other, in relation to which the breadth of the territorial sea is determined in a different way; this is so even where the coastlines of the two States are perfectly straight. But, even apart from the way in which the breadth of the respective territorial seas of the two States concerned is determined, a difference between the results of the two methods may well be the consequence of the configuration of the coastlines of the two States.
So far as concerns the relationship of Denmark and the Federal Republic and of the Federal Republic and the Netherlands, it is certain that the application of the method I consider correct gives a result different from that to which reference of equidistance to baselines leads, although that difference is very slight. In point of fact, even if the possible consequences which the configuration of the coastlines of the three States might have according as to one or other of the two methods of delimitation is used be disregarded and it be consequently supposed that the triangle resulting from the boundary line between Denmark and the Federal Republic and the boundary line between the Federal Republic and the Netherlands has always the same shape, there is no doubt that, if the method which I consider correct be employed, such a triangle would be situated further towards the centre of the North Sea, which would result in a small advantage for the Federal Republic.
9. The equidistance rule does no more than indicate the way in which the continental shelf is apportioned among different States; just as the apportionment occurs automatically, so the equidistance rule, an expression, as has been seen, of that apportionment, also operates automatically. There appertains to each State ipso jure a certain area of the continental shelf, as determined by virtue of the equidistance

criterion.
In the first place, it is not necessary, in order that a State may become the owner of rights over a certain area of the continental shelf, for any *205 legal act to be performed for this purpose by the State concerned.

 There is a difference here from what happens in the case of the territorial sea, in respect of which there is attributed to each State the legal power to determine its breadth, within certain limits, by means of a unilateral legal act. The Convention on the Continental Shelf, in Article 2, paragraph 3, states indeed: 'The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.' It follows that it is incorrect to speak, as Denmark and the Netherlands have done on several occasions, of validity and opposability erga omnes of a delimitation effected by a State unilaterally, in accordance with the equidistance criterion. Unilateral delimitation is not a legal act upon which the rights of the State over the continental shelf depend, and of which the validity or invalidity might be open to argument. Unilateral delimitation is simply a manifestation of State conduct, to be considered as legitimate or otherwise according to whether it is or is not in conformity with the apportionment of the continental shelf automatically effected by international law.
10. Nor is it necessary, for the equidistance rule to be able to operate, that an agreement be concluded on the question by the States concerned. An agreement in conformity with the equidistance criterion does no more than record a situation which has already arisen automatically; thus, such an agreement has only a purely declaratory character. But inasmuch as it is a matter of rights of which States can dispose freely, it is quite possible for an agreement between the States concerned to diverge from the equidistance criterion. In this case, the agreement has a constitutive character, because it modifies the existing situation, as it results from the automatic functioning of the equidistance rule.
None of this is contradicted, substantially, by the wording of Article 6 of the Geneva Convention. It is of course true that that Article, in paragraphs 1 and 2, mentions agreement first, and thereafter, in case of 'absence of agreement', the equidistance criterion. But this does not by any means signify that logical and chronological priority is attributed to agreement, in the sense that only in the absence of agreement can the equidistance rule operate; this would confer on that rule the character of an alternative rule. If the provisions of Article 6 were understood in this sense, several questions could be raised, to which it would not be easy to reply. At what moment would it be necessary to establish that the condition of absence of agreement, to which the functioning of the equidistance rule is subordinated, is fulfilled? What is the legal situation either before that moment or before the conclusion of an agreement if any? Is it community? What would be the extent of the continental shelf subject to such a community?
In fact, in referring to agreement, Article 6 simply means that the States concerned are always free to delimit the continental shelf, by means of an agreement, in the way they think most appropriate, even so as to modify, if appropriate, the existing situation resulting from the *206 application of the equidistance rule. It is to this rule that there must be attributed, even under Article 6, logical and chronological priority.
When it mentions agreement first, Article 6 adopts the point of view of a court, or of any person or body who proposes to determine the existing legal situation. In order to do this, it is necessary in the first place to ascertain whether an agreement has been concluded by the States concerned. If this is the case, there is nothing to do but hold such agreement to be decisive, because the situation prior to the agreement, and resulting from the equidistance criterion, is no longer in force. It is only in the absence of agreement that the equidistance rule must be applied, by finding for the apportionment effected by that rule, which has not been modified by any agreement.

11. The equidistance rule, as a rule of general international law codified in Article 6 of the Geneva Convention, is, as has been said, a rule which operates automatically. This characteristic of the rule does not prevent the possibility being imagined, from an abstract point of view, of its being limited by one or more exceptions. But an exception-rule properly so called would not be imaginable except as a rule also of an automatic character. Such would be a rule which, by reference to certain possible circumstances, precisely defined by the rule itself (for example, the existence of an island having certain characteristics as regards its dimensions and position, etc.), declared that in such a case the apportionment is effected (still automatically) according to a criterion other than that of equidistance, which criterion would also have to be specified by the rule.
But no such exception-rule exists in general international law. Nor can such a rule be considered to be contained in Article 6 of the Convention, which, both in paragraph 1 and paragraph 2, declares the equidistance criterion to be applicable 'unless another boundary line is justified by special circumstances'. With regard to this rule of the Convention, all the Parties to the present cases have always referred to it as an 'exception' to the equidistance rule; the argument has been concentrated on what might be called a quantitative aspect of the matter, namely the wider or narrower scope of the so-called 'exception'.
In my opinion, there is no question at all of a true exception: for the simple reason that the special circumstances rule, as it is found in Article 6 of the Convention, is not capable of operating automatically. In the first place, it does not specify in any way what are the circumstances which would prevent the equidistance rule from operating. Secondly, nothing is said as to the effect which the circumstances contemplated should bring about, because the rule is no indication whatsoever of what delimitation should replace that resulting from the equidistance criterion. The determination of both these issues could only be made by agreement between the States concerned, or by an arbitral award. So long as there *207 is neither agreement nor award the situation remains that which results from the equidistance criterion.
It must be concluded on this issue that the equidistance rule is an absolute rule, in the sense that it is not limited by any exception-rule properly so called. Even the case of the existence of an island or promontory which has an abnormal influence on the equidistance line, does not by any means constitute an exception, because such a circumstance does not in itself prevent the equidistance rule from operating.
In my opinion the Court ought first to have stated the equidistance rule as a rule of general international law of an absolute nature (i.e., not limited by any exception), adding that that rule was applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them. It follows (but this is a consequence which it was not necessary to state expressly) that the apportionment now existing is precisely that which results from equidistance.

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12. The equidistance rule is a necessary logical consequence of the apportionment of the continental shelf effected by international law by virtue of contiguity. Any consideration of equity falls outside the rule as such. It cannot be said that its purpose is to effect an equitable apportionment, so that it will only operate in cases where its application leads to an equitable result. Were it so it would be necessary to exclude entirely the equidistance rule as a rule of law and to regard the rule governing the apportionment of the continental shelf as something quite different. Such rule would be the rule of equitable sharing out. Equidistance would be but one possible method of arriving at the result of equitable sharing out aimed at by the legal rule.
But the purported rule of equitable sharing out cannot be accepted. Such a rule, as a rule the content of which is to refer the matter to equity, could not automatically effect the sharing out of the continental shelf among the various States. Such sharing out could only be the consequence of an agreement between the States concerned or else of an award which, being based upon equity, would not be a declaratory but a constitutive

award. Until the moment when the agreement was reached or the award handed down there would be no apportionment. The situation would be one of community; a hardly conceivable situation which would be in contrast with the attitude of international law on this subject.

13. All that I have just said does not mean that international law does not concern itself at all with the equitable nature of the apportionment; I am merely saying that considerations of equity cannot act so as to prevent the operation, at any rate initially, of the equidistance rule. The following is, in my view, the manner in which international law has recourse, in this field, to equity.

*208 In my opinion, the equidistance rule (an absolute rule, operating in all cases) is accompanied by another rule, which is not an exception-rule because it has an importance of its own. This latter rule envisages circumstances which exercise a certain influence on the application of the criterion of equidistance, in the sense that such application produces an inequitable result. The purpose of this rule is to correct such a result. It must be pointed out here and now that in order for it to be possible for this rule to operate it is not sufficient that just any divergence be noticed between the result of applying the equidistance rule and an absolutely equitable apportionment. On the contrary, there must be a particularly serious discrepancy.

What is the content of the rule in question? In what way, in other words, does the rule seek to attain its end?

In my opinion, the rule merely obliges the States concerned, in cases where the circumstances envisaged occur, to negotiate among themselves an agreement to revise the existing situation. In other words, the agreement modifying the existing situation, an agreement which can always be freely concluded, becomes, in the circumstances envisaged, a compulsory act. It follows that until such time as a revision agreement is concluded (or, failing agreement, an award is handed down on this subject) the situation resulting from the application of the criterion of equidistance must be considered as the situation in force.

I consider that it is the rule of general international law to which I have just referred which underlies Article 6 of the Geneva Convention when it provides that the equidistance line shall apply 'unless another boundary line is justified by special circumstances'. Seeing that the special circumstances rule can only be brought into operation with the agreement of the States concerned, it is precisely an agreement which the rule envisages as the subject-matter of an obligation which it lays upon the States concerned. Here too, it is a question of an agreement for the revision of the situation resulting from the automatic application of the equidistance rule, which, for the Convention also, constitutes the primary rule.

14. It is not necessary to determine what circumstances can give rise to a seriously inequitable application of the criterion of equidistance and which for that reason may, by virtue of the rule to which I have just referred, entitle a State to claim that the boundaries of its continental shelf should be modified. What matters is not the circumstances as such but rather the inequitable result to which they lead.

They may be geographical circumstances and also circumstances of a different kind.

Among geographical circumstances there may be recalled the case, frequently mentioned, of a promontory or islet situated off the coast of a State. It must further be recognized that the configuration of the coastline of a State in relation to the coastline of another adjacent State may also entail an inequitable application of the criterion of equidistance. And it must be added that a circumstance having the same consequence *209 may consist in the configuration of the coastline of one State in relation to the coastlines of two other adjacent States and in the combined effect of the application of the criterion of equidistance to the delimitation of the continental shelf of the first State in relation to the continental shelves of each of the other two States. This is precisely the situation which occurs in the present cases.

15. I would point out in this connection that there is no question now of effecting an apportionment of the continental shelf among the Parties to these cases ex novo and that it is not a question of how the boundary lines must be drawn in order to arrive at such an

apportionment: namely whether the two boundary lines (German-Danish and German-Netherlands) must be drawn conjointly or else independently of each other. It is not at all a question of drawing lines.

The problem supposes a certain apportionment already effected by the automatic operation of the equidistance rule, the equitable or inequitable character of which apportionment has to be appraised. This apportionment, characterized by equidistance lines delimiting on each side the continental shelf of the Federal Republic, is a consequence of the real geographical situation, a situation for which it is not possible to substitute purely hypothetical situations. Admittedly, if one were to start from the hypothesis that the Federal Republic constituted a single State with Denmark, the result of applying the criterion of equidistance for drawing the boundary line between that hypothetical State and the continental shelf belonging to the Netherlands might be recognized as equitable. The same thing would have to be said with regard to the boundary line between Denmark and a hypothetical State comprising the present Federal Republic and the present Netherlands.

Matters are otherwise if one considers (as must be done) the real geographical situation and the results to which, in relation to that geographical situation, the application of the criterion of equidistance leads. I am still referring to the results because it is those results that must be appraised. It is not a matter of judging the equitable or inequitable character either of a boundary line or of two boundary lines, whether considered conjointly or separately. The result can only take concrete shape, in the present case, as the combined effect of the criterion of equidistance for determining both boundary lines together.

In my opinion, the gravely inequitable nature of the result to which the application of the criterion of equidistance in the present case leads must be recognized, this inequitable character consisting in the remarkable disproportion between the area of the continental shelves pertaining to each of the three States on the one hand and the length of their respective coastlines on the other; and this is so even if for the coastline of the Federal Republic there be substituted another shorter line, such as the line Borkum-Sylt.

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*210* 16. Having indicated the solution that must be given, in my opinion, to the problem of the substantive law, I shall now turn to certain problems of a procedural nature which arise in these cases and which concern the powers of the Court.

There is first of all a problem which is connected with the substantive point which I have just examined. It is the problem, as expressed in a question put to the Parties in the course of the oral proceedings, of whether 'the two Special Agreements entitle the Court to enter into an examination of the combined effect of the two boundary lines proclaimed by Denmark and the Netherlands'. To this question Denmark and the Netherlands returned a negative answer.

Now it is quite true that the two disputes to which the two Special Agreements refer are quite distinct. But they are two disputes which have a certain connection with each other, because the claim advanced by the Federal Republic as against Denmark, with a view to the delimitation of the continental shelf as between the two States in a certain way, is based upon the inequitable nature of the consequences to which the criterion of equidistance would give rise if conjointly applied both to the delimitation as between the Federal Republic and Denmark and to the delimitation as between the Federal Republic and the Netherlands. The claim advanced by the Federal Republic as against the Netherlands presents similar features.

It is perfectly possible to envisage, as did Counsel for the two Kingdoms, a situation in which the Court were seised of a request for the resolution (in the real sense) of only one of the two disputes, for example, that between the Federal Republic and Denmark. Now if in such a situation the Federal Republic asked the Court to determine not only its boundary with Denmark but also its boundary with the Netherlands, there can be no doubt that it would not be open to the Court to give a decision in the absence of the

Netherlands, whose rights would be at issue. In such event, it would not be inapposite to cite the Judgment of the Court in the Monetary Gold case. If on the contrary the Federal Republic confined itself, in the same situation, to a request in respect of delimitation vis-a-vis Denmark only, I do not see that there would be any obstacle to deciding the dispute, even in the event that, for the purposes of its decision, the Court had also to take into consideration the consequences of the criterion of equidistance on the delimitation between the Federal Republic and the Netherlands.
But these are hypothetical situations which have nothing to do with the present proceedings.
In the present proceedings the Court was confronted with two Special Agreements, each of which requested the Court not to settle the dispute to which it related but rather to determine the principles and the rules of international law applicable to the delimitation of the continental shelf as between the parties to each Special Agreement (respectively the Federal Republic and Denmark and the Federal Republic and the *211* Netherlands). It is altogether true that, despite the joinder of the two cases, each Special Agreement had to be considered separately. But it was quite possible for the Court, on the basis of one of the Special Agreements and leaving the other out of account (and even if the other had not existed at all), to find as to the principles and rules applicable to the delimitation of the continental shelf as between the parties to the Special Agreement under consideration; and that remains true even if the Court had thereby been led to lay down a rule requiring account to be taken of the combined effect of the equidistance line as between the parties to the said Special Agreement, and of the equidistance line between the Federal Republic and the State which was a party to the other Special Agreement. The problem of whether such a rule exists or not is one which concerns the substance, and I have already considered it, answering it in the affirmative.
17. Having regard to the terms of the Special Agreements, which speak of principles and rules applicable to 'delimitation', etc., the problem arises of whether the Court had the power to lay down a rule which, like the one which I indicated, really concerns not delimitation qua statement of the existing situation but rather a modification of the existing situation.
In reality, from the terminological point of view, a distinction must be made between delimitation which consists in determining the existing situation and has merely declaratory effects, and apportionment, which has effects of a constitutive nature.
One may speak of apportionment, in the first place, in order to denote the result of the automatic functioning of certain rules of law. The placing on record of such a result constitutes the delimitation. This shows that delimitation implies the application of the rules concerning apportionment. It follows that the task with which the Court is entrusted by the Special Agreements, the determination of the principles and rules applicable to the delimitation, consists, in the first place and without the slightest doubt, of the task of the determination of the rules and principles by virtue of which the continental shelf is automatically apportioned as between the various States.
The term apportionment is also used to denote the sharing-out of something held in common. And one may also speak of apportionment to indicate a modification of the apportionment as it eventuates at a given time.
Consequently, if the term 'delimitation' employed in the Special Agreements is understood in its proper meaning, the Court's task would have to be considered as confined to determining the rules and principles which effect, automatically, the apportionment of the continental shelf, that apportionment being indeed presupposed by the delimitation. It would not have been open to the Court to indicate either the rules, if any, concerning the apportionment of the continental shelf considered hypothetically as something held in common, or the rules which, like *212* the one which I declared to exist, relate to a modification of the apportionment in force. Nor would it have been open to the Court to indicate the rule which it has determined, which also relates to apportionment.
The Special Agreements must nevertheless be interpreted with due regard to the characteristics of the disputes to which they relate. Now the two disputes are

characterized by the Federal Republic's claim to a certain area of the continental shelf lying on the far side of the equidistance lines. The Federal Republic has never asserted, in support of this claim, that there is a right which it enjoys by virtue of the automatic functioning of a legal rule. Rather than a delimitation on the basis of an apportionment already effected, it is an apportionment which ought to be effected to which the Federal Republic has always laid claim. Since the disputes do not concern solely delimitation qua recording of the existing situation, it is necessary to interpret the Special Agreements accordingly, and to hold that, despite the term 'delimitation' which they employ, the Special Agreements are intended to authorize the Court to determine even the rules, if any, relating to apportionment, more particularly the rule relating to possible modification of the existing apportionment.

18. Given that the task entrusted to the Court by the Special Agreements is to determine certain principles and certain rules of international law, it might be thought that the Court ought to have confined itself to stating the rule which, in my opinion, makes revision obligatory in the event that certain circumstances occur, without finding as to whether those circumstances actually exist. It would be for the Parties, in the agreement provided for in paragraph 2 of Article 1 of the Special Agreements, to ascertain whether circumstances rendering revision obligatory actually exist and, if such circumstances are acknowledged to exist, to draw the conclusions therefrom.

It must nevertheless be pointed out that the Special Agreements request the Court to indicate the principles and the rules which are ' pplicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them'. By referring to certain principles and certain rules as 'applicable' to the delimitation of the continental shelf as between the Parties, the Special Agreements empower the Court, in my opinion, not only to state the rules and principles, but also to determine what actually is the factual situation and to declare, on the basis of what it finds, whether the rules and principles it has determined ought to be applied. Had the Court come to an affirmative conclusion on this factual point, it would still have been for the Parties, in their agreement, to work out the consequences of that finding.

As regards, in particular, the rule I have stated to exist, which renders revision obligatory, it was for the Court to determine whether the circumstances which that rule contemplates had actually occurred in the present context, more particularly with regard to the gravely inequitable **213* nature of the prevailing apportionment. In the event that the Court had arrived at an affirmative conclusion on that point (as I think it ought to have done), the Court would thereby have found that the rule ought to be applied; a finding equivalent to declaring the Parties to be under an obligation to negotiate an agreement for revision.

19. The rule which renders it obligatory under certain circumstances to negotiate an agreement for the revision of the existing situation, as it results from application of the equidistance criterion, is a legal rule the content of which is to refer the matter to equity, from two different aspects. In the first place, it is on the inequitable character of the prevailing apportionment that the application of the rule depends. In the second place, the rule does not directly indicate the criteria in accordance with which the revision ought to be effected, because it refers the matter to equity for that purpose also. Nevertheless, despite the fact that it refers the matter to equity, the rule does not cease to be in itself a rule of law. Hence the Court's power to lay it down, in conformity with the terms of the Special Agreements, which request the Court in terms to indicate principles and rules of international law.

Furthermore, given that the Court's task was not to settle disputes but simply to state principles and rules of law, it would be beside the point to enquire whether it was a judgment on the basis of law or a judgment on the basis of equity that the Court was called upon to render. It was, in reality, a judgment which could be given neither on the basis of equity nor on the basis of the law, for the very simple reason that the judgment was, not to apply the law, but, on the contrary, to declare it.

It is nevertheless necessary to pose a rather difficult question, the answer to which depends on the nature of the renvoi to equity by the legal rule. It is necessary to ask

whether, after stating the rule which renders negotiation of a revision obligatory in the event that certain circumstances are present, and after finding that those circumstances exist in the present cases, the Court ought also to have indicated the criteria on the basis of which the revision should be carried out.

This question would have to be given an affirmative answer if the criteria of equity could be deemed to be an integral part of the rule of law, in view of the fact that it is to equity that the latter refers the matter. If that is the point of view adopted, it must be held that the Court, in indicating the criteria of equity would have done no more than specify the concrete content of the rule of law it was called upon to determine.

But the premise for such an answer to the question would not be correct. The fact that a rule of law makes a reference to extra-legal criteria by no means signifies that those criteria are embodied in the rule of law. They are criteria which the legal rule makes it obligatory to apply, but which remain outside that legal rule.

It must be concluded that the Court, after stating the rule which makes revision of the existing situation obligatory, ought to have refrained *214 from indicating the criteria of equity in accordance with which such a revision has to be effected. From that standpoint, the powers of the Court in relation to equity were different from the powers which it possessed to find the existence of circumstances rendering revision obligatory. The reason is that, where the last point is concerned, the powers of the Court went beyond a mere finding as to the rule of law; for the Court was, in addition, called upon to determine the factual situation (including the inequitable character of the prevailing apportionment) on which the applicability of the rule to the concrete case depends.

* * *

20. In examining the problem of the substantive law, I arrived at a twofold conclusion. I stated, in the first place, that the apportionment of the continental shelf between different States takes place automatically on the basis of the criterion of equidistance. I added, in the second place, that the equidistance rule is accompanied by another rule which, where the result of applying equidistance is in flagrant conflict with equity, obliges the States concerned to negotiate an agreement between themselves to revise the existing situation. This rule is applicable to the instant situation, because the circumstances which it contemplates are there present.

The Court too lays down in its Judgment a rule requiring an agreement to be negotiated. That rule refers to equity so far as concerns the criteria to which the agreement must conform, in the same way as the rule I have stated to exist refers to equity not only because it is upon the basis thereof that it must be seen whether the circumstances upon which its application depends are present, but also, precisely as in the case of the rule laid down by the Court, for the determination of the criteria to which the agreement it requires to be negotiated must conform.

The fact that the rule laid down in the Judgment likewise refers to equity for the determination of the criteria upon which the agreement must be based ought to have led the Court to state the characteristics of such a renvoi, in order to resolve the question of whether indicating those equitable criteria fell within the task entrusted to the Court in the Special Agreements, which was solely to determine rules of law. I think, for the same reasons as I stated in the preceding paragraph, that the answer that ought to have been given to this question, which the Court has not raised at all, is in the negative.

Between the rule laid down by the Court and the rule I have stated to exist, there are, however, profound differences, which should be stressed. Those differences concern the relationship in which each of the two rules stands towards other rules of law and, in consequence thereof, the very content of the two rules, and, in particular, the role played by the agreement which each of them contemplates.

*215 The rule I have stated to exist is a subsidiary rule, in the sense that it presupposes another rule, which may be termed the primary rule; that rule is the rule of equidistance. Seeing that this latter rule is a rule which functions automatically, the continental shelf is ipso jure apportioned in a certain way. It is in relation to this situation, which is

presupposed in the subsidiary rule, that the latter operates, where appropriate, in the sense of requiring the States concerned to negotiate an agreement to revise it. Once concluded, that agreement merely modifies a situation already regulated by the law in a certain way.

The rule laid down in the Court's Judgment, on the other hand, is the only rule concerning the apportionment of the continental shelf. It is a single rule, even though the Judgment distinguishes in its reasoning a first rule, which requires negotiations to be held, from what is termed the rule of equity, and even though in the operative provisions of the Judgment the Court, after having stated that delimitation is to be effected by agreement, refers to equitable principles, going on to indicate certain criteria which the agreement between the States concerned must or may apply. It is quite clear, in fact, that the reference to equity and the indication of certain criteria are merely a means of defining the contents of the rule requiring negotiation; they are by no means a formulation of independent rules or principles additional to the rule requiring negotiation.

Now the rule laid down by the Court (the only rule on this subject) is not a material rule which directly governs the apportionment of the continental shelf. It is, on the contrary, an instrumental rule, i.e., a rule which contemplates a certain way of creating the material rule. That way consists in agreement between the States concerned. For so long as no agreement has been concluded, there is no material rule and there is no apportionment at all. Hence arises that situation of a legal void to which I have already had occasion to refer; a situation which I consider almost inconceivable and in any event regrettable.

It may be questioned in this connection how the Court's view that delimitation (or, more correctly, apportionment) can only take place by means of agreement is reconcilable with what is stated in paragraphs 19 and 20 of the Judgment. In those paragraphs the Court rejects the doctrine of the just and equitable share for the reason (paragraph 19) that the rights of a State over the continental shelf, at least as regards the area that constitutes a natural prolongation of its land territory under the sea, are inherent rights existing ipso facto and ab initio, for the reason, in other words (paragraph 20), that 'the notion of apportioning an as yet undelimited area considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected'. Despite the difficulty of grasping the exact sense in which the terms 'delimitation' and 'apportionment' are used in the Judgment, it *216 seems that in the paragraphs I have just mentioned the Court recognizes that, independently of any agreement, there are 'areas which already appertain to one or other of the States affected', in other words, that there is an already existing apportionment (properly so called) of the continental shelf among the States affected, to each of which a certain area is automatically assigned.

21. The obligation which arises from the rule stated in the Judgment to constitute what is called the 'first rule', i.e., the obligation to negotiate the delimitation of the continental shelf, is regarded by the Court as being identical with the obligation assumed by the Parties under Article 1, paragraph 2, of the Special Agreements (paragraph 86 of the Judgment). With regard to this assimilation, I would refer to what I shall have to say hereafter. So far as concerns the obligation imposed by the rule laid down in the Judgment, it seems that that obligation is conceived of by the Court as independent of the existence of any dispute; this emerges too from the reference made in the Judgment, in this connection, to the Truman Proclamation. This significance of the principle stated by the Court is a wholly natural one, because the requirement of a delimitation or, more precisely, of an apportionment, the need, in other words, to fill the legal void of which I have just spoken, is a requirement which occurs even apart from the existence of a dispute between the States concerned.

Now the obligation to negotiate an agreement for the apportionment of the continental shelf, according to the Court, is only a special application of a principle which is said to underlie all international relations. There is, it seems, a general obligation to negotiate

which itself too is independent of the existence of a dispute.
In my opinion, it is not at all possible to recognize the existence of any general obligation to negotiate. A State which is asked by another State to enter into negotiations with a view to the conclusion of an agreement for the settlement of certain relations may, without doing anything contrary to law, refuse to do so, unless there be a specific rule requiring negotiation.
As for Article 33 of the Charter, which is mentioned in the Judgment, that Article refers only to the case of a dispute, and more precisely, to a dispute 'the continuance of which is likely to endanger the maintenance of international peace and security'. And, even within those limits, Article 33 by no means creates an absolute obligation to seek, by means of negotiation, a solution to the dispute. The obligation imposed by Article 33 is to seek the solution to a dispute by pacific means; negotiations are but one of the pacific means which the aforesaid Charter provision mentions as capable of being utilized. It is, in other words, an alternative obligation; so that Article 33 would be no means be violated in the perfectly conceivable hypothesis of a State's refusing to negotiate, while seeking a solution to the dispute by other pacific means.
*217 22. It must further be made clear that the negotiations which the Parties are required to hold on the basis of the rule laid down by the Court, as well as on the basis of the rule which I have stated as a subsidiary rule applicable to the instant situation, have nothing to do, as such, either with the negotiations that were unsuccessfully carried on in 1965 and 1966 or with the negotiations envisaged in Article 1, paragraph 2, of the Special Agreements. The 1965 and 1966 negotiations were aimed at settling by agreement the disputes which had arisen between the Parties. The negotiations envisaged in the Special Agreements will have the same aim, that is to say, the conclusion of agreements for the solution of the same disputes, it being understood that such agreements will necessarily have to be based upon the principles and rules laid down by the Court. On the other hand, the obligation to negotiate arising out of the rule stated by the Court is independent of any dispute; it is aimed not at the resolution of a dispute, which, in some case other than that with which the present cases are concerned, might even be non- existent, but rather at the creation ex novo of a special rule concerning the apportionment of the continental shelf.
It is quite true, however, that the discharge by the Parties to the present cases of this latter obligation implies at the same time the discharge of the obligation which they assumed under Article 1, paragraph 2, of the Special Agreements. But this is a mere coincidence, resulting from the fact that the rule determined by the Court (a rule with which the agreements envisaged in the Special Agreements must conform) is not a material rule but an instrumental rule requiring the negotiation of agreements. In the event of the Court's having stated solely a material rule, there would still be an obligation to negotiate, but it would only be the obligation arising out of Article 1, paragraph 2, of the Special Agreements.

(Signed) Gaetano MORELLI.

## *218 DISSENTING OPINION OF JUDGE LACHS

A disagreement has arisen concerning the delimitation of the continental shelf in the North Sea as between the Federal Republic of Germany and the Kingdom of the Netherlands. The two States have succeeded in reaching agreement only on the delimitation of the coastal continental shelf and concluded on 1 December 1964 a convention to this effect. They were, however, unable to agree on the further course of the boundary, negotiations to that end having failed.
A similar situation has arisen between the Kingdom of Denmark and the Federal Republic. They too concluded, on 9 June 1965, a convention concerning the delimitation of the coastal continental shelf. The question of the further boundary line has remained unresolved, as negotiations to this end have proved unsuccessful.
Thus important differences on the subject subsist and in order to solve them the three

States, by two Special Agreements, have requested the Court to decide: 'what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary' determined by the Conventions of 1 December 1964 and 9 June 1965 respectively. They have further declared that they shall delimit the continental shelf 'by agreement in pursuance of the decision requested from the International Court of Justice' (Article 1, paragraph 2, of both Special Agreements).

I

In the light of these requests the Court is obviously faced with a question of law. To that extent, its task is clear. To discharge it two methodological approaches are possible: it can address itself directly to the question of the law 'applicable' 'as between the Parties' or, alternatively, ascertain in general if there exist any 'principles and rules of international law' on the subject, and, in the affirmative, decide as to their applicability in the cases before it.

The latter approach may be justified in cases where the law is of very recent origin and doubts may exist as to the real status of a principle or rule. This is, indeed, the situation in the cases before the Court.

The need for a legal regulation of the exploration and exploitation of **219* the continental shelf has only recently become imperative as a result of the great strides of technology, which have enabled man to reach out for many of the treasures so jealously guarded by nature. Thus the law on the continental shelf is one of the newest chapters of international law.

The point of departure for any analysis of the issues involved is the Geneva Convention of 1958 on the Continental Shelf. The question of its applicability-and in particular of the applicability of its Article 6, paragraph 2, dealing with determination of the boundary of the continental shelf adjacent to the territories of two adjacent States-has dominated the whole proceedings in the present cases; it was raised in the written pleadings and again in the course of the oral proceedings. Thus it seems only logical to deal with this issue first. Moreover, the need to seek solutions outside Article 6, paragraph 2, or outside the Convention as a whole, will arise only if the reply as to their applicability is negative.

The substance and meaning of Article 6, paragraph 2, are determined by the interrelation of its three elements: agreement-equidistance-special circumstances. To consider them in that order:

(a) The paragraph specifies that in the first place it is by agreement, that the boundary is to be determined. This does not mean, however, that it imposes any more far-reaching obligation than the duty to negotiate of which certain other instruments speak and which, as is well-known, constitutes one of the general principles of contemporary international law. Thus this provision may not be construed as imposing an absolute obligation to reach agreement, but rather as emphasizing the obligation to make every possible effort in that direction: the parties concerned are to endeavour to resolve their differences round a conference table.

It is, then, essential that they open negotiations. The substance of the agreement is left to their discretion; they are perfectly free to decide on its basis and constituents. They may agree to apply one of the other two elements of Article 6, or find another basis for determining the boundary. The law on the subject does not impose any restrictions upon them except those that are essential in all negotiations; in other words, all that is required is that the negotiations be conducted in good faith. Hence the parties can move within the general limits imposed by law.

(b) The second element of Article 6, paragraph 2, is that of equidistance. The words 'shall be determined' are used twice in that paragraph: once in relation to the agreement between the parties, and a second time providing for the application of equidistance 'in the absence of agreement'. This latter term obviously refers to two situations: either the failure of negotiations or the fact that none took place. For one can very well imagine that two neighbouring States may not even enter into negotiations; there may be compelling

reasons which prevent both, or *220 one of them, from doing so. Should the boundary in such event remain uncertain, with all the resulting inconveniences, or even risks? There is no juridical basis for such an inference. Equidistance is also applicable if there are no 'special circumstances' justifying another solution.

Not only the text but also the discussion that took place in the International Law Commission should dispel all doubts as to the true bearing of the notion of equidistance. When the Special Rapporteur suggested the addition of the words 'as a general rule', one of the members of the Commission (Lauterpacht) opposed it as 'it was at least arguable that they deprived the rule of its legal character'. He argued that 'No judge or arbitrator could interpret a text so worded, because any party to a dispute could always argue that its case did not fall within the general rule, but formed an exception to it'. It was then that the words 'unless special circumstances should justify ... [another] delimitation' were introduced. They were linked with the deletion of the words 'as a rule'. And the chairman made the point quite clear by stating that the amendment 'stressed the exceptions rather than the rule' (Yearbook of the International Law Commission, 1953, Vol. I, pp. 128, 131, 133). The intention of the drafters is further elucidated in the commentary of the Commission:

'The rule thus proposed is subject to such modifications as may be agreed upon by the parties. Moreover, while ... the rule of equidistance is the general rule, it is subject to modification in cases in which another boundary line is justified by special circumstances.' (Yearbook of the International Law Commission, 1953, Vol. II, P. 216, para. 82.)

The decision taken at the Geneva Conference is based on the conclusions of the International Law Commission. The rejection of the Venezuelan amendment ('the boundary of the continental shelf appertaining to such States shall be determined by agreement between them or by other means recognized by international law') demonstrated the determination of States to accept a clear and definitive rule; no uncertainty was to be allowed on the subject. In no way did it affect the basic concept of what was to become Article 6 of the Convention.

(c) In the logical order I ought now to deal with the third element of Article 6, paragraph 2, namely 'special circumstances'. However, this being an exception to the general rule, I shall dwell on its applicability at a later stage.

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*221 These clarifications seem to go to the essence of the matter. Their purpose, as suggested above, is to elicit the true significance of the notion of equidistance within the framework of Article 6, while placing the latter in its true perspective and establishing its proper relationship to Articles 1 and 2 of the Convention.

For, in cases 'where the same continental shelf is adjacent to the territories of two adjacent States', thus where a boundary problem arises, the exercise of the rights defined in Article 2 is conditioned (if not wholly, certainly in some degree) by the application of Article 6, paragraph 2. One may therefore view it as laying down the rules concerning the implementation of Article 2 in specific circumstances. To this extent it has an inescapable impact on Article 2.

Having analysed what to my mind is the real meaning and scope of the notion of equidistance, I do not propose to dwell on its virtues or advantages. It may suffice to say that it is practical and concrete. It thus qualifies as a rule, and I shall henceforth so term it. It is admitted that no other principle or rule of delimitation partakes of the same facility and convenience of application and certainty of results. At this stage I would merely add that by the entry into force of the Convention on the Continental Shelf the equidistance rule has become part of the treaty law on the subject.

II

Only two States (the Kingdom of Denmark and the Kingdom of the Netherlands) appearing before the Court in the present cases are parties to the Convention. The

Federal Republic, not having ratified it, is not contractually bound by it. In fact no claim in that sense has been advanced.
The question which arises, therefore, is whether the rules expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf have acquired a wider status, so as to be applicable to States not parties to the Convention, in particular whether they were susceptible of becoming and have in fact become part of general international law.
Both these contentions have been advanced, and both have been denied. To substantiate these denials the history of the Article has been invoked. Special stress is laid on the facts that hesitations accompanied the adoption of the equidistance rule, that other possible solutions were discussed and that the equidistance rule was adopted only at a later stage, on the basis of non- legal considerations.
*222 True as these facts may be, they are not conclusive. They constitute but part of the history, above referred to, of how Article 6, paragraph 2, came into being. Doubts and hesitations did exist. But is the same not true of many new rules of law? Even in science, a successful experiment is frequently greeted with suspicion. Some laws of nature, self-evident today, were once viewed as heresy. How much more is this true in the sphere of man-made law, and in particular when a new chapter of law is brought into being?
It is all to the credit of the International Law Commission that it discussed the issues involved in Article 6 at such length before adopting its final text. Meanwhile the comments of governments were invited and received. In fact it took three years (from 1953 to 1956) until that text was finalized and submitted to the General Assembly of the United Nations. It passed through all the stages contemplated by the Statute of the International Law Commission for its work in implementation of Article 13, paragraph 1 (a), of the Charter. At the Geneva Conference itself it was the subject of further discussion-before being finally voted into the Convention.
Even if it be conceded that the Committee of Experts, in which the equidistance rule originated, was guided by considerations of practical convenience and cartography, this can have no effect on its legal validity. There are scores of rules of law in the formation of which non-legal factors have played an important part. Whenever law is confronted with facts of nature or technology, its solutions must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law. This, for example, is how medium filum aquae has been recognized as the boundary rule for nonnavigable rivers, and the rule of the 'talweg' for navigable rivers dividing two States. Geography, likewise, lies at the basis of the rules concerning bays (Article 7, paragraph 2, of the Convention on the Territorial Sea). Many illustrations can be derived from other chapters of international law.
Nor can the insertion of the primary obligation to determine the boundary by agreement cast doubt on the character of the provision. It is true that this general principle of international law is not normally stated. Yet one can find a similar stipulation in the Projet de Convention sur la Navigation des Fleuves Internationaux drafted 90 years ago: 'In the absence of any stipulation to the contrary, the frontier of States separated by a river corresponds to the talweg, i.e., the median line of the channel' [translation by the Registry] (Engelhardt, Du regime conventionnel des fleuves internationaux, Paris, 1879, pp. 228 f.). Reference may *223 also be made to the provisions of Article 12 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.
It is also stated that the faculty of making reservations to Article 6, provided by Article 12, paragraph 1, of the Convention, while not preventing the equidistance rule from becoming general law, creates considerable difficulties in this respect. Here we touch the very essence of the institution of reservations. There can be little doubt that its birth and development have been closely linked with the change in the process of elaboration of multilateral treaties, the transition from the unanimity to the majority rule at international conferences.

This new institution reflected a new historical tendency towards a greater rapprochement and co-operation of States and it was intended to serve this purpose by opening the door to the participation in treaties of the greatest possible number of States. Within this process, reservations were not intended to undermine well-established and existing principles and rules of international law, nor to jeopardize the object of the treaty in question. Thus they could not imply an unlimited right to exclude or vary essential provisions of that treaty. Otherwise, instead of serving international co- operation the new institution would hamper it by reducing the substance of some treaties to mere formality.

Such was, indeed, the view of this Court when it stated that 'the object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them' (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 24).

These considerations apply to all multilateral treaties, the Convention on the Continental Shelf being no exception. Special attention should be drawn to the fact that it reflects elements of codification and progressive development of international law, both closely interwoven.

As for Article 6, paragraph 2, the right to make reservations is determined by the three elements of which it is composed. First: can a reservation be made to the provision that the boundary of the continental shelf 'shall be determined by agreement between' the States concerned? Can any State contract out of the obligation to seek agreement by consent? Obviously not, for, as was indicated earlier, this stipulation should be read as the application ad casum of a general obligation of States.

Can the reservation apply to the remaining part of the paragraph? In view of a special situation a State may claim that in the relationship between rule (equidistance line) and exception (special circumstances) the latter should prevail. It may also be that a State recording a reservation aims at the exclusion of 'special circumstances' and thus states its *224 opposition to any exception from the rule. No better proof can be offered that the possibilities of reservation are limited to these two than the practice of States. Such was, indeed, the object of the reservations made by Venezuela and France on the one hand (a special definition of 'special circumstances' is reflected in the reservation made by Iran). On the other hand the reservation made by Yugoslavia shows the desire to strengthen the rule by excluding any exceptions to it. (But even here the scope of the reservations is not unlimited, as objections to some of them indicate.)

These considerations lead to the conclusion that the very substance of paragraph 2 of Article 6 does not admit of reservations which purport 'to exclude ... the legal effects' of its provisions, but only of those which may 'vary' those legal effects (Draft Articles of the Law of Treaties, Article 2).

The right to make reservations to Article 6 could not have been intended as creating an unlimited freedom of action of the parties to the Convention. This would have opened the door to making it wholly ineffective, with the obvious result of creating a serious loophole in the Convention.

This is confirmed by the practice, covering as it does a period of ten years.

This practice:

(a) constitutes important evidence as to the interpretation of the faculty to make reservations to Article 6;

(b) indicates that the provisions of Article 6 have been generally accepted without reservation by the parties to the Convention.

As to the wider issue, there is evidence that reservations made to important law-making or codifying conventions have not prevented their provisions from being generally accepted as law. Five States made reservations to the Fourth Hague Convention (1907), yet the principles it incorporated have with the passage of time become part of general international law, binding upon all States.

The Geneva Convention on the High Seas is another case in point. It contains no clause expressly permitting reservations, but neither does it follow the example of the Convention on Slavery of 7 September 1956 (Article 9) and prohibit them. In fact, more

reservations have been made to it than to the Continental Shelf Convention. Yet the Geneva Convention on the High Seas is obviously a codifying instrument par excellence: its Preamble speaks of 'desiring to codify the rules' and describes the ensuing provisions as 'generally declaratory of established principles of international law'.
The Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague on 12 April 1930 (League of Nations Treaty Series, Vol. 179, pp. 91-113, No. 4137), was, to use its *225 own words, 'a first attempt at progressive codification' (Preamble, para. 4) in that field. Yet its Article 20 authorized reservations to all of its substantive provisions. After a lapse of over 38 years, no more than 14 States are parties to it-with six reservations and two declarations. This notwithstanding, this Court has relied on the practice based, inter alia, on its provisions (Articles 1 and 5), even though the parties to the case were not parties to the Convention (Nottebohm, Second Phase, Judgments, I.C.J. Reports 1955, pp. 22 f.). It was also relied upon by the Italian/United States Conciliation Commission (Merige claim (I.L.R., 22 (1955), p. 450) and also Flegenheimer claim (I.L.R., 25 (1958-I), p. 149)).
A further illustration is provided by Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly on 21 December 1965: the new test therein introduced concerning the incompatibility of reservations with the object and purpose of the Convention has no bearing on the principle itself.
To summarize the foregoing observations: from the manner in which the Convention as a whole was prepared, from its obvious purpose to become universally accepted, from the structure and clear meaning of Article 6, paragraph 2, as a whole, from the genesis of the equidistance rule and from the fact that it has been enshrined in no less than four provisions of three conventions signed in Geneva in 1958, I find it difficult to infer that it was proposed by the International Law Commission in an impromptu and contingent manner or on an experimental basis, and adopted by the Geneva Conference on that understanding. Nor is there anything-including Article 12-that can disqualify the equidistance rule from becoming a rule of general law or constitute an obstacle to that process. Furthermore, there are no other known factors which may have had this effect.

III

It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, a fortiori, capable of producing this effect, a phenomenon not unknown in international relations.
I shall therefore now endeavour to ascertain whether the transformation of the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and in particular the equidistance rule, into generally accepted law has in fact taken place. This calls for an analysis of State practice, of the time factor, and of what is traditionally understood to constitute opinio juris.
*226 Ten years have elapsed since the Convention on the Continental Shelf was signed, and 39 States are today parties to it.
Delay in the ratification of and accession to multilateral treaties is a well- known phenomenon in contemporary treaty practice. (According to a recent study conducted by the United Nations Institute for Training and Research, 55 out of 179 multilateral treaties in respect of which the Secretary-General of the United Nations performs depositary functions had received an average of only about 27 per cent. of possible acceptances.) It is self-evident that in many cases substantive reasons are at the root of these delays. However, experience indicates that in most cases they are caused by factors extraneous to the substance and objective of the instrument in question. Often the slowness and inherent complication of constitutional procedures, the need for interdepartmental consultations and co-ordination, are responsible (lack of ratification does not, however, prevent States from applying the provisions of such conventions). Frequently, again, there is procrastination, due to the lack of any sense of urgency, or of immediate interest

in the problems dealt with by the treaty, for so long as there are other important issues to deal with. This may be illustrated by a comparison between the Convention on Diplomatic Relations (signed at Vienna on 24 April 1961) and the Convention on the High Seas (signed at Geneva on 29 April 1958). Both are eminently instruments which codify existing law. Yet the first, within a period of about seven years, had received 77 ratifications, accessions or notifications of succession, while after a lapse of ten years only 42 States had become parties to the latter. The reasons seem self-evident: the Convention on Diplomatic Relations is of direct, daily interest for every State. It took ten years for an instrument codifying existing law, the Convention on the Prevention and Repression of the Crime of Genocide (adopted by the General Assembly of the United Nations on 9 December 1948), to obtain 59 ratifications and accessions, while by the end of 1967-20 years after its adoption-71 States had become parties to it.

These overlong delays in ratification and their causes, not related to the substance of the instruments concerned, are factors for which due allowance has to be made.

I may have dwelt on this point at excessive length. I have done so because it is relevant to the issue now before the Court. For it indicates that the number of ratifications and accessions cannot, in itself, be considered conclusive with regard to the general acceptance of a given instrument.

In the case of the Convention on the Continental Shelf, there are other elements that must be given their due weight. In particular, 31 States came into existence during the period between its signature (28 June 1958) and its entry into force (10 June 1964), while 13 other nations have since acceded to independer ce. Thus the time during which these *227 44 States could have completed the necessary procedure enabling them to become parties to the Convention has been rather limited, in some cases very limited. Taking into account the great and urgent problems each of them had to face, one cannot be surprised that many of them did not consider it a matter of priority. This notwithstanding, nine of those States have acceded to the Convention. Twenty- six of the total number of States in existence are moreover land-locked and cannot be considered as having a special and immediate interest in speedy accession to the Convention (only five of them have in fact acceded).

Finally, it is noteworthy that about 70 States are at present engaged in the exploration and exploitation of continental shelf areas.

It is the above analysis which is relevant, not the straight comparison between the total number of States in existence and the number of parties to the Convention. It reveals in fact that the number of parties to the Convention on the Continental Shelf is very impressive, including as it does the majority of States actively engaged in the exploration of continental shelves.

Again, it is noteworthy that while 39 States are parties, initial steps towards the acceptance of the Convention have been taken by 46 States, who have signed it: half of them have ratified it. Thus to the figure of 39 that of 23 States is to be added, i.e., those States which by signing it have acquired a provisional status vis-a-vis the Convention, each of them being 'obliged to refrain from acts which would defeat the object and purpose of the treaty ...' until it 'shall have made its intention clear not to become a party to the treaty' (Article 15a of the Draft Articles of the Law of Treaties, prepared by the I.L.C., as amended and adopted by the Committee of the Whole of the Conference on the Law of Treaties; Doc. A/CONF. 39/C.1/L.370/Add. 4, p. 8).

This mathematical computation, important as it is in itself, should be supplemented by, so to speak, a spectral analysis of the representativity of the States parties to the Convention.

For in the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic and legal systems, States of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or-as it was once claimed-by the consensus of European States only.

This development was broadly reflected in the composition of the Geneva Conference on the Law of the Sea; it is now similarly reflected within the number of States which are

parties to the Convention on the Continental Shelf. These include States of all continents, among them States of various political systems, with both new and old States representing the main legal systems of the world.

*228 It may therefore be said that, from the viewpoints both of number and of representativity, the participation in the Convention constitutes a solid basis for the formation of a general rule of law. It is upon that basis that further, more extensive practice has developed:

(a) A considerable number of States, both parties and not parties to the Convention (and quite apart from the Parties to the present cases), have concluded agreements delimiting their continental shelves. Several of these make specific reference to the Geneva Convention ('having regard to ...', 'bearing in mind ...' or 'in accordance with the Geneva Convention on the Continental Shelf', 'bearing in mind Article 6 of the Geneva Convention on the Continental Shelf' or 'in accordance with the principles laid down in the Geneva Convention on the Continental Shelf of 1958, in particular its Article 6 '). At least six other agreements (registered with the United Nations) have accepted as a basis the equidistance or median lines, though without actually referring to the Convention. (Texts: United Nations Doc. A/AC. 135/11 , and Add. 1.)

(b) A considerable number of States (both parties and not parties to the Convention) have passed special legislation concerning their continental shelves, or included provisions on the subject in other instruments. Some of them have enacted a unilateral delimitation of their continental shelf on the basis of the equidistance rule. Fifteen have referred specifically to the Convention of 1958, invoking it in a preamble or in individual articles, or employing definitions derived from it (sometimes with slight modifications). One instrument refers to 'law and the provisions of international treaties and agreements', 'law or ratified international treaties' (Guatemala), and another accepts the median line as a definitive boundary (Norway). Another (U.S.S.R.) reproduces mutatis mutandis the full text of Article 6 of the Convention, while three (Finland, Denmark and Malaysia) make specific reference to that Article. Another, yet again, invokes 'established international practice sanctioned by the law of nations' (Philippines). (Texts: U.N. Doc. A/AC. 135/11 , and Add. 1.)

(c) In some cases the unilateral adoption of the equidistance rule has had a direct bearing on its recognition by other States. To give but one instance: Australia's Federal Petroleum (Submerged Lands) Act, 1967, which defines adjacent areas (section 5) and their delimitation (Second Schedule), is based on the application of the equidistance rule. This delimitation appears to have been effected on the assumption that a neighbouring State could not advance any claim beyond the equidistance line.

All this leads to the conclusion that the principles and rules enshrined in the Convention, and in particular the equidistance rule, have been *229 accepted not only by those States which are parties to the Convention on the Continental Shelf, but also by those which have subsequently followed it in agreements, or in their legislation, or have acquiesced in it when faced with legislative acts of other States affecting them. This can be viewed as evidence of a practice widespread enough to satisfy the criteria for a general rule of law. For to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court, e.g.: 'generally ... adopted in the practice of States' (Fisheries, Judgment, I.C.J. Reports 1951, p. 128). Not all States have, as I indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States.

Thus this test cannot be, nor is it, one endowed with any absolute character: it is of its very nature relative. Criteria of frequency, continuity and uniformity are involved. However, not all potential rules are susceptible to verification by all these criteria. Frequency may be invoked only in situations where there are many and successive opportunities to apply a rule. This is not the case with delimitation, which is a one-time act. Furthermore, as it produces lasting consequences, it invariably implies an intention to satisfy the criterion of continuity.

As for uniformity, 'too much importance need not be attached to' a 'few uncertainties or contradictions, real and apparent' (Fisheries, Judgment, I.C.J. Reports 1951, p. 138). Nor can a general rule which is not of the nature of jus cogens prevent some States from adopting an attitude apart. They may have opposed the rule from its inception and may, unilaterally, or in agreement with others, decide upon different solutions of the problem involved. Article 6, paragraph 2, of the Convention on the Continental Shelf, by virtue of the built-in exceptions, actually opens the way to occasional departures from the equidistance rule wherever special circumstances arise. Thus the fact that some States, as pointed out in the course of the proceedings, have enacted special legislation or concluded agreements at variance with the equidistance rule and the practice confirming it represents a mere permitted derogation and cannot be held to have disturbed the formation of a general rule of law on delimitation.

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*230 With regard to the time factor, the formation of law by State practice has in the past frequently been associated with the passage of a long period of time. There is no doubt that in some cases this may be justified.

However, the great acceleration of social and economic change, combined with that of science and technology, have confronted law with a serious challenge: one it must meet, lest it lag even farther behind events than it has been wont to do.

To give a concrete example: the first instruments that man sent into outer space traversed the airspace of States and circled above them in outer space, yet the launching States sought no permission, nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognized as law within a remarkably short period of time. Similar developments are affecting, or may affect, other branches of international law.

Given the necessity of obviating serious differences between States, which might lead to disputes, the new chapter of human activity concerning the continental shelf could not have been left outside the framework of law for very long.

Thus, under the pressure of events, a new institution has come into being. By traditional standards this was no doubt a speedy development. But then the dimension of time in law, being relative, must be commensurate with the rate of movement of events which require legal regulation. A consequential response is required. And so the short period within which the law on the continental shelf has developed and matured does not constitute an obstacle to recognizing its principles and rules, including the equidistance rule, as part of general law.

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Can the practice above summarized be considered as having been accepted as law, having regard to the subjective element required? The process leading to this effect is necessarily complex. There are certain areas of State activity and international law which by their very character may only with great difficulty engender general law, but there are others, both old and new, which may do so with greater ease. Where continental shelf law is concerned, some States have at first probably accepted the rules in question, as States usually do, because they found them convenient and useful, the best possible solution for the problems involved. Others may also have been convinced that the instrument elaborated within the framework of the United Nations was intended to become and would in due course become general law (the teleological element *231 is of no small importance in the formation of law). Many States have followed suit under the conviction that it was law.

Thus at the successive stages in the development of the rule the motives which have prompted States to accept it have varied from case to case. It could not be otherwise. At all events, to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction-and in fact to

deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated; alternatively, the startingpoint may consist of a treaty to which more and more States accede and which is followed by unilateral acceptance. It is only at a later stage that, by the combined effect of individual or joint action, response and interaction in the field concerned, i.e., of that reciprocity so essential in international legal relations, there develops the chain-reaction productive of international consensus. In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an obligation to do so. What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the States in question. No further or more rigid form of evidence could or should be required.

In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted-even on the test of practice itself, if it shows 'much uncertainty and contradiction' (Asylum, Judgment, I.C.J. Reports 1950, p. 277). It may also be controverted on the test of opinio juris with regard to 'the States in question' or the parties to the case.

In approaching this issue one has to take into account the great variety of State activity-manifesting itself as it does today in many forms of unilateral act or international instrument or in the decisions of international organizations-, the multiplicity and interdependence of these processes.

With the ever-increasing activities of States in international relations, some rules of conduct begin to be accepted even before reaching that state of precision which is normally required for a rule of law. If their binding force is contested, courts operating within the traditional framework of certitude may apply tests of perfection and clarity they could not possibly pass. The alternative would be to fall back on some general and, it may be, elusive principle. This may not be conducive to strengthening the edifice of international law, which is so important for presentday *232 international relations. One should of course avoid the risk of petrifying rules before they have reached the necessary state of maturity and by doing so endangering the stability of and confidence in law. It may, however, be advisable, without entering the field of legislation, to apply more flexible tests, which, like the substance of the law itself, have to be adapted to changing conditions. The Court would thus take cognizance of the birth of a new rule, once the general practice States have pursued has crossed the threshold from haphazard and discretionary action into the sphere of law.

As to the cases before the Court, the situation leaves little room for doubt. The conclusion by States of agreements in the field of continentalshelf delimitation has self-evidently expressed their willingness to accept the rules of the Convention 'as law' and has in fact represented a logical furtherance of the provisions of Article 6, paragraph 2. As for the unilateral acts concerned, they also, by their reference to the Convention or borrowing of its very wording, have given recognition to its provisions. Other States have done so by acquiescence.

The foregoing analysis leads to the conclusion that the provisions of Article 6, paragraph 2, of the Geneva Convention on the Continental Shelf, and more especially the equidistance rule, have attained the identifiable status of a general law. This may be contested in a particular case by a State denying its opposability to itself. Then, of course, the matter becomes one of evidence.

IV

I now turn to the principal issue concerning the law applicable to the present cases. Is the Federal Republic bound by Article 6, paragraph 2, of the Geneva Convention?

The Federal Republic of Germany signed the Convention on the Continental Shelf on 30 October 1958. This fact, as indicated earlier, cannot remain without influence on that State's relationship to the Convention.

Admittedly it does not imply an obligation to ratify the instrument, nor is it in itself sufficient to bind the Federal Republic to observance of its provisions. However, it certainly implies a link between the State concerned and the treaty to which it is not as yet a party.

The Court has made this perfectly clear by stating that 'Without going into the question of the legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes a first step to participation in the Convention'; and the Court continued: 'It is evident that without ratification, signature *233 does not make the signatory State a party to the Convention; nevertheless it establishes a provisional status in favour of that State' (Reservations to Genocide Convention, Advisory Opinion, I.C.J. Reports 1951, p. 28). Consequently the Court recognized, in the context of the case it was dealing with at the time, certain rights which 'the signature confers upon the signatory'. This obviously also implies some obligations.

Now, at no time did the Federal Republic make a statement which could be interpreted as a repudiation of the Convention or the abandonment of its intention to ratify it. This was made clear even in the course of the proceedings before the Court, by the admission that it had not 'yet' ratified the Convention (hearing of 23 October 1968).

There is no need to stress the obvious. As long as this ratification has not been forthcoming, the Federal Republic cannot be considered as a party to the Convention. The Government may have changed its view, as governments do; parliament may eventually refuse ratification. However, the act of signature has to be viewed in the context of other voluntary and positive acts of the Federal Republic in this domain.

On 22 January 1964 the Federal Government issued a Proclamation which stated, inter alia:

'The Federal Government will shortly submit to the Legislature an Accession Bill on this Convention in order to create the constitutional basis for ratification by the Federal Republic of Germany';

and further:

'In order to eliminate legal uncertainties that might arise in the present situation until the Geneva Convention on the Continental Shelf comes into force and until its ratification by the Federal Republic of Germany, the Federal Government deems it necessary to affirm the following now:

1. In virtue of the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf, the Federal Government regards the exploration and exploitation of the natural resources of the seabed and subsoil of the submarine areas adjacent to the German coast but outside the German territorial sea, to a depth of 200 metres and also-so far as the depth of the superjacent waters admits of the exploitation of the natural resources-beyond that, as an exclusive sovereign right of the Federal Republic of Germany. In the individual case the delimitation of the German continental shelf vis-a-vis the continental shelves of foreign States *234 remains subject to agreement with those States.'

[Translation by the Registry [FN1]].

In the expose des motifs of the Bill on the Continental Shelf, 25 July 1964, special reference is made to the Convention, as a manifest expression of a change in the general approach to the problem of the continental shelf:

'For a long time the possibility of individual States' acquiring special rights over the parts of the continental shelf lying off their coast had been denied in the theory and practice of international law. In recent years the opposite view, that the extraction and appropriation of the resources of the marine subsoil are not free but reserved to the coastal States, has come to prevail. A manifest expression of this change can in particular be seen in the Convention on the Continental Shelf of 29 April 1958 (reproduced in Archiv des Volkerrechts, Vol. 7, 1958-59, pp. 325 ff.), adopted at the Geneva Conference on the Law of the Sea, which was signed by the Federal Republic of Germany together with 45 other States and has since been ratified by 21 of those States. According to its Article 11 this Convention will come into force as soon as the next instrument of ratification is

deposited.
Considering the above, one may proceed on the assumption that, at least since the Federal Government's Proclamation of 20 January 1964, which has remained unchallenged, the Federal Republic holds sovereign rights, coinciding as to content with those established for coastal States by the Geneva Convention, in the domain of the German continental shelf.' [Translation by the Registry [FN2]].
*235 The Proclamation of the Federal Government of 22 January 1964 refers, then, to 'the development of general international law, as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf'. Here an opinion is expressed as to the character and scope of the law on the continental shelf. It constitutes in fact a value-judgment on the state of the law on the subject. Indeed it is emphatically implied that the mere signing of that instrument, at a time when it had not yet entered into force, was evidence of general international law. The Federal Republic viewed its own signature as a constituent element of that evidence, thus attaching to it far more importance than is normal in the case of signatures to instruments requiring ratification. If words have any meaning, these could be understood solely as the recognition by the Federal Republic that the Geneva Convention reflected general international law. Specific reference was made to State practice. It deemed this practice, covering, up to the date of the Proclamation, a period of over five years, to be adequate and sufficiently uniform to be considered as evidence of general international law, for if there had been variations within it, or it had been inadequate, no such conclusion as to the definitive state of the law could have been drawn. The Federal Government also linked the practice with the Geneva Convention. Events after 22 January 1964 could in no circumstances be held to weaken an official statement of this kind, but in fact they have only added to its force. For the Geneva Convention has become law, and subsequent practice has corroborated it further.
The Proclamation is, therefore, as binding upon the Federal Republic today as it was at the time it was made. A value-judgment of so final a nature may not be revoked. It should therefore be viewed as an unequivocal *236 expression of opinio juris, with all the consequences flowing therefrom. Indeed, if it may be claimed that the opinio juris of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic. This is a decisive point in the present cases.
As for the expose des motifs of the Bill on the Continental Shelf, it stands on the Geneva Convention and the Federal Government's Proclamation of 20 January 1964, and states that: 'The rules provided for in this Bill are to be the municipal supplement to the effects of the Proclamation in the field of international law' (Verhandhmgen des deutschen Bundestages, 1964, Vol. 91, Drucksache IV/2341). It refers to the Convention as a whole with no exception or reservation. The great evidential weight attaching to documents of this nature is surely incontrovertible. This Court has held a number of expose des motifs 'conclusive' in a case before it (Fisheries, Judgment, I.C.J. Reports 1951, p. 135). States may obviously change their intentions, conduct and policy, but it would seriously undermine the worth of and rehance upon statements made by governments if value-judgments of so important a nature were disregarded or held as not binding upon the governments which made them. For, to use the words which the Court employed in another context: 'Language of this kind can only be construed as the considered expression of a legal conception ...' (Fisheries, Judgment, I.C.J. Reports 1951, p. 136).
It has been submitted that the two official statements did not specifically cite Article 6. This is true; however, they did not exclude it either. The Convention as a whole is referred to, and that undoubtedly implicates Article 6. And although the actual wording of the first part of Article 6, paragraph 2, was employed, this cannot be understood as excluding its remaining provisions. Only a specific exclusion of the other parts of the paragraph could have had the effect alleged by the Federal Government. Any doubt as to this reasoning should be dispelled by the Proclamation's specific statement that 'The Federal Government will shortly submit an Accession Bill on this Convention'. There was no hint of any objections the Federal Republic might raise to any provisions of the Convention-more particularly Article 6, paragraph 2-, though this was surely the time and

context for placing them on record. There is not even the slightest evidence that reservations to the paragraph, of whatever scope or nature, had been contemplated. If agreement between the parties was mentioned, this, as the Federal Republic has itself indicated (ut infra), was because the paragraph in question refers to it 'in the first place'. This view is confirmed by a further recognition of Article 6, to be found in the joint minutes of the delegations of the Federal Republic and the *237 Netherlands, dated 4 August 1964 (Memorial, Annex 4). Though here, too, reference is specifically made to the determination of the continental shelf 'by agreement', this is because agreement was the obvious objective of the conference contemplated at the time by the Federal Government (which in no way implies rejection of the other components of Article 6, paragraph 2). This point has been confirmed by the Federal Government itself:

'At that time the Federal Republic could still expect to come to an amicable agreement with its neighbours on the delimitation of the continental shelf before its coast on equitable lines inasmuch as Article 6 expressly refers the Parties to a settlement by agreement in the first place' (Reply, para. 27).

The Reply continues:

'the insistence on the equidistance line as the only valid rule for the delimitation of the continental shelf, and the reliance on Article 6, paragraph 2, of the Convention for this purpose by the Kingdom of Denmark and the Kingdom of the Netherlands in the negotiations taken up on the instance of the Federal Republic of Germany ... caused the Government of the Federal Republic to reconsider the advisability of ratifying the Continental Shelf Convention as long as the interpretation of Article 6, paragraph 2, is uncertain' (ibid.).

And yet the Federal Republic denies that it has ever recognized Article 6, paragraph 2 (Reply, para. 28).

These statements call for some comment. For to refuse to recognize provisions, and to take exception to a given interpretation of them, are mutually exclusive positions. An interpretation is disputed in the name of a contrary conception, in upholding which one in fact defends the provisions as such. Thus either the Federal Republic has, as it claims, refused to recognize Article 6, paragraph 2, of the Convention beyond its first component (though this refusal leaves the binding force of its two official statements wholly intact), or it must have held a conception thereof which caused it to contest a particular interpretation. The two positions cannot be equated, for interpretation must needs concern the paragraph as a whole, which in no imaginable conception could have been reduced to a single element, i.e., the determination of the boundary by agreement. The difference of interpretation could in fact only have concerned the relationship between the rule and the exception, between equidistance and special circumstances.

*238 In sum, the fragility of the claim to have withheld recognition from Article 6, paragraph 2, as a whole is manifest. It is a claim which has been argued from a change of position on the ratification issue the very purpose of which was to explain away definitive and unambiguous statements conveying such recognition. In fact the Federal Republic made clear its intention to ratify the Convention simultaneously with the Proclamation acknowledging it and the practice as expressive of 'general international law'. The link between such recognition and ratification may have been more than merely chronological, e.g. (the latter resulting from the former), one of cause and effect. Subsequently the Federal Government had second thoughts about ratifying the Convention. But, given the unreserved nature of the Proclamation and expose des motifs, the expression of such second thoughts cannot alter the fact that the Federal Republic-whether or not it ratifies the Convention-has recognized the binding character of the rules concerned.

The whole of the Federal Republic's reasoning on the subject bears all the marks of an ex post facto construction. It has obscured the true legal issue in the present cases. It can have no effect on the recognition of the Convention (and within it of Article 6, paragraph 2) and of State practice, reflected in the two official statements placed on record by the Federal Government.

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Having thus analysed the position taken by the Federal Republic, I reach the conclusion that it has recognized the provisions of the Convention on the Continental Shelf and in particular its Article 6, paragraph 2, as binding. Subsequent changes in its attitude, in view of the nature of its unequivocal statements, can have no legal effect. For, in the circumstances, its situation cannot be assimilated with that of a country which 'has always opposed any attempt to apply' a rule (Fisheries, Judgment, I.C.J. Reports 1951, p. 131), nor with that of one having 'repudiated' the relevant treaty (Asylum, Judgment, I.C.J. Reports 1950, p. 278).

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In the light of all these facts and of the law, the real legal problem with which the Court has been confronted is not that of the binding effect of the equidistance rule upon the Federal Republic, for this is established, but the question of whether there are special circumstances *239 which would justify a departure from it in the present cases. Indeed, notwithstanding all that may have been alleged to the contrary, this is the implicit burden of the Federal Republic's claim.

Are there in fact any special circumstances justifying a departure from the equidistance rule? Within the meaning of Article 6, paragraph 2, 'special circumstances' is to be understood as constituting merely an exception to the general rule. This should not be interpreted otherwise than in a restrictive manner. Indications to this effect were given by the International Law Commission: 'As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or navigable channels' (Yearbook of the International Law Commission, 1953, Vol. II, p. 216, para. 82. Similar and other views were expressed at the Geneva Conference). There is furthermore room for the view that the presence of natural resources should not be overlooked.

What are called 'special circumstances' should at all events rest on sound criteria. The term should not be made subject to vague and arbitrary interpretation (Conference on the Law of the Sea, 1958, Official Records, II, p. 93; VI, p. 91).

Nor should the concept of 'special circumstances' be allowed to substitute another rule for the equidistance rule. The provision should be thus understood: that a special situation, created by 'special circumstances' calls for a special, ad hoc arrangement.

There must be, in other words, a combination of factual elements creating a situation to ignore which would give rise to obvious hardship or difficulties. Here, as elsewhere, the application of the rule, and the admission of possible exceptions from it, call for a reasonable approach. 'Reasonableness' requires that the realities of a situation, as it affects all the Parties, be fully taken into account.

The mere fact that on the application of the equidistance rule the area of continental shelf allotted to the Federal Republic would be smaller than those of Denmark or the Netherlands does not create a qualitatively anomalous situation such as could be regarded as a 'special circumstance'. For the area falling to the Federal Republic would not be inconsiderable. Moreover, if the notion of 'special circumstances' is to be taken to imply a slanting reference to comparative bases, a much wider spectrum of factors should be taken into account-e.g., the comparative wealth and economic potential of the States concerned.

The evidence produced in the cases before the Court is not in fact sufficient to justify an exemption from the rule. It has not been shown that its application would, on account of the bend in the coast, expose the Federal Republic to any special hardship, impose upon it any undue *240 burdens or create for it any serious difficulties. Thus I find no adequate basis for exemption from the equidistance rule.

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In the light of the grounds I have set forth, I deem it unnecessary to deal with the other issues raised by the three Parties, or the Submissions made by them. In particular, the question of the combined effect of the delimitations concerned in each respective case does not arise, as each is to be determined on the basis of the equidistance rule.
I conclude that the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundaries already determined by agreement is to be carried out in accordance with the provisions of Article 6, paragraph 2, of the Geneva Convention of 1958, and in particular by the application of the equidistance rule. There are no special circumstances which justify any departure from this rule.
To my great regret, therefore, I am unable to concur in the reasoning and conclusions of the Judgment.

(Signed) Manfred LACHS.

## *241 DISSENTING OPINION OF JUDGE SORENSEN

To my great regret I find myself unable to concur in the decision of the Court, and I wish to avail myself of the right under Article 57 of the Statute to state the reasons for my dissent.
On certain points I agree with the Court. I do not think that the equidistance principle-even subject to modification in special circumstances-is inherent in the legal concept of the continental shelf or part of that concept by necessary implication.
I also agree that the Federal Republic of Germany has not by her conduct assumed the obligations under the Geneva Convention on the Continental Shelf. As I shall indicate later, the conduct of the Federal Republic may be considered relevant in another context, but I agree that the Convention is not opposable to her on a contractual or quasicontractual basis.
I do find, however, that the Convention, and in particular Article 6 thereof, is binding upon the Federal Republic on a different basis. In order to substantiate this opinion I wish first to make some observations on the Convention in general, and then afterwards to examine whether the conclusions reached hold good with respect to Article 6 in particular.

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It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms. It is against this particular background that regard should be had to the history of the drafting and adoption of the Convention, to the subsequent attitudes of States, and to the relation of its provisions to the rules of international law in other, but connected, fields.
In that respect, however, I take a less narrow view than the Court as to the conditions for attributing such effect to the rules set forth in a convention. I agree, of course, that one should not lightly reach the conclusion that a convention is binding upon a non-contracting State. But I find it necessary to take account of the fact-to which the Court does not give specific weight-that the Geneva Convention belongs to a particular category of multilateral conventions, namely those which result from the work of the United Nations in the field of codification *242 and progressive development of international law, under Article 13 of the Charter.
Over a number of years, and following the procedure laid down in its Statute, the International Law Commission had elaborated a comprehensive set of draft articles on the law of the sea, including some on the continental shelf. The Commission submitted the draft articles to the General Assembly in the report of its eighth session in 1956. By resolution 1105 (XI) the General Assembly decided to convene a conference of

plenipotentiaries to examine the law of the sea on the basis of this draft, and all States Members of the United Nations or the specialized agencies were invited to participate. The conference met in Geneva in the early months of 1958 and adopted four conventions on the law of the sea, one of them being the Convention on the Continental Shelf, which were opened for signature on 28 April 1958.

In assessing the legal effects of a convention adopted in such circumstances, the distinction between the two notions of 'codification' and 'progressive development' of international law may be taken as the point of departure. According to Article 15 of the Statute of the International Law Commission, the term 'codification' is used in that Statute to mean 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, procedent and doctrine'. The term 'progressive development', on the other hand, is used to mean 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'.

There is no doubt that the distinction between these two categories is sound in theory and relevant in practice. There are treaty provisions which simply formulate rules of international law which have already been generally accepted as part of international customary law, and it is beyond dispute that the rules embodied and formulated in such provisions are applicable to all States, whether or not they are parties to the treaty. On the other hand, it is equally clear that there are treaty provisions which are intended to modify the existing legal situation, whether they change the content of existing rules or regulate matters which have not previously been regulated by international law. Rules set forth in such treaty provisions are neither binding upon nor can be invoked by non-contracting States.

It has come to be generally recognized, however, that this distinction between codification and progressive development may be difficult to apply rigorously to the facts of international legal relations. Although theoretically clear and distinguishable, the two notions tend in practice to overlap or to leave between them an intermediate area in which it is not possible to indicate precisely where codification ends and progressive development begins. The very act of formulating or restating *243 an existing customary rule may have the effect of defining its contents more precisely and removing such doubts as may have existed as to its exact scope or the modalities of its application. The opportunity may also be taken of adapting the rule to contemporary conditions, whether factual or legal, in the international community. On the other hand, a treaty purporting to create new law may be based on a certain amount of State practice and doctrinal opinion which has not yet crystallized into customary law. It may start, not from tabula rasa, but from a customary rule in statu nascendi.

The International Law Commission itself has recognized that the distinction between the process of codification and that of progressive development, as defined in its Statute, gives rise to practical and theoretical difficulties. The report of its eighth (1956) session contains, in the introduction to the chapter on the law of the sea-which includes the draft articles on the continental shelf-, the following statement:

'In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the statute between these two activities can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already ' sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which Articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.' (I.L.C., VIII, Report, para. 26).

Considerations such as these are borne out by an examination of the process by which rules of customary international law are created. Article 38 of the Statute of the Court refers to international custom 'as evidence of a general practice accepted as law'. According to classic doctrine such practice must have been pursued over a certain length

of time. There have even been those who have maintained the necessity of 'immemorial usage'. In its previous jurisprudence, however, the Court does not seem to have laid down strict requirements as to the duration of the usage or practice which may be accepted as law. In particular, it does not seem to have drawn any conclusion in this respect from the ordinary meaning of the word 'custom' when used in other contexts. In the Asylum case the Court only required of the Colombian Government that it should prove-

*244 'that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State'. (I.C.J. Reports 1950, p. 276; also quoted in the case concerning U.S. Nationals in Morocco, I.C.J. Reports 1952, p. 200).

The possibility has thus been reserved of recognizing the rapid emergence of a new rule of customary law based on the recent practice of States. This is particularly important in view of the extremely dynamic process of evolution in which the international community is engaged at the present stage of history. Whether the mainspring of this evolution is to be found in the development of ideas, in social and economic factors, or in new technology, it is characteristic of our time that new problems and circumstances incessantly arise and imperatively call for legal regulation. In situations of this nature, a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law. The fact that it does not purport simply to be declaratory of existing customary law is immaterial in this context. The convention may serve as an authoritative guide for the practice of States faced with the relevant new legal problems, and its provisions thus become the nucleus around which a new set of generally recognized legal rules may crystallize. The word 'custom', with its traditional time connotation, may not even be an adequate expression for the purpose of describing this particular source of law.

This is not merely a question of terminology. If the provisions of a given convention are recognized as generally accepted rules of law, this is likely to have an important bearing upon any problem of interpretation which may arise. In the absence of a convention of this nature, any question as to the exact scope and implications of a customary rule must be answered on the basis of a detailed analysis of the State practice out of which the customary rule has emerged. If, on the other hand, the provisions of the convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to ordinary principles of treaty interpretation, including, if the circumstances so require, an examination of travaux preparatoires.

Turning now to the Convention on the Continental Shelf, it is hardly necessary to recall that the legal problems with which it deals have arisen out of the rapidly increasing demand for sources of energy and the development of new techniques permitting the extraction of resources from the subsoil of submarine areas. As problems of international law, the problems relating to the exploitation of the natural resources of the *245 continental shelf are of recent origin. Although the seeds of the contemporary doctrine of the continental shelf may be found in earlier legal writings, it is only during the last quarter of a century that technical developments have added practical significance to the problems. The point of departure for the evolution of the legal doctrine relating to the continental shelf was the proclamation issued by the President of the United States on 28 September 1945.

On the basis of early State practice and the comments made by governments, the International Law Commission hammered out the doctrine of the continental shelf in legal provisions which were subsequently discussed and adopted, with certain modifications, by the Geneva Conference in 1958. As far as the main elements are concerned, the provisions of the Convention circumscribed the doctrine on a number of points. The outer limits of the continental shelf were defined, although according to alternative criteria, one of which was the indeterminate criterion of exploitability. The rights of the coastal State over the shelf area were characterized as 'sovereign' rights-which means that they

include the ordinary legislative, executive and judicial competence of the State on a territorial basis-but only for limited purposes, namely the exploration and exploitation of natural resources. These rights were declared to be exclusive, and it was further laid down that they did not depend on occupation or any express proclamation. The term 'natural resources' was defined in great detail. In addition, the Convention imposed certain duties on the coastal State for the purpose of safeguarding the interest of other States in the use of the high seas, and provisions were included for delimitation vis-a-vis neighbouring States [FN1].

It is difficult to express any definite opinion as to the exact legal status of the continental shelf in general international law prior to the Geneva Conference. It may be argued that customary international law had by then already developed to the point of authorizing a coastal State to exercise some measure of sovereign rights over the adjacent area of the continental shelf. But it can hardly be asserted that the doctrine of the continental shelf, as formulated and circumscribed in considerable detail, first by the International Law Commission in its draft of 1956, and then by the Geneva Conference in 1958, was nothing more than a restatement of then existing rules of customary international law. The provisions of the Convention were not simply declaratory of already accepted international law in the matter.

This being so, the question remains whether the Convention may nevertheless now be taken as evidence of generally accepted rules of international law. In the Judgment, the Court has applied certain minimum conditions for recognizing that a treaty provision attains the *246 character of a generally accepted rule of customary law. In a general way I agree that these conditions reflect the elements or factors to be considered, except that I also believe, as indicated above, that it should be considered as a relevant element that a convention has been adopted in the process of codification and development of international law under the United Nations Charter. I do not, however, find the rather schematic approach adopted by the Court entirely satisfactory. The conditions should not, in my view, be considered as alternative conditions which could be examined and rejected one by one. The proper approach, in my opinion, is to examine the relevant elements as interlocking and mutually interdependent parts of a general process.

Approaching the problems of the present cases in this manner, I think that the decisive considerations may be summarized as follows. The adoption of the Geneva Convention on the Continental Shelf was a very significant element in the process of creating new rules of international law in a field which urgently required legal regulation. The Convention has been ratified or acceded to by a quite considerable number of States, and there is no reason to believe that the flow of ratifications has ceased. It is significant that the States which have become parties to the Convention are fairly representative of all geographical regions of the world and of different economic and social systems. Not only the contracting parties, but also other States, have adapted their action and attitudes so as to conform to the Convention. No State which has exercised sovereign rights over its continental shelf in conformity with the provisions of the Convention has been met with protests by other States. True, there have been certain controversies on such questions as the understanding of the term 'natural resources' and the delimitation of shelf areas between the States concerned, a problem which will be examined further below. In general, however, such controversies have revolved on the interpretation and application of the provisions of the Convention, rather than the question whether those provisions embody generally applicable rules of international law.

I do not find it necessary to go into the question of the opinio juris. This is a problem of legal doctrine which may cause great difficulties in international adjudication. In view of the manner in which international relations are conducted, there may be numerous cases in which it is practically impossible for one government to produce conclusive evidence of the motives which have prompted the action and policy of other governments. Without going into all aspects of the doctrinal debate on this issue, I wish only to cite the following passage by one of the most qualified commentators on the jurisprudence of the Court. Examining the conditions of the opinio necessitatis juris Sir Hersch Lauterpacht writes:

*247 'Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely, the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the opinio necessitatis juris except when it is shown that the conduct in question was not accompanied by any such intention.' (Sir Hersch Lauterpacht: The Development of International Law by the International Court, London 1958, p. 380.)

Applying these considerations to the circumstances of the present cases, I think that the practice of States referred to above may be taken as sufficient evidence of the existence of any necessary opinio juris.

In my opinion, the conclusion may therefore safely be drawn that as a result of a continuous process over a quarter of a century, the rules embodied in the Geneva Convention on the Continental Shelf have now attained the status of generally accepted rules of international law.

That being so, it is nevertheless necessary to examine in particular the attitude of the Federal Republic of Germany with regard to the Convention. In the Fisheries case the Court said that the ten-mile rule would in any event 'appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast' (I.C.J. Reports 1951, p. 131). Similarly, it might be argued in the present cases that the Convention on the Continental Shelf would be inapplicable as against the Federal Republic, if she had consistently refused to recognize it as an expression of generally accepted rules of international law and had objected to its applicability as against her. But far from adopting such an attitude, the Federal Republic has gone quite a long way towards recognizing the Convention. It is part of the whole picture, though not decisive in itself, that the Federal Republic signed the Convention in 1958, immediately before the time-limit for signature under Article 8. More significant is the fact that the Federal Republic has relied on the Convention for the purpose of asserting her own rights in the continental shelf. The Proclamation of the Federal Government, dated 20 January 1964, contained the following passage:

'In order to eliminate legal uncertainties that might arise during the present situation until the Geneva Convention on the Continental Shelf comes into operation and is ratified by the Federal Republic of Germany, the Federal Government deems it desirable already now to make the following statement:

1. In view of the development of general international law as expressed in recent State practice and in particular in the signing of the Geneva Convention on the Continental Shelf, the Federal *248 Government regards the exploration and exploitation of the natural resources of the seabed and subsoil ... as the exclusive sovereign right of the Federal Republic of Germany ...'

Leaving aside for the moment the particular question of the delimitation of the German area of the continental shelf vis-a-vis other States, to which I shall revert later, this proclamation may be taken as conclusive evidence of the attitude adopted by the Federal Republic towards the Convention. This attitude is relevant, not so much in the context of the traditional legal concepts of recognition, acquiescence or estoppel, as in the context of the general process of creating international legal rules of universal applicability. At a decisive stage of this formative process, an interested State, which was not a party to the Convention, formally recorded its view that the Convention was an expression of generally applicable international law. This view being perfectly well founded, that State is not now in a position to escape the authority of the Convention.

It has been asserted that the possibility, made available by Article 12, of entering reservations to certain articles of the Convention, makes it difficult to understand the articles in question as embodying generally accepted rules of international law. I intend to revert to this question below, with particular regard to Article 6. As a more general point I wish to state that, in my view, the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to

provisions of the Convention on the High Seas, although this Convention, according to its preamble, is 'generally declaratory of established principles of international law'. Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of jus cogens, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.
As a special proviso to the preceding general observations I only wish *249 to add that the recognition of the Convention as an expression of generally accepted international law should not prejudge an issue which has arisen since the convention was adopted in 1958. The test of exploitability for determining the outer limits of the continental shelf should not be taken to imply that the status of the seabed and subsoil of the ocean depths could be governed by the Convention. The legal concept of the continental shelf cannot reasonably be understood, even in its widest connotation, as extending far beyond the geological concept. The problem does not arise in the present cases, and I therefore do not find it necessary to pursue it further.

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Once it has been concluded that the provisions of the Convention on the Continental Shelf must be considered as generally accepted rules of international law and that they are therefore applicable to the Federal Republic even as a non-contracting State, it is necessary to look more particularly at Article 6, which is the relevant article for the purpose of the present cases. Although the provisions of the Convention in general are considered to be binding on the Federal Republic, there might be special grounds for holding that this general conclusion does not apply to a particular article.
In examining this question, it must surely be held, by way of a startingpoint, that Article 6 can hardly be separated from the rest of the Convention without upsetting the balance of the legal regime instituted by the Convention, or breaking the unity and coherence of that regime. For once it is recognized that the coastal State has sovereign rights for certain purposes over the continental shelf adjacent to its coasts, a question of delimitation in relation to the shelf areas of neighbouring States necessarily arises-save only in the rare instances of island States which do not share their continental shelf with other States. A convention on the legal regime of the continental shelf would be incomplete if it left this question of delimitation open. Consequently, there would have to be strong reasons for not considering Article 6 as generally binding along with the rest of the Convention. To put it otherwise, there is a strong presumption in favour of considering the rules on the delimitation of the shelf areas as having a similar legal effect to that of the rules on the extent and nature of the rights of the coastal State.
Far from being invalidated, this presumption is upheld and confirmed by other elements. The rules set forth in Article 6 conform to the rules which are generally applied for the delimitation of maritime areas between neighbouring States. The 1958 Geneva Conference faced this problem in three different contexts, in addition to that of the continental shelf, namely the territorial sea, the contiguous zone and the special fishery conservation areas. For all three situations it adopted identical solutions, *250 as formulated in Article 12 of the Convention on the Territorial Sea and the Contiguous Zone. These solutions are substantially the same as that of Article 6 of the Continental Shelf Convention. The European Fisheries Convention of 9 March 1964 adopted the same solution for the delimitation of exclusive fishing zones as between neighbouring States. Furthermore, the practice of States since 1958 in matters concerning the delimitation of

shelf areas conforms to the rules of Article 6, and there is no difference between the practice of States parties to the Convention and that of non-contracting States. The main rule of the Article, the principle of equidistance or the median line, has been followed in several bilateral agreements between neighbouring States. It is true that some of these bilateral agreements deviate from the geometrically exact line of equidistance. In some cases the agreement has the effect of 'straightening out' the line. In other cases it has taken account of 'special circumstances' within the meaning of Article 6. However that may be, such agreements are perfectly compatible with the provisions of Article 6. Likewise, unilateral delimitations proclaimed. by States, even before becoming parties to the Convention, have been based on the equidistance principle in conformity with Article 6. Although there are areas in certain parts of the world where the delimitation is still the subject of controversy, there seems to be no case where the delimitation, whether undertaken bilaterally or unilaterally, cannot be considered as having taken place within the framework of Article 6.

It has been argued by the Federal Government-and the Court has accepted that line of argument-that certain instances of State practice are irrelevant for the purpose of the present cases, since they relate only to paragraph 1 of Article 6, namely the delimitation of shelf areas between opposite coasts, and not to the delimitation as between adjacent States under paragraph 2 of Article 6. In my opinion, this argument is not decisive. In order to substantiate this opinion a closer analysis of the provisions of Article 6 is called for.

The geographical terms used in the two paragraphs of Article 6 are not quite precise. Paragraph 1 refers to two or more States 'whose coasts are opposite each other' while paragraph 2 refers to 'adjacent States'. These two provisions thus seem to envisage two distinct types or models of geographical configuration. The realities of geography, however, do not always conform to such abstract models. The coastlines of adjacent States (i.e., States having a common land frontier) may confront each other as opposite coasts in their further course from the point where the common land frontier meets the sea. Thus the same coastline may fall under the provisions of both paragraphs. Neither expressly nor implicitly does Article 6 provide any exact and rational criterion for deciding when, and to what extent, two coastlines are adjacent and when they are opposite.

The difficulties of drawing a clear-cut distinction between the two types **251* of geographical situations were, in my opinion, well illustrated during the oral proceedings by the production of a sketch map (marked D) showing the area between Denmark and Germany in the westernmost part of the Baltic Sea.

As a matter of legal principle, the distinction between 'median line' (paragraph 1) and 'equidistance' (paragraph 2) seems to me to be fictitious, and the juridico-technical terminology of the two paragraphs therefore inadequate. In both paragraphs the decisive element is that the line in question shall be drawn in such a manner that each point of it is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured. The geometrical technique which is used for the drawing of the line is likewise identical in the two cases.

The proceedings of the Geneva Conference seem to confirm that the legal principle is the same in the two cases. In its draft articles the International Law Commission had applied the distinction between 'opposite coasts' and 'adjacent States' to the delimitation of the continental shelf as well as of the territorial sea. Article 12 of the draft dealt with the delimitation of the territorial sea in straits and off other opposite coasts, while Article 14 dealt with the delimitation of the territorial sea of two adjacent States. At the Conference, however, it was proposed by Norway that the two rules be merged into one, and a new consolidated rule was eventually adopted as Article 12 of the Convention on the Territorial Sea and the Contiguous Zone. In support of the proposal it was argued that-

'the problems dealt with in the two articles [scil. Articles 12 and 14 of the I.L.C. draft] were so closely interrelated as in some cases to be practically indistinguishable-for instance where two States had a common land frontier which met the sea at the head of a deep bay' (Official Records, Vol. III, p. 188),

and also that-

'The merging of Articles 12 and 14 was merely a matter of drafting; the substance of the two articles was so similar that they would be better combined' (ibid., p. 190).
These arguments met with the general approval of the First Committee of the Conference, dealing with the territorial sea and contiguous zone. In the Fourth Committee, discussing the continental shelf, the delegate of Norway drew attention to the fact that the problems dealt with in Article 72 of the draft (which later became Article 6 of the Convention) were very similar to those covered by other articles, particularly Articles 12 and 14, with regard to which the Norwegian delegation had submitted proposals. Any drafting changes in the texts of Articles 12, 14 and 66 **252* (concerning the contiguous zone, eventually Article 24 of the Convention on the Territorial Sea and the Contiguous Zone) should therefore be taken into consideration by the drafting committee (Official Records, Vol. VI, p. 92). This suggestion, however, was not followed up, although nobody spoke against it. Consequently, the differences which now exist between the provisions of the two Conventions on this point seem to be due to insufficient co-ordination in the drafting, rather than different views on the principles involved. So far as Article 6 of the Convention on the Continental Shelf is concerned, there is no difference of principle between paragraphs 1 and 2. A more adequate formulation of that principle would have been a negative formulation, on the model of Article 12 of the Convention on the Territorial Sea, to the effect that 'no State is entitled to extend its area of the continental shelf beyond a line, every point of which is equidistant from [etc.]' (it may be pointed out in passing that the aforesaid Article 12 employs the term 'median line' with respect to both opposite and adjacent coasts).
A formula such as the one just quoted would also be the only adequate formula for dealing with complex situations, for instance where three or more States are facing each other as opposite States. It seems obvious that under the median line principle no State should be authorized to extend its area into the area to be divided by two other States, and that the median line between States A and B must stop where it intersects with the median line between B and C, although this does not follow from the actual wording of Article 6.
Although an international judge cannot rewrite the Convention on the Continental Shelf, the preceding explanations seem to warrant the conclusion that paragraphs 1 and 2 of Article 6 should be interpreted as expressions of a single legal principle, and that no clear-cut distinction can be made between the practice of States under one or the other of the two paragraphs.
In order to cover all aspects of the practice of States relating to Article 6, it is also necessary to consider the reservations which some States have made to that Article. Such reservations are not inadmissible under Article 12 of the Convention, and their legal effects must therefore be determined on the merits of each particular case. Some of the reservations have been objected to by other States, but it is not for the Court in the present cases to express an opinion on the legal effects of such objections. The reservations made, and the objections entered against them, are relevant only in so far as their total effect might be to disprove the thesis that Article 6, as part of the Convention, has been accepted as generally binding international law. In my opinion, however, this is not the case. First, only four out of 39 States parties to the Convention have entered reservations to Article 6. Secondly, having examined each of the reservations in detail, I find it safe to consider them not as aiming at excluding the regime of Article 6 as such, but at placing on record **253* that the existence or non-existence of special circumstances is claimed within the meaning of the express terms of that Article.
In general, the reservations made to Article 6 do not seem to invalidate the conclusion that the practice of States is in conformity with the provisions of Article 6.
Now if the Federal Republic, in her relations with other North Sea States, had consistently denied the applicability of Article 6, paragraph 2, to the delimitation of her shelf area, the question might have arisen of whether the provisions of that paragraph were opposable to the Federal Republic in spite of her objections. Like the more general problem examined above relating to her attitude to the Convention in general, this is a problem

concerning the attitude of the Federal Republic at the formative stage of a new rule of generally applicable international law. Far from having denied the applicability of Article 6, however, the Federal Republic has on one occasion actually referred to it as being applicable. In the Joint Minutes, signed in Bonn on 4 August 1964 by the respective leaders of a German and of a Netherlands delegation (Memorial, Federal Republic/Netherlands, p. 104), it is stated that the treaty which the two delegations would propose to their Governments to conclude concerning the lateral delimitation of the continental shelf near the coast would constitute 'an agreement in accordance with the first sentence of paragraph 2 of Article 6 of the Geneva Convention'. The same Joint Minutes embodied a statement to the effect that the Federal Government was seeking to bring about a conference of North Sea States-

'with a view to arriving at an appropriate division of the continental shelf situated in the middle of the North Sea in accordance with the first sentence of paragraph (1) and the first sentence of paragraph (2) of Article 6 of the Geneva Convention'.

Consequently, there is nothing to substantiate a conclusion that Article 6, and in particular paragraph 2 thereof, has not become part of generally accepted international law on an equal footing with the other provisions of the Convention.

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If, then, Article 6, paragraph 2, is held to be applicable, the next question is: which of the specific rules set forth in that paragraph should be applied in the present case?

The first sentence provides that the boundary shall be determined by agreement between the States concerned. In the present cases, the Parties have negotiated with a view to reaching agreement. These negotiations have not been entirely unsuccessful, since partial agreements *254 concerning the delimitation near the coast were concluded. No agreement could be reached on delimitation farther out to sea. Each of the two Special Agreements states in the preamble that the existing disagreement 'could not be settled by detailed negotiations'. On the other hand, Article 1, paragraph 2, or each Sepcial Agreement provides that the Governments concerned 'shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice'. In their pleadings before the Court the Parties have confirmed that at present the possibilities of negotiation have been exhausted, and that no agreement will be possible for so long as the Court has not decided what principles and rules are applicable. In my opinion, the Court cannot but take cognizance of this declaration.

Consequently, the next question is whether the principle of equidistance should be applied, or whether there are special circumstances which justify another boundary line. A natural construction of the wording of the provision, in particular the words 'unless another boundary line is justified ...', seems to indicate that the principle of equidistance is intended to be the main rule, and the drawing of another boundary line an exception to this main rule. This general understanding of the provision seems to be confirmed by the travaux preparatoires, including in particular the 1953 report of the Committee of Experts and the reports of the International Law Commission in 1953 and 1956. The problem, however, of the degree to which the 'special circumstances rule' should be considered as an exception to the main rule, and of exactly how 'exceptional' it should be, is largely identical with the problem as to whether the words 'special circumstances' should be given a wide or a narrow construction, and as to the nature of the 'special circumstances' which could justify a departure from the principle of equidistance.

This question is not only crucial to the settlement of the dispute between the Parties, if, as I believe, Article 6 is applicable, but also the most difficult question to answer. The ordinary and natural meaning of the words in the context of Article 6 does not give any guidance. If one then turns to the travaux preparatoires, some guidance is found in the debates and in the reports of the International Law Commission. Mention is made of 'any exceptional configuration of the coast, as well as the presence of islands or of navigable channels' (I.L.C. Report, 1953, Commentary on Article 82, and Report, 1956,

Commentary on Article 72). At the Geneva Conference, one of the members of the 1953 Committee of Experts, Commander Kennedy, speaking this time as a representative of the United Kingdom, mentioned as examples of special circumstances 'the presence of a small or large island in the area to be apportioned', such islands to be 'treated on their merits', of 'the possession by one of the two States concerned of special mineral exploitation rights or fishery rights, or the presence of a navigable channel' (Official Records, *255 Vol. VI, p. 93). As an element of the travaux preparatoires the explanations of votes given by delegates at the Conference when the Article was adopted may also be taken into consideration. The representative of the Federal Republic stated that he had voted in favour of the Article 'subject to an interpretation of the words 'special circumstances' as meaning that any exceptional delimitation of territorial waters would affect the delimitation of the continental shelf' (ibid., p. 98). Although a declaration of this kind cannot be held against the Federal Republic as justifying inferences a contrario, the statement is, nevertheless, significant as evidence of the types of special circumstance which were in the minds of delegates to the Conference. Incidentally, the statement made by the German delegate takes account of the situations obtaining in the Germano-Netherlands and Germano- Danish border areas, and the two subsequent partial agreements of 1964 and 1965 may be taken to recognize the existence of 'special circumstances' in these two situations. Nowhere in the travaux preparatoires, however, is any reference to be found to geographical situations resembling the bend in the general direction of the German North Sea coast.

It is true that the special circumstances clause was meant to apply in cases where the equidistance principle would lead to inequitable or unreasonable results. To indicate what is inequitable or unreasonable, however, is hardly possible in the absence of any standard of evaluation. The Convention itself does not offer any such standard, nor do the travaux preparatoires. There is no basis in international law for maintaining that two or three neighbouring States should have shelf areas of approximately the same size measured in square kilometres. The idea of justitia distributiva, however meritorious it may be as a moral or political principle, has not become part of international law, as will be seen from a cursory glance at the established international order with its patent factual inequalities between States. Nor is there any basis for maintaining that the respective areas of the continental shelf should be proportionate to the length of the coasts of the States concerned, or to any such uncertain and hitherto unknown concept as their 'coastal fronts'. In itself, the continental shelf area which appertains to the Federal Republic under the equidistance principle is not insignificant: it covers an area of 23,000 square kilometres (more than two-thirds of the total land area of the Netherlands, and more than half of that of Denmark), and its farthest point out to sea is at a distance of some 170 kilometres, or nearly 100 nautical miles, from the nearest points of the German coast.

The fact that this area would have been larger, had it not been for the combined effect of the Netherlands-German and Germano-Danish equidistance lines, is immaterial in this context. This combined effect is the product of the bend of the German coast as a geographical factor, and of the location of the Federal Republic's land frontiers with her neighbours, as a legal and political factor. Had the Netherlands-German *256 frontier lain farther to the west, and the Germano-Danish frontier farther to the north, the two equidistance lines would have met farther out to sea, or might not have met at all, so that the 'cutting-off' effect would have been reduced or entirely removed. But the Court has to base its findings on the geographical and political factors as they are, and not upon comparisons with hypothetical situations. The politico-geographical circumstances of coastal States all over the world, including those around the North Sea, are extremely different and have the effect of producting great inequalities as to the areas of continental shelf which each State could claim under the principle of equidistance. The special circumstances clauses of Article 6 cannot reasonably be understood as being designed to rectify any such inequalities caused by elementary geographical factors in combination with the location of political frontiers.

If anything, it might conceivably be argued that the areas to which sovereign rights

attach for the purpose of exploring and exploiting the natural resources of the continental shelf should be delimited in such a way as to apportion these resources equitably among the States concerned, taking into account the structure and trends of their respective national economies. The Convention, however, does not give any support for a solution based on such considerations, and the Parties to the present cases have not been able to provide relevant information as to the location of the natural resources, if any, of the areas in question.

One final consideration appears to be relevant. The delimitation of maritime areas between neighbouring States is a matter which may quite often cause disagreement and give rise to international disputes. In accordance with the function of law in the international community, the rules of international law should be so framed and construed as to reduce such causes of disagreement and dispute to a minimum. The clearer the rule, and the more automatic its application, the less the seed of discord is sown. This is particularly important in the absence of provision for the compulsory adjudication of disputes between the parties. The Convention on the Continental Shelf does not include any clause concerning the adjudication of boundary disputes, as envisaged at a certain stage of the work of the International Law Commission. Several of the States parties to the Convention are not parties to the Optional Protocol concerning the Compulsory Settlement of Disputes, adopted by the Geneva Conference, or to any other instrument providing for compulsory adjudication. In such circumstances, if the Court is faced with alternative ways of interpreting a treaty provision, it would seem not only legitimate but also advisable to give preference to the interpretation which will have the effect of circumscribing more narrowly the possible area of dispute. As far as Article 6 of the Convention on the Continental Shelf is concerned, there is no doubt that the principle of equidistance is one whose application is simple and almost mechanical, **257* while the special circumstances clause, because of its very vagueness, it fraught with potential conflict. Consequently, a narrow interpretation of the term 'special circumstances' should be preferred.

Similar considerations are even more pertinent to the fundamental question, whether or not the provisions of the Convention, and in particular Article 6, should be recognized as generally accepted international law. If this question is answered in the negative, and the delimitation is to be governed by a principle of equity only, considerable legal uncertainty will ensue, and that in a field where legal certainty is in the interest not only of the international community in general, but also-on balance-of the States directly concerned.

For the reasons stated above, my opinion is that the question set forth in the Special Agreements should have been answered as follows:

1. Article 6, paragraph 2, of the Convention on the Continental Shelf of 29 April 1958 is applicable to the delimitation, as between the Parties, of the areas of the continental shelf in the North Sea which appertain to each of them, beyond the partial boundary lines already agreed upon.
2. Within the meaning of Article 6, paragraph 2, no special circumstances exist which justify another boundary than that resulting from the application of the principle of equidistance.

(Signed) Max SORENSEN.

FN1 Cf. Grisbadarna award: 'the fundamental principles of the law of nations, both ancient and modern, according to which the maritime territory is essentially an appurtenance of a land territory' [translation by the Registry]. (U.N.R.I.A.A., XI, p. 159.)

FN2 It may also be noted that the delegate of the Federal Republic of Germany to the Geneva Conference of 1958, Professor Munch, declared that he was in agreement with the wording of Article 6, paragraphs 1 and 2, 'subject to an interpretation of the words 'special circumstances' as meaning that any exceptional delimitation of the territorial waters would affect the delimitation of the continental shelf' (U.N. Conference on the Law of the Sea, Official Records, VI, 4th Committee, p. 98).

 FN3 It is worthy of note that, at the conference on the Law of the Sea, the Delegation of Yugoslavia proposed to delete from Article 72 (now Article 6) the words 'and unless another boundary line is justified by special circumstances' (A/CONF. 13/42 , p. 130) and the Delegation of the United Kingdom, in its amended draft of the same Article, omitted the same words (ibid., p. 134).

FN4 A typical attitude is expressed in the following extract from a letter addressed by the French Ministry of Foreign Affairs to the International Law Commission on 2 August 1953: 'If ... the International Law Commission were to deem indispensable a choice between the three definitions' it has 'proposed, the French Government considers that delimitation by means of a line every point of which is equidistant from the nearest points on the coastline of each of the two adjacent States should be chosen, as being likely to yield the best solution in the greatest number of cases' [translation by the Registry] (Doc. A/CN./ 4/71 /Add.2; I.L.C. Yearbook, 1953, Vol. II, pp. 88 f., in fine).

FN5 It may be recalled as an example that, in its letter to the International Law Commission concerning the delimitation of the territorial sea, the Government of the United Kingdom stated: '4. Where the adjacent States are unable to reach agreement ... Her Majesty's Government consider that as a rule recourse should be had to judicial settlement. Such settlement should be according to international law rather than ex aequo et bono' (I.L.C. Yearbook, 1953, Vol. II, p. 85).

FN6 Professor Max Huber understands it 'as a basis independent of law' [translation by the Registry] (Annuaire de l'Institut de droit international, 1934, p. 233).

FN7 Italics supplied.

FN8 The Convention speaks of the equidistance principle but the Court uses the term 'equidistance method', thereby reducing the sig ificance of the principle to that of a technical means.

FN9 It may be noted that the Court was asked to indicate not a method of delimitation which could be applied in any or all circumstances, but the principles and rules of international law which are applicable in the circumstances that were indicated in these cases and referred to in the Special Agreements.

FN10 See Proceedings of The Hague Peace Conferences. Conference of 1907, Vol. II, New York, 1921, p. 319, where the text is given more fully.

FN11 Italics supplied.

FN12 It may be appropriate to mention here that, when analysing the former Judgments of the Court on 'Contestations relatives au trace de la frontiere', Professor Suzanne Bastid has noted that in them 'can be discerned certain tendencies showing that there is a distinction to be made between conflicts concerning frontiers and those to do with the attribution of a territory' [translation by the Registry] (Recueil des Cours de l'Academie de droit international, Vol. 107 (1962), p. 452).

FN1 'Die Bundesregierung wird den gesetzgebenden Korperschaften in Kurze den Entwurf eines Zustimmungsgesetzes zu dieser Konvention vorlegen, um die

verfassungscrechtliche Grundlage fur die Ratifikation durch die Bundesrepublik Deutschland zu schaffen.' 'UmRechtsunklarheiten zu beseitigen, die sich in der gegenwartigen Situation bis zum Inkrafttreten der Genfer Konvention uber den Festlandsockel und bis zu ihrer Ratifikation durch die Bundesrepublik Deutschland ergeben konnten, halt es die Bundesregierung fur erforderlich, schon jetzt folgendes festzustellen:
1. Die Bundesregierung sieht auf Grund der Entwicklung des allgemeinen Volkerrechts, wie es in der neueren Staatenpraxis und insbesondere in der Unterzeichnung der Genfer Konvention uber den Festlandsockel zum Ausdruck kommt, die Erforschung und Ausbeutung der Naturschatze des Meeresgrundes und des Meeresuntergrundes der an die deutschen Meereskusten grenzenden Unterwasserzone ausserhalb des deutschen Kustenmeeres bis zu einer Tiefe von 200 m und-soweit die Tiefe des Daruber befindlichen Wassers die Ausbeutung der Naturschatze gestattet-auch hieruber hinaus als ein ausschliessliches Hoheitsrecht der Bundesrepublik Deutschland an. Im einzelnen bleibt die Abgrenzung des deutschen Festlandsockels gegenuber dem Festlandsockel auswartiger Staaten Vereinbarungen mit diesen Staaten vorbehalten.'
(Bundesgesetzblatt, Teil II, Nr. 5, 6 February 1964.)

FN2 'Lange Zeit hindurch war in der volkerrechtlichen Lehre und Praxis die Moglichkeit des Erwerbs von Sonderrechten einzelner Staaten an den ihrer Kuste vorgelagerten Teilen des Festlandsockels verneint worden. In den letzten Jahren setzte sich die gegentielige Auffassung durch, dass die Gewinnung und aneignung der Schatze desMeeresuntergrundes nicht frei, vielmehr den Kustenstaaten vorbehalten seien. Als sichtbarer Ausdruck dieser Wandlung kann namentlich die auf der Genfer Seerechtskonferenz zustande gekommene Konvention uber den Festilandsockel vom 29. April 1958 (abgedruckt in Archiv des Volkerrechts Bd. 7 [1958/59] S. 325 ff.) gewertet werden, die neben 45 anderen Staaten auch von der Bundesrepublik Deutschland unterzeichnet und in der Zwischenzeit von 21 dieser Staaten ratifiziert worden ist. Nach ihrem Artikel 11 wird diese Konvention bereits mit der Hinterlegung der nachsten Ratifikationsurkunde in Kraft treten.
Es kann angesichts dessen davon ausgegangen werden, dass der Bundesrepublik spatestens seit der ohne Widerspruch gebliebenen Proklamation der Bundesregierung vom 20. Januar 1964 im Bereich des deutschen Festlandsockels Hoheitsrechte zustehen, die sich inhaltlich mit den in der Genfer Konvention zugunsten der Kustenstaaten festgelegten Rechten decken.' (Verhandlungen des deutschen Bundestages, 1964, Vol. 91, Drucksache IV/2341.)

FN1 I use the expression 'neighbouring States' in a wide and general sense, covering all States adjacent to the same continental shelf, whether or not they have a common land froniter.

I.C.J., 1969
NORTH SEA CONTINENTAL SHELF (Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands)
1969 I.C.J. 3
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# INTERNATIONAL CRIMINAL LAW

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# 3

# WAR CRIMES

## 3.1 THE NOTION

War crimes are *serious violations* of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict. As the Appeals Chamber of the ICTY stated in *Tadić* (*Interlocutory Appeal*), (i) war crimes must consist of 'a serious infringement' of an international rule, that is to say 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'; (ii) the rule violated must either belong to the corpus of customary law or be part of an applicable treaty; (iii) 'the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule' (§94); in other words, the conduct constituting a serious breach of international law must be criminalized.

In the same decision the Appeals Chamber gave the following example of a non-serious violation: 'the fact of a combatant simply appropriating a loaf of bread in an occupied village' would not amount to such a breach, 'although it may be regarded as falling foul of the basic principle laid down in Art. 46(1) of the [1907] Hague Regulations [on Land Warfare] (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory' (§94).

War crimes may be perpetrated in the course of either *international* or *internal* armed conflicts, that is, civil wars or large-scale and protracted armed clashes breaking out within a sovereign State. Traditionally war crimes were held to embrace only violations of international rules regulating war proper, that is international armed conflicts and not civil wars. Particularly after the ICTY Appeals Chamber decision in *Tadić* (*Interlocutory Appeal*) of 1995 (see *infra*, 3.3), it is now widely accepted that serious infringements of customary or applicable treaty law on internal armed conflicts must also be regarded as amounting to war crimes proper. As evidence of this new trend, suffice it to mention Article 8(2)(c–f) of the ICC Statute.

War crimes are serious violations of the international humanitarian law of armed conflict, a vast body of substantive rules comprising what are traditionally called 'the law of the Hague' and 'the law of Geneva'.

The former set of rules includes many Hague Conventions of 1899 or 1907 on

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international warfare. These rules provide for the various categories of lawful combatants, and regulate both combat actions (means and methods of warfare) and the treatment of persons who do not take part in armed hostilities (civilians, wounded, and the sick) or no longer take part in them (chiefly prisoners of war). The so-called 'law of Geneva' comprises the various Geneva Conventions (at present the four Conventions of 1949 plus the two Additional Protocols of 1977), and is essentially designed to regulate the treatment of persons who do not, or no longer, take part in the armed conflict. However, the Third Geneva Convention of 1949 also regulates the various classes of lawful combatants, thereby updating the Hague rules; in addition the First Additional Protocol of 1977 to some extent updates those rules of the Hague law which deal with means and methods of combat, for the sake of sparing civilians as far as possible from armed hostilities. It is thus clear that the traditional distinction between the two sets of rules is fading away; even assuming it has not become obsolete, its purpose now is largely descriptive.

War crimes may be perpetrated *by military personnel against enemy servicemen or civilians*, or *by civilians against* either *members of the enemy armed forces* or *enemy civilians* (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes, as clarified in *Pilz* by the Dutch Special Court of Cassation[1] as well as in *Motosuke*, by a Temporary Court Martial of the Netherlands East Indies, at Amboina.[2] Such offences may nonetheless fall within the ambit of the military law of the relevant belligerent.

[1] A young Dutchman in the occupied Netherlands had enlisted in the German army and while attempting to escape from his unit had been fired upon and wounded. Pilz, a German doctor serving in the German army with the rank of *Hauptstürmführer*, prevented medical and other aid or assistance being given by a doctor and hospital orderly to the wounded Dutchman, and in addition, 'in abuse of his authority as a superior', had 'ordered or instructed a subordinate to kill the wounded [man] by means of a firearm' (at 1210), as a result of which the Dutchman had died. The Court held that the offence was not a war crime, for 'the wounded person was part of the occupying army and the nationality of this person is therefore irrelevant, given that, by entering the military service of the occupying forces, he removed himself from the protection of international law and placed himself under the laws of the occupying power' (at 1210): consequently, the offence constituted a crime 'within the province of the internal law of Germany' (at 1211).

[2] Motosuke, a Japanese officer, had been accused, among other things, of having ordered the execution by shooting of a Dutch national named Barends, who, during the occupation of Ceram by Japanese armed forces, had joined the Gunkes, a corps of volunteer combatants composed mainly of Indonesian natives serving with the Japanese army. The Court held that by joining the Japanese forces, Barends had lost his nationality. His killing by Japanese forces was not considered a war crime (at 682–4).

## 3.2 THE NEED FOR A LINK BETWEEN THE OFFENCE AND AN (INTERNATIONAL OR INTERNAL) ARMED CONFLICT

Criminal offences, to amount to war crimes, must also have a link with an international or internal armed conflict. Many courts, chiefly the ICTY[3] and the ICTR,[4] have restated this proposition, which can be easily deduced from the whole body of international humanitarian law of armed conflict. This applies in particular to offences committed by civilians, although courts have also required the link or nexus with an armed conflict in the case of crimes perpetrated by members of the military. (In this respect a case worth mentioning is *Lehnigk and Schuster*, decided by the Italian Court of Assize of S. Maria Capua Vetere in 1994.)[5]

Special attention should be paid to crimes committed by civilians *against other civilians*. They may constitute war crimes, provided there is a link or connection between the offence and the armed conflict. If such a link is absent, the breach does not amount to a war crime, but simply constitutes an 'ordinary' criminal offence under the law applicable in the relevant territory. The Swiss Appellate Military Tribunal aptly confirmed this proposition in *Niyonteze*, in 2000;[6] as did the Tribunal Militaire de Cassation in its decision of 27 April 2001 on the same case (§9).

[3] See *Tadić* (Trial Chamber), at §573; *Delalić and others* (§193).

[4] See *Akayesu* (§§630–4, 638–44), *Kayishema and Ruzindana* (§§185–9, 590–624), *Musema* (§§259–62, 275, and 974). In all these cases the Court eventually found that the link required was lacking.

[5] In October 1943, after Italy had declared war against Germany and while the German troops were pulling out as a result of the military advance of the Allied forces in Southern Italy, a German unit including the two accused killed 22 Italian civilians who had taken shelter in a farm, to avoid being caught in the adverse consequences of the armed conflict under way. In the case brought against the two Germans *in absentia* (in Germany one of the two accused had been acquitted because the crime was covered by a statute of limitation, while the legal condition of the other was unclear, although criminal proceedings had been instituted against him). The Italian Court first asked itself whether the crime with which the two accused were charged should be regarded as ordinary murder or 'murder against the laws and customs of war', or in other words a war crime (at 8). In this respect the Court stated that a murder may amount to war crime only if it was proved that there exists 'an objective link [of the offence] with the demands of war' or, in other words, if the offence had 'a war-like nature', namely it had a link with war and did not 'prove to be generically linked to war' (at 9). The Court then dwelled at length on the facts and concluded that what some witnesses had stated (namely that the German unit had killed the civilians in the farm, in the dark, because they had seen light signals from the farm and feared that there could be partisans or enemy troops) was not correct; the killing was not carried out as a response to, or out of fear of, enemy action, and did not serve any military purpose; indeed the Germans had killed the civilians only out of 'intolerance and hatred for the Italian people' (at 26–30); hence, the murder was not linked to war and could not be classified as a war crime (at 30). That these conclusions totally lack legal merit is patent: the Court undisputedly misinterpreted the laws of war. Clearly, even assuming that the killing only resulted from hatred, it still was a war crime: subjective motives do not have legal relevance in this context.

[6] The accused was a Rwandan arrested in Switzerland and accused of having instigated, and in some cases ordered, the murder of civilians in Rwanda in 1994 in his capacity as mayor of a local 'community' (*commune*). The Tribunal could not apply the Genocide Convention since Switzerland had not yet ratified it. The Tribunal held, therefore, that it would apply the laws of warfare and the provisions of the Geneva Conventions applicable to internal armed conflicts as well as the Second Protocol of 1977. Faced with the question whether

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## 3.3 ESTABLISHING WHETHER A SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW HAS BEEN CRIMINALIZED

As pointed out above, in order for a serious violation of international humanitarian law to become a war crime, it is necessary that the violation be criminalized. The question then becomes one of how to determine whether this is the case.

The point of departure is the observation that the failure of the relevant rules of international humanitarian law to provide for any courts or criminal proceedings in the event of the rule being breached is not determinative of the issue. What matters is that criminal or military courts have in fact adjudicated breaches of international humanitarian law. Various courts rightly held this view: for instance, the IMT in *Göring and others* (at 220–1), a US Military Tribunal sitting at Nuremberg in *List and others* (the so-called *Hostages* case) (at 635), and in *Ohlendorf and others* (the so-called *Einsatzgruppen* case) (at 658), as well as the US Supreme Court in *Ex parte Quirin* (at 465).

A second, general and preliminary, remark concerns the need to avoid the following simplistic proposition: to determine whether a particular act may be termed a war crime, one need only establish that the act breaches international humanitarian law, since all violations of the laws of war are war crimes under national law and military manuals. The Judge Advocate at a Canadian Military Court pronouncing in 1946 on a war crime in *Johann Neitz* took this view. After noting that, under Canadian law, a war crime was any 'violation of the laws and usages of war committed during any war in which Canada had been or may be engaged at any time', the Judge Advocate added: 'The test of criminal responsibility is therefore not properly applicable, and the issue upon any charge is not "did the accused commit a crime?" as we understand the word "crime" under our criminal law, but "did he violate the laws and usages of war"?' (at 195–6).

This approach is not convincing, as not all violations of international humanitarian

a civilian could be held responsible for war crimes where he had instigated or ordered the murder of other civilians, the Tribunal held that 'Anyone, whether military or civilian, who attacks a civilian protected by the Geneva Conventions . . . breaches these Conventions and consequently falls under Article 109 of the Swiss Penal Military Code [providing for the punishment of war crimes]. This Appellate Tribunal thus differs from the judgments of the ICTR, which require a close link between the breach and an armed conflict and confine the application of the Geneva Conventions to persons discharging functions within the armed forces or the civilian government (*Musema* §§259[–62] and *Akayesu* §§642–3). Nevertheless this Tribunal considers that in any case there must exist a link between the breach and an armed conflict. If, within the framework of a civil war, where civilians of the two sides are both protected by the Geneva Conventions, a protected person commits a breach against another protected person, it is necessary to establish a link between this act and the armed conflict. If such link is lacking, the breach does not constitute a war crime but an ordinary offence (*infraction de droit commun*)' (at 39–40). In the case at bar, the Tribunal found this link in the fact that the accused was the mayor of the *commune*, and exercised *de jure* and de facto authority over the local citizens; it was thus in his capacity as a 'public official' or civil servant that he committed the crimes (at 40–1).

law amount to war crimes, as pointed out in *Tadić* (*Interlocutory Appeal*) (§94). In short, to establish whether a breach of that body of law, in addition to giving rise to State responsibility (if the act was performed by a State agent), is also criminalized, the simple equation, breach of international humanitarian law equals a war crime, may not suffice, in light of case law and the general principles of criminal justice, in particular the principle of legality (*nullum crimen sine lege*).

These points having been established, several situations need to be distinguished. First, it may be that a violation has been consistently considered a war crime by national or international courts (this is, for example, true of the most blatant violations, such as unlawfully killing prisoners of war or innocent civilians, shelling hospitals, refusing quarter, killing shipwrecked or wounded persons, and so on). The existence of war crimes cases on a particular matter may sometimes be considered sufficient for holding the breach to be a war crime. However, strictly speaking the existence of a few (possibly isolated) war crimes cases may not be enough. It would be better if it were possible to show that the breach is considered a war crime under customary international law, in which case there would have to be widespread evidence that States customarily prosecute such breaches as war crimes and that they do so because they believe themselves to be acting under a binding rule of international law (*opinio juris*).

A second possible instance is that a breach is termed a war crime by the Statute of an international tribunal. In this case, even if the breach has never been brought before a national or international tribunal, it may justifiably be regarded as a war crime—or, at least, as a war crime falling under the jurisdiction of that international tribunal.

A third, and more difficult, category is when the case law and statutes of international tribunals are absent or silent on the matter.[7] In such a case, how is one to determine whether violating a prohibition of international humanitarian law amounts to a war crime? In light of the case law (see *List and others* (*Hostages* case), *John G. Schultz*, *Tadić* (*Interlocutory Appeal*), and *Blaškić*, to which I will presently return) and the general principles of international criminal law, one is entitled, in seeking an answer to the question, to examine: (i) military manuals, (ii) the national legislation of States belonging to the major legal systems of the world, or, if these elements are lacking, (iii) the general principles of criminal justice common to nations of the world, as set out in international instruments, acts, resolutions and the like; and (iv) the legislation and judicial practice of the State to which the accused belongs or on whose territory the crime has allegedly been committed.

Let us now take a look at how courts have gone about this matter.

In *List and others* (the *Hostages* case) the defendants were high-ranking officers in the German armed forces charged with war crimes and crimes against humanity. (They were accused of offences committed by troops under their command during

[7] An example is the prohibition on the use of weapons that are inherently indiscriminate or cause unnecessary suffering.

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the occupation of Greece, Yugoslavia, Albania, and Norway, these offences mainly being reprisal killings, purportedly carried out in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity.) They claimed that Control Council Law no. 10, on the basis of which they stood accused, was an *ex post facto* act and retroactive in nature. The Tribunal rejected the contention, holding that the crimes defined in that Law were crimes under pre-existing rules of international law, 'some by conventional law and some by customary law'. It went on to state that the war crimes at issue were such under the Hague Regulations of 1907 and then added:

> In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply, recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages or war, or the general principles of criminal justice common to civilized nations generally. (At 634–5.)

The Tribunal then noted that the acts at issue were traditionally punished, adding that, although no courts had been established nor penalties provided for the commission of these crimes, 'this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes' (at 635).

It was the Appeals Chamber of the ICTY that best addressed the issue under discussion, in *Tadić* (*Interlocutory Appeal*). The question in dispute was whether the accused could be held criminally liable for breaches of international humanitarian law allegedly committed in an internal armed conflict; in other words, whether he could be held responsible for war crimes perpetrated in a civil war. The Appeals Chamber first considered whether there were customary rules of international humanitarian law governing internal armed conflicts, and answered in the affirmative (§§96–127). It then asked itself whether violations of those rules could entail individual criminal responsibility. For this purpose, the Court examined national cases, military manuals, national legislation, and resolutions of the UN Security Council. It concluded in the affirmative (§§128–34) and then added that in the case at issue this conclusion was fully warranted 'from the point of view of substantive justice and equity', because violations of international humanitarian law in internal armed conflicts were punished as criminal offences in the countries concerned, that is both the old Socialist Federal Republic of Yugoslavia and in Bosnia and Herzegovina; as the Court noted, 'Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law' (§135; see also §136).

An ICTY Trial Chamber returned to the question in *Blaškić*. The defence contended that violations of common Article 3 of the four 1949 Geneva Conventions (on internal armed conflict) did not entail criminal liability. The Trial Chamber dismissed this contention by noting, first, that those violations were envisaged in Article 3 of the

ICTY Statute, conferring jurisdiction on the Tribunal, and secondly, that the criminal code of Yugoslavia, taken over in 1992 as the criminal code of Bosnia and Herzegovina (the place where the alleged offences had been committed), provided that war crimes committed either in international or in internal armed conflicts involved the criminal liability of the perpetrator (§176). The question was also dealt with, albeit in less compelling terms, by a US Court of Military Appeals in *John G. Schultz.*[8]

[8] The accused, a former captain of the US Air Force who had returned to civilian life, in 1950, in Japan, had killed two Japanese pedestrians. He was tried by a US General Court Martial on charges of involuntary manslaughter and drunken driving, in violation of Articles of War (respectively 93 and 96). The Judge Advocate General of the Air Force appealed the case on, among other grounds, the issue of whether the Court Martial had jurisdiction over the accused and the offences charged. The Court of Appeals, having found that the accused was neither a 'retainer to the camp' nor a 'person accompanying or serving with the US Armies', hence not amenable to a US Court Martial's jurisdiction on these grounds, asked itself whether he fell under the category of 'any other person who by the law of war is subject to trial by military tribunals'. To answer this question it noted, among other things, that US jurisdiction extended to two types of offences: first, crimes committed against the civilian population made 'punishable by the penal codes of all civilized nations', namely war crimes; secondly, 'crimes condemned by local statute which the military occupying power must take cognizance of inasmuch as the civil authority is superseded by the military'. The Court first looked into the first category, to establish whether the offence at issue fell within such category. Having reached a negative conclusion, it turned to the second category, and concluded that the offence came within its purview. Let us now briefly see how the Court discussed the class of war crimes in a lengthy *obiter dictum.*

The Court noted that this category 'finds its basis in the customs and usages of civilized nations'. It then went on to say that, 'In deciding whether a given offence constitutes a crime under the common law of war, we have no single source which will provide a ready answer. This law is nowhere precisely codified. We note, however, that certain crimes are universally recognized as properly punishable under the law of war. These include murder, manslaughter, robbery, rape, larceny, arson, maiming, assaults, burglary, and forgery . . . The test bringing these offences within the common law of war has been their almost universal acceptance as crimes by the nations of the world. This test is consistent with the rule, already noted, that the common law of war has its sources in the principles, customs, and usages of civilized nations. We know of no authority for the proposition that the list of crimes denounced above is either all-inclusive or unchanging. By definition, the law of war must be a concept which changes with the practice of war and the customs of nations. It is neither formalized nor static . . . It is therefore no obstacle to finding a particular offence to be a violation of the law of war that it has not yet been precisely labelled as such. On the other hand, of course, we are not free to add offences at will. In deciding whether an offence comes within the common law of war, we must consider the international attitude towards that offence. The power to define such offences is derived from Articles of War 12 and 15 . . . and it is no objection that Congress has not codified that branch of international law or defined the acts which that law condemns . . . The accused was convicted, in substance, of homicide through negligent operation of a motor vehicle. By the court's findings, there is indicated an intent to find the accused guilty of a crime of a lesser degree than involuntary manslaughter. The question before us is whether the common law of war includes such an offence. We note first that all the crimes which, historically, have been treated as violations of the law of war include an element of *animus criminalis.* Negligent homicide or vehicular homicide, as the term is commonly used, does not include such an element. This is, however, not necessarily determinative. We shall assume that a crime may become a violation of the law of war if universally recognized as an offence even though it contains no element of specific criminal intent. A careful perusal of the penal codes of most civilized nations leads us to the conclusion that homicide involving less than culpable negligence is not universally recognized as an offence. Even in those American jurisdictions—still relatively few in number—which have given statutory recognition to either negligent homicide or vehicular homicide, the degree of negligence required is often held to be "culpable" or "gross"—the same as that required for involuntary manslaughter. Imposing criminal liability for less than culpable negligence is a relatively new concept in criminal law and has not, as yet, been given universal acceptance by civilized nations' (at 114–16).

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## 3.4 THE OBJECTIVE ELEMENTS OF THE CRIME

### 3.4.1 GENERAL

In order to identify the main legal features of the prohibited conduct, it is necessary to consider in each case the content of the substantive rule that has been allegedly breached. This should not be surprising. No authoritative and legally binding list of war crimes exists in customary law. (An enumeration can only be found in the Statute of the ICC, under Article 8, which is not, however, intended to codify customary law.) It should also be noted, more generally, that the principle *nullum crimen sine lege* (traditionally cherished in national legal systems, particularly those of civil law countries) is upheld in international criminal law only in a limited way (see *infra*, 7.3 and 7.4.1). Hence in each case the objective element of the crime can only be inferred from the substantive rule of international humanitarian law allegedly violated. For a subcategory of war crimes, namely those acts that are provided for in terms and defined by the 1949 Geneva Conventions and Additional Protocol I of 1977 as 'grave breaches', a further requirement is provided for: such acts must be committed within the context of an international armed conflict. (However, as the ICTY Appeals Chamber held in *Tadić* (*Interlocutory Appeal*), a customary rule is *in statu nascendi*, that is in the process of forming, whereby 'grave breaches' can also be perpetrated in internal armed conflicts; according to Judge Abi-Saab's Separate Opinion delivered in that case, such a rule has already evolved.)

### 3.4.2 CLASSES OF WAR CRIMES

War crimes can be classified under different headings. The following classification is based on some objective criteria, and may prove useful, although of course it only serves descriptive purposes: (i) war crimes committed in *international* armed conflicts (that is, between two or more States, or between a State and a national liberation movement, pursuant to Article 1(4) of the First Additional Protocol of 1977), and (ii) war crimes perpetrated in *internal* armed conflicts (that is, large-scale armed hostilities, other than internal disturbances and tensions, or riots or isolated or sporadic acts of armed violence, between State authorities and rebels, or between two or more organized armed groups within a State). Traditionally States and courts have held that war crimes may only be committed during wars proper. Violations of international law committed in the course of internal armed conflicts were not criminalized. Thus, a glaring and preposterous disparity existed. As stated above, in 1995, a seminal judgment of the ICTY Appeals Chamber in *Tadić* (*Interlocutory Appeal*) (§§97–137) signalled a significant advance: the Appeals Chamber held that war crimes could be committed not only in international armed conflicts but also in internal armed conflicts. Since then the view has been generally upheld and the ICC Statute definitively consecrates it in Article 8(2)(c)–(f).

Both classes include the following:

1. Crimes committed *against persons not taking part, or no longer taking part, in armed hostilities.* In practice by far the most numerous crimes are committed against civilians,[9] or armed resistance movements in occupied territory,[10] and include sexual violence against women.[11] In particular, they are perpetrated against persons detained in internment or concentration camps.[12] They are also committed against prisoners of war.[13]

In the case of international armed conflicts, these crimes are termed 'grave breaches' against one of the 'protected persons' (wounded, shipwrecked persons, prisoners of war, civilians on the territory of the Detaining Power or subject to the belligerent occupation of an Occupying Power) or 'protected objects' provided for in the 1949 Geneva Conventions as well as the First Additional Protocol. These Conventions stipulate that 'grave breaches' of the same Conventions are also subject to 'universal jurisdiction'. Grave breaches are defined in the following provisions: Articles 50, 51, 130, and 147 of the First, Second, Third, and Fourth Geneva Conventions, respectively, as well as in Article 85 of the First Additional Protocol. They include wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive

[9] See for instance *von Falkenhausen and others* (at 867–93), *Bellmer* (at 541–4), *Lages* (at 2–3), *Wagener and others* (at 148), *Sch. O.* (at 305–7), *Sergeant W.* (decision of 18 May 1966, at 1–3; decision of 14 July 1966, at 2). For fairly recent cases see for instance *Major Malinky Shmuel and others* (at 10–137), *Calley* (at 1164–84), *Tzofan and others* (*Yehuda Meir* case) at 724–46, *Sablić and others* (at 37–135).

[10] See for instance the *SIPO Brussels* case (at 11518–26), *Allers and others* (at 225–47).

[11] In this respect it is worth mentioning two cases brought after the Second World War before the Dutch Temporary Court Martial in Batavia (Indonesia). The first is *Washio Awochi*. The accused, a Japanese civilian who managed a club for Japanese civilians in Indonesia, had procured or arranged the procurement of girls and women for the club's visitors, forcing them into prostitution; they were not free to leave the part of the club where they had been confined. The Court held that the defendant was guilty of the war crime of 'forcing into prostitution' and sentenced him to 10 years' imprisonment (at 1–15). In *Takeuchi Hiroe* the accused, a Japanese national, had used violence or threats of violence against a young Indonesian woman, and had forced her to have sexual intercourse with him. The Court found him guilty of the war crime of rape and sentenced him to five years' imprisonment (at 1–5).

See also some cases of rape brought before the ICTY: *Furundžija* (§§165–89) and *Kunarac and others* (§§436–64 and 630–87, 717–45, 785–98, 806–22).

[12] Among the numerous cases on this matter one may recall various ones concerning the ill-treatment of persons detained in the concentration camps instituted in Poland, such as Auschwitz (see *Mulka and others*), in Germany, at Dachau (see *Martin Gottfried and others*), by the German occupying troops in Majdanek (see *Götzfrid*, at 2–70), in camps in Belgium (see for instance *Köpperlmann* as well as *K.W.* (at 565–7) and *K.* (at 653–5), in Amersfoort (Netherlands) (see for instance *Kotälla*), or in Bolzano (Italy) (see for instance, *Mittermair*, at 2–5, *Mitterstieler*, at 2–7, *Lanz*, at 2–4, *Cologna*, at 2–9, *Koppelstätter and others*, at 3–7) or in the Italian camp of Fossoli (see *Gutweniger*, at 2–4), or in internment camps in the former Yugoslavia (see for instance *Sarić*, 2–6). Such crimes may even be perpetrated by internees against other internees (see for instance *Ternek*, at 3–11, and *Enigster*, at 5–26).

[13] See for instance some cases brought after the First World War before the Leipzig Supreme Court: *Heynen* (at 2543–7), *Müller* (at 2549–52) and *Neumann* (at 2553–6). See also other cases, relating to the Second World War: *Mälzer* (at 53–5), *Feurstein and others* (at 1–26), *Krauch and others* (at 668–80), *Weiss and Mundo* (at 149), *Gozawa Sadaichi and others* (at 195–228), *General Seeger and others* (*Vosges* case), at 17–22; *St. Die* case, at 58–61; *La Grande Fosse* case, at 23–7; *Essen lynching* case, at 88–92.

destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

In the case of internal armed conflict,[14] the same violations are prohibited and may amount to a war crime if they are serious, but may not be termed 'grave breaches'. In this connection reference should be made to Article 3 common to the four 1949 Geneva Conventions, Additional Protocol II (especially Article 4 thereof),[15] as well as Article 4 of the ICTR Statute.[16]

2. Crimes against enemy combatants or civilians, committed by resorting to *prohibited methods of warfare.*

Examples include intentionally directing attacks against the civilian population in the combat area or individual civilians in the combat area not taking part in hostilities; committing acts or threats of violence the primary purpose of which is to spread terror among the civilian population; intentionally launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians, or damage to civilian objects; intentionally making non-defended localities or demilitarized zones the object of attack; intentionally making a person the object of attack in the knowledge that he is *hors de combat*; intentionally attacking medical buildings, material, medical units and transport, and personnel; intentionally using starvation of civilians, as a method of warfare by depriving civilians of objects indispensable to their survival, including wilfully impeding relief supplies; intentionally launching an attack in the knowledge that such attack will cause widespread, long-term, and severe damage to the natural environment; utilizing the presence of civilians or other protected persons with a view to rendering certain points, areas, or military forces immune from military operations; declaring that no quarter will be given, that is, that enemy combatants will be killed and not taken prisoner.

3. Crimes against enemy combatants and civilians, involving the use of *prohibited means of warfare.*

Examples include employing weapons, projectiles, and materials which are of a nature to cause superfluous injury or unnecessary suffering; employing poison or poisoned weapons, or asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices; using chemical or bacteriological weapons; employing expanding bullets, or weapons the primary effect of which is to injure by fragments not detectable by X-rays, or blinding laser weapons (according to the definition of the

[14] For a case where a court has endeavoured to define the notion of 'internal armed conflict' see *Ministère public and Centre pour l'égalité des chances et la lutte contre le racism* v. *C. and B.* (at 5–7). Other cases where courts had to pronounce on whether or not the conflict was internal, include: *Osvaldo Romo Mena* (decision of the Supreme Court of Chile of 26 October 1995, at 3, and decision of 9 September 1998, at 2–5), *Chilean state of emergency* case (at 1–3), *G.* (Swiss Military Tribunal, at 7).

[15] For a case where a court has held that Additional Protocol II was applicable, see *Applicability of the Second Additional Protocol to the Conflict in Chechnya*, (*Chechnya* case) (at 2–3). See also *Constitutional Conformity of Protocol II* (§25).

[16] For a case of war crimes in civil war, see *Nwaoga* (at 494–5).

1995 Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, adopted at Geneva on 10 October 1980, the latter are 'laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to un-enhanced vision, that is to the naked eye or to the eye with corrective eyesight devices'); employing booby-traps or land mines indiscriminately, that is, in such a way as to hit both combatants and civilians alike, or anti-personnel mines which are not detectable; employing napalm and other incendiary weapons in a manner prohibited by the 1980 Protocol III to the aforementioned Convention (for instance, by making a military objective 'located within a concentration of civilians the object of attack by air-delivered incendiary weapons').

4. Crimes *against specially protected persons and objects* (such as medical personnel units or transport, personnel participating in relief actions, humanitarian organizations such as the Red Cross, or Red Crescent, or Red Lion and Sun units, UN personnel belonging to peace-keeping missions, etc.).

5. Crimes consisting of *improperly using protected signs and emblems* (such as a flag of truce; the distinctive emblems of the Red Cross, or Red Crescent, or Red Lion and Sun; perfidious use of a national flag or of military uniform and insignia, etc.).

## 3.5 THE SUBJECTIVE ELEMENT OF THE CRIME

The subjective—or mental—element (*mens rea*) of the crime is sometimes specified by the international rule prohibiting a certain conduct.

Thus, for instance, Article 130 of the Third Geneva Convention of 1949 (on prisoners of war) enumerates among the 'grave breaches' of the Convention the 'wilful killing [of prisoners of war], torture or inhuman treatment, including biological experiments' as well as 'wilfully causing great suffering or serious injury to body or health' of a prisoners of war, or 'wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in [the] Convention'. The word 'wilful' obviously denotes *criminal intent*, namely the intention to bring about the consequences of the act prohibited by the international rule (for instance, in the case of 'wilful killing' proof must be produced of the intention to cause the death of the victim; in the case of 'wilfully causing great suffering' it must be proved that the perpetrator had the intention to cause great suffering, etc.). The same holds true for other similar provisions, such as Article 147 of the Fourth Geneva Convention (on civilians) as well as provisions of other treaties, such as Article 15 of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict. (This provision, in enumerating the serious violations of the Protocol entailing individual criminal liability, makes such liability contingent upon the fact that the author of the 'offence' has perpetrated it 'intentionally'.)

One can also mention Article 85(3) of the First Additional Protocol of 1977. This provision subordinates the criminalization of such acts as attacking civilians or undefended localities, or demilitarized zones, or perfidiously using the distinctive emblem of the Red Cross, Red Crescent or Red Lion and Sun, to three conditions: (i) the acts must be committed 'wilfully'; (ii) they must be carried out in violation of the relevant provisions of the Protocol; and (iii) they must cause death or serious injury to body or health. Thus, the provisions clearly require intent or at least *recklessness* (so-called *dolus eventualis*), which exists whenever somebody, although aware of the likely pernicious consequences of his conduct, knowingly takes the risk of bringing about such consequences (see *infra*, 8.3). For other acts, the same provision also requires '*knowledge*' as a condition of criminal liability. This, for instance, applies to 'launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects' (Article 85(3)(b)); or to 'launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects' (Article 85(3)(c)). As we shall see (*infra*, 8.2.1), in criminal law 'knowledge' normally is part of 'intent' (*dolus*) and refers to awareness of the circumstances forming part of the definition of the crime. However, in the context of the provision at issue, 'knowledge' must be interpreted to mean 'predictability of the likely consequences of the action' (recklessness or *dolus eventualis*). Therefore, for an act such as that just mentioned to be regarded as a war crime, evidence must be produced not only of the intention to launch an attack, for instance an attack on a military objective normally used by civilians (e.g. a bridge, a road, etc.), but also of the foreseeability that the attack is likely to cause excessive loss of life or injury to civilians or civilian objects. In other instances, international rules require knowledge in the sense of awareness of a circumstance of fact, as part of criminal intent (*dolus*). Thus, Article 85(3)(e) of the same Protocol makes it a crime to wilfully attack a person 'in the knowledge that he is *hors de combat*'.

When international rules do not provide, even implicitly, for a subjective element, it would seem appropriate to hold that what is required is the intent or, depending upon the circumstances, recklessness as prescribed in most legal systems of the world for the underlying offence (murder, rape, torture, destruction of private property, pillage, etc.).

Generally speaking, it appears admissible to contend that, for at least some limited categories of war crimes, gross or *culpable negligence* (*culpa gravis*) may be sufficient, that is, the author of the crime, although aware of the risk involved in his conduct, is nevertheless convinced that the prohibited consequence will not occur (whereas in the case of 'recklessness' or *dolus eventualis* the author knowingly takes the risk); see *infra*, 8.4. Indeed, the consequent broadening of the range of acts amenable to international prosecution is in keeping with the general object and purpose of international humanitarian law. This modality of *mens rea* may for instance apply to cases of command responsibility (see *infra*, 10.4), where the commander should have known that war crimes were being committed by his subordinates. Also, it could be con-

tended that it may apply to such cases as wanton destruction of private property; in contrast, it may seem difficult to consider culpable negligence a sufficient subjective element of the crime in cases involving the taking of human life.

## 3.6 THE DEFINITION OF WAR CRIMES IN THE STATUTE OF THE ICC

Generally speaking, the Rome Statute appears to be praiseworthy in many respects as far as substantive criminal law is concerned. Many crimes have been defined with the required degree of specificity, and the general principles of criminal liability have been set out in detail.

As far as war crimes more specifically are concerned, it is no doubt commendable that they have been regulated in such a detailed manner. Furthermore, the notion of war crimes has rightly been extended to offences committed in time of internal armed conflict. However, in some areas the relevant provision of the Rome Statute, Article 8, marks a retrograde step with respect to existing international law.

First of all, there is a perplexing phrase, 'within the established framework of international law', that appears in Article 8(2)(b) and (e), dealing with crimes likely to be perpetrated while in combat (that is, crimes involving the wrongful use of means or methods of combat), respectively in international armed conflicts and in non-international armed conflicts. These two provisions are worded as follows:

> [For the purpose of this Statute 'war crimes' means] Other serious violations of the laws and customs applicable in international armed conflict [in armed conflicts not of an international character: litt (e)], *within the established framework of international law*, namely, any of the following acts.

As in the other provisions of Article 8 no mention is made of 'the established framework of international law'. One could argue that there is only one possible explanation of this odd phrase: the offences listed in the two aforementioned provisions are to be considered as war crimes for the purpose of the Statute only if they are regarded as such by customary international law. In other words, whilst for the other classes of war crimes the Statute confines itself to setting out the content of the prohibited conduct, and the relevant provision can thus be directly and immediately applied by the Court, in the case of the two provisions under consideration things are different. The Court may consider that the conduct envisaged in these provisions amounts to a war crime only if and to the extent that general international law already regards the offence as a war crime. It would follow, for example, that 'declaring that no quarter will be given' (Article 8(2)(b)(xii)) will no doubt be taken to amount to a war crime, because indisputably denial of quarter is prohibited by customary international law and, if effected, amounts to a war crime. By contrast offences such as 'The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the

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population of the occupied territory within or outside this territory' (Article 8(2)(b)(viii)) cannot *ipso facto* be regarded as war crimes. The Court will first have to establish whether: (i) under general international law they are considered as breaches of the international humanitarian law of armed conflict and, in addition, (ii) whether under customary international law their commission amounts to a war crime.

If the above explanation were to be regarded as sound, it would follow that for two broad categories of war crimes the Statute does not set out a self-contained legal regime, but presupposes a mandatory examination, by the Court, on a case by case basis, of the current status of general international law. This method, while commendable in some respects, may however entail that the Statute's provisions eventually constitute only a tentative and interim regulation of the matter, for the final say rests with the Court's determination. Whether or not such a regulation is considered satisfactory, in any event it seems indisputable that it has been designed to leave greater freedom to sovereign States or, to put it differently, to make the net of international prohibitions less tight and stringent.

Secondly, the legal regulation of means of warfare seems to be narrower than that laid down in customary international law.

The use in international armed conflict of modern weapons which are contrary to the two basic principles prohibiting those weapons which (a) cause superfluous injury or unnecessary suffering, or (b) are inherently indiscriminate, is not banned per se and therefore does not amount to a crime under the ICC Statute. The ban will only take effect, and its possible breach amount to a crime, if an amendment to this end is made to the Statute pursuant to Articles 121 and 123. In practice, as it is extremely unlikely that such amendment will ever be agreed upon, those weapons may eventually be regarded as lawful. Thus, in the event the two principles are deprived of their overarching legal value. This seems all the more questionable because even bacteriological weapons, which undoubtedly are already prohibited by general international law, might be used without entailing the commission of a crime falling under the jurisdiction of the Court. (It would seem that the use of this category of weapons is not covered by the ban on 'asphyxiating, poisonous or other gases and all analogous liquids, materials or devices', contained in Article 8(2)(b)(xviii) and clearly relating to chemical weapons only.)

A similar criticism may be made of the sub-article on damage to the environment, 'Intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (Article 8(2)(b)(iv)). Article 55(1) of Additional Protocol I—to which any article on environmental war crimes must accord 'precedential' value—provides:

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition on the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Article 55 makes no mention of the 'excessive' or disproportionate character of the attack nor of 'anticipated military advantage' (let alone of the 'direct overall military advantage anticipated', a phrase that gives belligerents a very great latitude and renders judicial scrutiny almost impossible). Moreover, in paragraph 2 it prohibits reprisals by way of attack against the natural environment. Article 8 of the ICC Statute therefore takes a huge leap backwards by allowing the defence that 'widespread, long-term and severe damage to the natural environment' caused by the perpetrator—not just damage, but widespread, long-term and severe damage, intentionally caused—was not 'clearly excessive' (perhaps it was excessive, but not 'clearly excessive') in relation to the concrete and direct overall military advantage anticipated. This seems indefensible.

Thirdly, one may entertain some misgivings concerning the distinction, upheld in Article 8, between the regulation of *international* armed conflict, on the one side, and *internal* conflicts on the other. Insofar as Article 8 separates the law applicable to the former category of armed conflict from that applicable to the latter category, it is somewhat retrograde, as the current trend has been to abolish the distinction and to have simply one corpus of law applicable to all conflicts. It can be confusing—and unjust—to have one law for international armed conflict and another for internal armed conflict.

More specific flaws may be discerned. For instance, while for crimes in internal armed conflicts perpetrated against adversaries *hors de combat* (combatants who have laid down their weapons, the wounded, the sick, civilians) the relevant provision (Article 8(2)(c)) refers to a low threshold of armed conflict ('an armed conflict not of an international character', excluding 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'), as for the threshold required by the provision for crimes committed in combat, it is provided (in Article 8(2)(f)), that the relevant provisions apply 'to armed conflicts that take place in the territory of a State when there is *protracted* armed conflict between governmental authorities and organized groups or between such groups' (emphasis added). It follows that for a crime belonging to the second class to be perpetrated, an added requirement is envisaged, namely that the internal armed clash be 'protracted'. It would seem that the main reason for this distinction is that in the first class, there already existed a set of provisions laid down in Article 3 common to the four Geneva Conventions and that furthermore these provisions are held to have turned into customary international law. In contrast, no previous treaty or customary rule existed regulating method of combat in internal armed conflict. While making progress in this area, the majority of States gathered at the Rome Conference have preferred, so the explanation goes, to tread gingerly so as to take due account of States' concerns. Assuming that this explanation is correct, nonetheless the fact remains that a dichotomy has been created, which appears contrary to the fundamental object and purpose of international humanitarian law.

Furthermore, the prohibited use of weapons in internal armed conflicts is not regarded as a war crime. This regulation does not reflect the current status of general

international law. As the Appeals Chamber of the ICTY stressed in *Tadić* (*Interlocutory Appeal*), in modern warfare it no longer makes sense to distinguish between international and internal armed conflicts:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as *proscribe weapons causing unnecessary suffering* when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? (§97, emphasis added.)

The Appeals Chamber rightly answered this question by finding that the prohibition of weapons causing unnecessary suffering, as well as the specific ban on chemical weapons, also applies to internal armed conflicts (§§119–24).

The above restrictions on modern regulation of armed conflict are compounded by two more factors: (i) allowance has been made for superior orders to relieve subordinates of their responsibility for the execution of orders involving the commission of war crimes; (ii) Article 124 allows States to declare, upon becoming parties to the Statute, that the Court's jurisdiction over war crimes committed by their nationals or on their territory shall not become operative for a period of seven years.[17]

One is therefore left with the impression that the framers have been eager to shield their servicemen as much as possible from being brought to trial for, and possibly convicted of, war crimes.

In sum, a tentative appraisal of the provisions on war crimes of the Rome Statute cannot but be chequered: in many respects the Statute marks a great advance in international criminal law, in others it proves instead faulty; in particular, it is marred by being too obsequious to State sovereignty.

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[17] One should also note an odd provision, which applies to all the crimes envisaged in the Rome Statute. While children may be conscripted or enlisted as from the age of 15 (Article 8(2)(b)(xxvi), and (e)(vii)), the Court has no jurisdiction over persons under the age of 18 at the commission of the crime (Art. 26). Thus a person between 15 and 17 is regarded as a lawful combatant and may commit a crime without being brought to court and punished. A commander could therefore recruit minors into his army expressly for the purpose of forming terrorist units whose members would be immune from prosecution. Moreover, in modern warfare, particularly in developing countries, young persons are more and more involved in armed hostilities and thus increasingly in a position to commit war crimes and crimes against humanity.

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# 7

# GENERAL PRINCIPLES

## 7.1 PRELIMINARY REMARKS

In every legal order general principles are needed, which set out the overall orientation of the system, provide sweeping guidelines for the proper interpretation of the law whenever specific rules on legal construction prove insufficient or unhelpful, and also enable courts to fill the gaps of written or unwritten norms. International criminal law, being a branch of public international law, shares of course with any other sector of this body of law the general principles proper to it. However, given the unique features and the overarching purpose of this corpus of legal rules (see *supra*, 2.2), on many occasions those general principles may turn out to be of scant assistance. More useful and relevant appear to be the general principles proper to international criminal law, for they are more attuned to its specificities.

An international court has recently questioned reliance on such principles. In *Delalić and others* Trial Chamber III of the ICTY, after noting that these principles 'exist and are recognised in all the world's major criminal justice systems' stated that:

> [i]t is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems. (§403.)

The Chamber then explained the difference between the two levels (national and international) as follows:

> Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties and conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. (§404.)

With respect, this explanation is not compelling. It would seem rather that the difference between national criminal laws and international criminal rules lies in the still rudimentary character of the latter. This body of law has not yet attained the degree of sophistication proper to national legal systems. It follows that the principles in question are not yet applicable at the international level in all their implications

and ramifications. Whether or not this legal justification is more cogent that the one advanced by the Trial Chamber, one can however share at least the substance of the conclusions reached by the Chamber.[1]

It should be added that in international criminal law there exist principles that are not *specific* to this body of law, for the same principles can also be found in most State legal systems of the world. Nonetheless, as we shall see, often the unique features of the international legal order and the way law takes shape therein, condition the content and scope of some of those principles. One may therefore conclude that some of those principles ultimately bear scant resemblance to those of municipal legal systems, for they are uniquely shaped to suit the characteristic features of the world legal order.

## 7.2 THE PRINCIPLE OF INDIVIDUAL CRIMINAL RESPONSIBILITY

In international criminal law the general principle applies that no one may be held accountable for an act he has not performed, or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him.

The ICTY Appeals Chamber set this fundamental principle out most clearly in *Tadić (Appeal)*.[2] The principle in fact lays down *two notions*. First, nobody may be held accountable for criminal offences perpetrated *by other persons*. The rationale behind this proposition is that in modern criminal law the notion of collective responsibility is no longer acceptable. In other words, a national, ethnic, racial, or religious group to which a person may belong is not accountable for acts performed by a member of the group in his individual capacity. By the same token, a member of

[1] 'It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order. To this end, the affected State or States must take into account the following factors, inter alia: the nature of international law; the absence of international legislative policies and standards; the ad hoc processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States' (§405).

[2] Before ascertaining whether the Appellant could be found guilty under the notion of participation in a common criminal purpose, it stated that 'nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated'. 'The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, in laws, or in judicial decisions. In international criminal law the principle is laid down, *inter alia*, in Article 7(1) of the Statute of the International Tribunal which states that: "A person who planned, instigated, ordered, committed . . . [a crime] . . . shall be *individually responsible* for the crime"' (emphasis added) (§186).

An ICTY Trial Chamber recently restated in *Kordić and Čerkez* that this is a general principle applicable at the international level (§364).

any such group is not criminally liable for acts contrary to law performed by leaders or other members of the group and to which he is extraneous. The principle of individual autonomy whereby the individual is normally endowed with free will and the independent capacity to choose his conduct is firmly rooted in modern criminal law, including international criminal law. Secondly, a person may only be held criminally liable if he is somehow *culpable* for any breach of criminal rules. In other words, he may only be deemed accountable if he entertains a frame of mind that involves, or expresses, or implies his mental participation in the offence, or his culpably negligent (or deliberate) omission to prevent or punish the commission of crimes by his subordinates. As a consequence, *objective* criminal liability is ruled out.

It follows from the first notion that among other things no one may be held answerable for acts or omissions of *organizations* to which he belongs, unless he bears personal responsibility for a particular act, conduct, or omission.

An exception was, however, provided for in Articles 9 and 10 of the Statute of the IMT at Nuremberg. Article 9, paragraph 1 stipulated that:

> At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

Under Article 10:

> In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Thus, *mere membership in a criminal organization was regarded as criminal*, whether or not participation in that organization was voluntary. The idea behind the whole scheme for post-war trials for war crimes, first propounded by Colonel Murray C. Bernays in the US Pentagon in 1944, and eventually upheld by the Secretary of War Stimson, was that 'It will never be possible to catch and convict every Axis war criminal, or even any great number of them, under the old concepts and procedures'.[3] Given also that Anglo-American law to some extent upholds the notion of corporate criminal liability, it was suggested that it was for an international court to adjudicate and punish the crimes of the leaders and of the criminal organizations. Thereafter, every member of the Nazi Government and those organizations would be subject to arrest, trial, and punishment in the national courts of each State concerned. 'Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and the individual would be punished in the discretion of the court.'[4] This scheme was confirmed by Control Council Law no. 10, of 20 December 1945, which

[3] See Memo by Colonel Bernays of 15 September 1944, in B. F. Smith, *The American Road to Nuremberg—The Documentary Record—1944–45* (Stanford, Cal.: Hoover Institution Press, 1982), at 35.

[4] Ibid., at 36.

provided in Article II(1)(d) that acts 'recognized as a crime' included 'membership in categories of a criminal group or organization declared criminal by the International Military Tribunal'.

In its judgment in *Göring and others* the IMT eventually labelled some organizations as criminal: the Leadership Corps of the Nazi Party; the Gestapo and the SD; the SS. However, the Tribunal discarded the doctrine of 'objective' or 'group responsibility' and brought back the provisions of the Statute to traditional concepts of criminal law. It made the following qualifying points (at 255–79).

First, it held that the labelling of a group or organization as criminal should not be based on 'arbitrary action' but on 'well-settled legal principles', chiefly the principle that 'criminal guilt is personal' and 'that mass punishments should be avoided'. In addition, 'the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished'.

Secondly, the Tribunal reduced the notion of 'criminal organization' to that of 'criminal conspiracy':

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.

It followed that one 'should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization'.

Thirdly, the Tribunal issued three 'recommendations' to other courts with regard to penalties to be inflicted on members of criminal organizations.[5]

Fourthly, the Tribunal, each time it termed an organization criminal, added a similar caveat: one could hold criminally liable only those members of the organization who had had '*knowledge* that it was being used for the commission' of international crimes, or were '*personally implicated*' in the commission of such crimes,[6] and in addition had not ceased to belong to the organization prior to 1 September 1939 (the start of the war of aggression by Germany).

[5] They were as follows: '1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardized. Uniformity of treatment so far as practical should be a basic principle . . . 2. [Control Council] Law no. 10 . . . leaves punishment entirely in the discretion of the trial court even to the extent of inflicting the death penalty. The De-Nazification Law of 5 March 1946, however, passed for Bavaria, Greater-Hesse, and Württemberg-Baden, provides definite sentences for punishment in each type of offense. The Tribunal recommends that in no case should imprisonment imposed under Law no. 10 upon any members of an organization or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws. 3. The Tribunal recommends to the Control Council that Law no. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organization so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law' (at 267–7).

[6] Emphasis added. See ibid., at 262, 268, 273.

It would appear that subsequent courts complied. Consequently members of German organizations termed criminal by the IMT were not punished for the mere fact of belonging to one of them.

Furthermore, other Tribunals upheld the principle of personal responsibility laid down by the IMT in is judgment. Thus, in *Krupp and others*, where the 12 accused were officials of the Krupp industrial enterprises who occupied high positions in the political, financial, industrial, and economic life of Germany, a US Tribunal sitting at Nuremberg held that the defendants could be held criminally liable only if it could be proved that they had 'actually and personally' committed the offences charged.[7]

Another US Tribunal sitting at Nuremberg took a similar stand in *Flick and others* (at 1189), and then in *Krauch and others* (*I. G. Farben* trial, at 1108). In this latter case the 23 accused were all officials of I. G. Farben industrial enterprises, charged among other things with war crimes. The Tribunal took pains to emphasize that they did not bear collective responsibility but could only be found guilty of individual criminal liability.[8]

## 7.3 THE PRINCIPLE OF LEGALITY OF CRIMES (*NULLUM CRIMEN SINE LEGE*)

To fully grasp the significance and scope of this principle a few words of introduction are necessary.

National legal systems tend to embrace, and ground their criminal law on either the doctrine of *substantive justice* or that of *strict legality*. Under the former doctrine the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been legally criminalized at the moment it is taken. The paramount interest is

[7] 'The mere fact without more that a defendant was a member of the Krupp Directorate or an official of the firm is not sufficient [for criminal liability to arise]'. It then cited a rule of the American *Corpus Juris Secundum* on corporate liability, whereby officers of a corporation, normally not criminally responsible for corporate acts performed by other officers or agents, are nevertheless liable if they actually and personally do the acts constituting the offence, or such acts are done by their direction or permission, so that an officer is liable 'where his scienter or authority is established, or where he is the actual present and efficient actor'. The Tribunal added that the same principles must apply in the case of war crimes (at 627–8).

[8] It noted the following: 'It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term Farben as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the Prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the *Vorstand* [administration board]. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders, or abets. But the evidence must establish action of the character we have indicated, with knowledge of the essential elements of the crime' (at 1153).

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defending society against any deviant behaviour likely to cause damage or jeopardize the social and legal system. Hence this doctrine favours society over the individual (*favor societatis*). Extreme and reprehensible applications of this doctrine can be found in the Soviet legal system (1918–58) or in the Nazi criminal law (1933–45). However, one can also find some variations of this doctrine in modern democratic Germany, where the principles of 'objective justice' (*materielle Gerechtigkeit*) have been upheld as a reaction to oppressive governments trampling upon fundamental human rights, and courts have had recourse to the celebrated 'Radbruch's formula'. Radbruch, the distinguished German professor of jurisprudence, formulated this 'formula' in 1946. In terms subsequently taken up in some German cases,[9] he pro-

[9] The German Federal Constitutional Court referred to that 'formula' in its judgment of 24 October 1996 in *Streletz and Kessler*. The question at issue was whether the accused, former senior officials of the former German Democratic Republic (GDR) charged with incitement to commit intentional homicide for their responsibility in ordering the shooting and killing by border guards of persons trying to flee from the GDR, could invoke as a ground of justification the fact that their actions were legal under the law applicable in the GDR at the material time, which did not make them liable to criminal prosecution. The defendants submitted that holding them criminally liable would run contrary to the ban on the retroactive application of criminal law and Article 103(2) of the German Constitution laying down the *nullum crimen* principle. The Court dismissed the defendants' submissions. It among other things noted that the prohibition on retroactive law derived its justification from the special trust reposed in criminal statutes enacted by a democratic legislature respecting fundamental rights. It then went on to state: 'This special basis of trust no longer obtains where the other State statutorily defines certain acts as serious criminal offences while excluding the possibility of punishment by allowing grounds of justification covering some of those acts and even by requiring and encouraging them notwithstanding the provisions of written law, *thus gravely breaching the human rights generally recognised by the international community*. By such means those vested with State power set up a system *so contrary to justice* that it can survive only for as long as the State authority which brought it into being actually remains in existence.

'In this wholly exceptional situation, the requirement of objective justice, which also embraces the need to respect the human rights recognised by the international community, makes it impossible for a court to accept such justifications . . .

'The Federal Republic has experienced similar conflicts when dealing with the crimes of National Socialism.

'In that connection, the Supreme Court of Justice for the British Zone, and later the Federal Court of Justice, ruled on the question whether an act might become punishable retroactively if a provision of written law was disregarded on account of a gross breach of higher-ranking legal principles. They took the view that *there could be provisions and instructions that had to be denied the status of law, notwithstanding their claim to constitute law, because they infringed legal principles which applied irrespective of whether they were recognised by the State*; whoever had behaved in accordance with such provisions remained punishable . . . The Federal Constitutional Court has so far had to deal with the problem of "statutory injustice" [*gesetzliches Unrecht*] only in spheres other than that of the criminal law. It has taken the view that *in cases where positive law is intolerably inconsistent with justice the principle of legal certainty may have to yield precedence to that of objective justice*. In that connection it has referred to the writings of Gustav Radbruch . . . and in particular to what has become known as Radbruch's formula . . . On that point it has repeatedly stressed that positive law should be disapplied only in absolutely exceptional cases and that a merely unjust piece of legislation, which is unacceptable on any enlightened view, may nevertheless, because it also remains inherently conducive to order, still acquire legal validity and thus create legal certainty . . . However, the period of National Socialist rule had shown that the legislature was capable of imposing gross "wrong" by statute . . . so that, where a statutory provision was intolerably inconsistent with justice, that provision should be disapplied from the outset . . .

'The Federal Court of Justice has since further developed its case-law when trying cases of so-called Government criminality [*Regierungskriminalität*] during the SED regime in the GDR . . . a court must disregard a justification if it purports to exonerate the intentional killing of persons who sought nothing more

pounded the notion that positive law must be regarded as contrary to justice and not applied where the inconsistency between statute law and justice is so intolerable that the former must give way to the latter. This 'formula' has been widely accepted in the legal literature.[10]

In contrast, the doctrine of strict legality postulates that a person may only be held criminally liable and punished if at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order or, in other words, under the applicable law. Historically, this doctrine stems from the opposition of the baronial and knightly class to the arbitrary power of monarchs, and found expression in Article 39 of *Magna Charta libertatum* (Magna Carta) of 1215.[11] One must however wait for the principal thinkers of the Enlightenment to find its proper philosophical and political underpinning. Montesquieu and then the great American proclamations of 1774 and of the French revolution (1789) conceived of the doctrine as a way of restraining the power of the rulers and safeguarding the prerogatives of the legislature and the judiciary. As the German criminal lawyer Franz von Liszt later wrote, 'the *nullum crimen sine lege, nulla poena sine lege* principles are the bulwark of the citizen against the State's omnipotence; they protect the individual against the brutal force of the majority, against the Leviathan'.[12]

At present, most democratic civil law countries tend to uphold the doctrine of strict legality as an overarching principle. In civil law countries the doctrine is normally held to articulate four basic notions: (i) criminal offences may only be provided for in written law, namely legislation enacted by Parliament, and not in customary rules (less certain and definite than statutes) or secondary legislation (which emanates from the government and not from the parliamentary body expressing popular will); this principle is referred to by the maxim *nullum crimen sine lege scripta*; (ii) criminal legislation must abide by the principle of specificity, whereby rules criminalizing human conduct must be as specific and clear as possible, so as to guide the behaviour

than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection, because such a justification, which puts the prohibition on crossing the border above the right to life, must remain ineffective on account of a manifest and intolerable infringement of elementary precepts of justice and of human rights protected under international law. The infringement in question is so serious as to offend against the legal beliefs concerning the worth and dignity of human beings that are common to all peoples. *In such a case positive law has to give way to justice*' (emphasis added).

[10] See for instance the excellent book by G. Vassalli, *Formula di Radbruch e diritto penale* (Milan: Giuffré, 2001), in particular at 3–205, 279–319.

Of course, the notion propounded by Radbruch could simply be termed the Natural Justice view that an unjust law is no law and must be disregarded. As such, it might be susceptible to the criticism of positivists that it makes the law subjective, since the sense of justice varies from person to person.

[11] '*Nullus liber homo capiatur vel impresonetur aut dissaisiatur aut utlegatur aut exuletur aut aloquo modo destruatur nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terrae*' (it is only through the legal judgment by his peers and on the strength of the law of the land that a freeman may be apprehended or imprisoned or disseised or outlawed or exiled or in any other manner destroyed, nor may we go upon him or send upon him).

[12] F. von Liszt, 'Die deterministischen Gegner der Zweckstrafe', 13 *Zeitschrift für das gesamte Strafrechtswissenschaft* (1893), at 357.

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of citizens; this is expressed by the Latin tag *nullum crimen sine lege stricta*; (iii) criminal rules may not be retroactive, that is, a person may only be punished for behaviour that was considered criminal at the time the conduct was undertaken; therefore he may not be punished on the strength of a law passed subsequently; the maxim referred to in this case is *nullum crimen sine proevia lege*;[13] (iv) resort to analogy in applying criminal rules is prohibited.

Plainly, as stated above, the purpose of these principles is to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning of this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis* or in favour of society).

In contrast, in common law countries, where judge-made law prevails or is at least firmly embedded in the legal system, there is a tendency to adopt a qualified approach to these principles. For one thing, common law offences (as opposed to statutory offences) result from judge-made law and therefore may lack those requirements of rigidity, foreseeability, and certainty proper to written legislation. For another, common law offences are not strictly subject to the principle of non-retroactivity, as is shown by recent English cases contemplating new offences, or at any rate the extinguishing of traditional defences (see, for instance, *R.* v. *R.* (1992), which held that the fact of marriage was no longer a common law defence to a husband's rape of his wife).[14] However, the European Court of Human Rights has not regarded such cases as questionable or at any rate contrary to the fundamental provisions of the European Convention (see *SW and CR* v. *United Kingdom*, 1995).

Thus, the condition is not the same in every legal system. Let us now see which of the two aforementioned doctrines is applied in international law.

One could merely state that international law, being based on customary processes, is more akin to English law than to French, German, Argentinean, or Chinese law. This, however, is not sufficient. The main problem is that for a long period, and until recently, international law has applied the doctrine of *substantive justice* and it is only

[13] The German Federal Constitutionalal Court set out the principle in admirable terms in its aforementioned decision of 24 October 1996 in *Streletz and Kessler*. In illustrating the scope of Article 103(2) of the German Constitution, laying down the principle at issue, it stated the following: '(1.a) Article 103 §2 of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender's detriment . . . Accordingly, it also requires that a statutory ground of justification which could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament's law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law'.

[14] It would seem that the English law used to be that a man could not rape his wife because, by agreeing to marry, she had implicitly consented to sexual intercourse for all time. This was obviously a somewhat mediaeval approach. The defence existed only as a matter of common law—it was not in any statute. The judge in *R.* v. *R.* rightly held that societal attitudes had changed and that it was no longer acceptable to hold that a husband could in law never be held guilty of raping his wife; hence he did not allow the old common law defence. In fairness, it was not the introduction of a *new offence*—rape had always been an offence. It was a question of disallowing a (retrograde) common law defence.

in recent years that it is gradually replacing it with the doctrine of *strict legality*, albeit with some important qualifications.

That international law has long applied the former doctrine is not to be attributed to a totalitarian or authoritarian streak in the international community. Rather, the rationale for that attitude was that States were not prepared to enter into treaties laying down criminal rules, nor had customary rules evolved covering this area. In practice, there only existed customary rules prohibiting and punishing war crimes, although in a rather rudimentary or unsophisticated manner (see *supra*, 2.2 and 3.1–3.4.1). Hence the need for the international community to rely upon the doctrine of substantive justice when new and extremely serious forms of criminality (crimes against peace, crimes against humanity) suddenly appeared on the international scene.

The IMT clearly enunciated this doctrine in *Göring and others*. From the outset the Tribunal had to face the powerful objections of German defence counsel that the Tribunal was not allowed to apply *ex post facto* law. These objections were grounded in the general principles of criminal law embedded in civil law countries, and also upheld in German law before and after the Nazi period. The French Judge H. Donnedieu de Vabres, coming from a country where the *nullum crimen* principle is deeply implanted, also showed himself to be extremely sensitive to the principle. As a consequence, when dealing with the crimes against peace of which the defendants stood accused, the Tribunal, before stating that in fact such crimes were already prohibited when they were perpetrated (at 219–23)—a finding that still seems highly questionable—noted that in any case it was not contrary to justice to punish those crimes even if the relevant conduct was not criminalized at the time of their commission:

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. (At 219.)

In other words, substantive justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if these acts were not prohibited as criminal when they were performed.

In his Dissenting Opinion in the Tokyo trial (*Araki and others*), Judge B. V. A. Röling spelled out the same principle, again with regard to crimes against peace. He noted that in national legal systems the *nullum crimen* principle 'is not a principle of justice but a rule of policy'; this rule was:

> valid only if expressly adopted, so as to protect citizens against arbitrariness of courts . . . as well as arbitrariness of legislators . . . the prohibition of *ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom. (At 1059.)

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Judge Röling then delineated two classes of criminal offences:

> Crime in international law is applied to concepts with different meanings. Apart from those indicated above [war crimes], it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment emphasizes the political measure rather than the judicial retribution. (At 1060.)

Judge Röling applied these concepts to crimes against peace and concluded that such crimes were to be punished because of the dangerous character of the individuals who committed them, hence on *security considerations*. In his view, however, given the novel nature of these crimes, it followed that persons found guilty of them could not be punished by a death sentence (ibid.).

As stated above, after the Second World War the doctrine of strict legality gradually replaced that of substantive justice (which had been upheld in a number of cases, among which one may cite *Peleus*).[15] *Two factors* brought about this change.

First, States agreed upon and ratified a number of important human rights treaties which laid down the *nullum crimen* principle, to be strictly complied with by *national* courts.[16] The same principle was also set out in such important treaties as the Third and Fourth Geneva Conventions of 1949, respectively on Prisoners of War and on Civilians.[17] The expansive force and striking influence of these treaties could not but impact on international criminal proceedings, leading to the acceptance of the notion that also in such proceedings the *nullum crimen* principle must be respected as a fundamental part of a set of basic human rights of individuals. In other words, the principle came to be seen from the viewpoint of the human rights of the accused, and no longer as essentially encapsulating policy guidelines dictating the penal strategy of States at the international level.

[15] In his summing up the Judge Advocate stated: 'You have heard a suggestion made that this Court has no right to adjudicate upon this case because it is said you cannot create an offence by a law which operates retrospectively so as to expose someone to punishment for acts which at the time he did them were not punishable as crimes. That is the substance of the Latin maxim [*nullum crimen sine lege, nulla poena sine lege*] that has been used so much in this Court. My advice to you is that the maxim and the principle [of legality] that it expresses has nothing whatever to do with this case. It has reference only to municipal or domestic law of a particular State, and you need not be embarrassed by it in your consideration of the problems that you have to deal with here' (at 132). It should be noted that the defendants had been accused of killing survivors of a sunken merchant vessel, the Greek steamship *Peleus*; they had raised the pleas of 'operational necessity' and superior orders. The British Judge Advocate in *Burgholz* (*No. 2*) took a clearer stand. After noting that the Allies had set up tribunals in Germany and Japan 'with the object of bringing to justice certain persons who have outraged the basic principles of decency and humanity', he pointed out: 'It may well be that no particular concrete law can be pointed to as having been broken, and you remember what Defence Counsel Dr. Meyer-Labastille said yesterday on the principle of "no punishment without pre-existing law." That principle I agree with but to this extent, that I do not regard it as limiting punishment of persons who have outraged human decency in their conduct' (at 79).

[16] See for instance Article 15 of the UN Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, or Article 9 of the American Convention on Human Rights.

[17] See Article 99(1) of the Third Convention and Article 67 of the Fourth Convention. See also Article 75(4)(c) of the First Additional Protocol of 1977.

The second factor is that gradually the network of international criminal law greatly expanded both through a number of international treaties criminalizing conduct of individuals (think of the 1948 Convention on Genocide, the 1949 Geneva Conventions, the 1984 Convention on Torture, and the various treaties on terrorism) and by dint of the accumulation of case law. In particular, this case law contributed to clarifying or specifying elements of crimes, defences, and other important segments of international criminal law. As a consequence, the principle of strict legality has been laid down first, albeit implicitly, in the two ad hoc Tribunals (ICTY and ICTR),[18] and then, explicitly, in the Statute of the ICC, which envisages it in terms in Article 22.

The conclusion is therefore warranted that nowadays this principle must be complied with also at the international level, albeit subject to a number of significant qualifications, which we shall presently consider.

## 7.4 ARTICULATIONS OF THE PRINCIPLE OF LEGALITY

### 7.4.1 THE PRINCIPLE OF SPECIFICITY

Under the principle of specificity, criminal rules must be as specific and detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely, both the objective elements of the crime and the requisite *mens rea*. The principle is aimed at ensuring that all those who may fall under the prohibitions of the law know in advance which specific behaviour is allowed and which conduct is instead proscribed. They may thus foresee the consequences of their action and freely choose either to comply with, or instead breach, legal standards of behaviour. Clearly, the more accurate and specific the criminal rule, the greater is the protection accorded to the agent from arbitrary action of either enforcement officials or courts of law.

The principle is still far from being fully applicable in international law, which still includes many rules that are loose in their scope and purport. In this regard, suffice it to mention, as an extreme or most conspicuous instance, the provision first enshrined in the London Charter of 1945 and then restated in many international instruments (Control Council Law no. 10, the Statutes of the Tokyo Tribunal, the ICTY, and the ICTR), whereby crimes against humanity encompass 'other inhumane acts'. Similarly, the provisions of the four 1949 Geneva Conventions on grave breaches among other things enumerate, as 'grave breaches', 'torture or *inhuman treatment*'. In addition, many rules contain notions that are not defined at the 'legislative' level, such as 'rape', 'torture', 'persecution', 'enslavement', etc. Furthermore, most international rules

[18] See for instance Articles 1–8 of the ICTY Statute, as well as para. 29 of the UN Secretary-General Report to the Security Council for the establishment of the Tribunal (S/25704) ('It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law').

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proscribing conduct as criminal do not specify the *subjective* element of the crime. Nor are customary rules on defences crystal clear: they do not indicate the relevant excuses or justifications in unquestionable terms.

Given this legal indeterminacy, and the consequent legal uncertainty for the possible addressees of international criminal rules, the contribution of courts to defining law, not infrequent even in civil law systems, and quite normal in common law countries, becomes of crucial importance at the international level, as has already been pointed out above (2.4.7). Both national and international courts play an immensely important role in gradually defining notions, or spelling out the objective and subjective elements of crimes, or defining such general legal concepts as excuses, justifications, etc.

Thus, for instance, the District Court of Tel Aviv, in *Ternek* spelled out, by way of construction, the notion of 'other inhumane acts' in a manner that seems acceptable (at 540, and §7).[19] Similarly, in defining the concept of 'rape' a Trial Chamber of the ICTY in *Furundžija* had recourse to international law as well as general principles common to the major legal systems of the world, and general principles of law.[20]

One should not underestimate, however, another drawback of international criminal law: the lack of a central criminal court endowed with the power and authority to clarify for the whole international community the numerous hazy or unclear criminal rules. To put it differently: the contribution of courts to the gradual specification and precision of legal rules, emphasized above, suffers from the major shortcoming that such judicial refinement is 'decentralized' and fragmentary. In addition, when such

[19] The Court stated that: 'The defence counsel argue, secondly, that the words "other inhumane acts" which appear in the definition of "crimes against humanity" should be interpreted subject to the principle of *ejusdem generis*. That is, that an "other inhumane act" should be of the type of the specific action mentioned before it, in the same definition, which are "murder, extermination, enslavement, starvation and deportation" . . . We believe that there is truth in the defence counsel's second claim. The punishment determined in Article 1 of the [Israeli] Law [of 1950 on the Doing of Justice to Nazis and their Collaborators] for "crimes against humanity" is death (subject to extenuating circumstances pursuant to Article 11(b) of the Law), and it can be assumed that the legislator intended to inflict the most extreme punishment known to the penal code only for those inhumane actions which resemble in their type and severity "murder, extermination, enslavement, starvation and deportation of a civilian population". If we measure by this yardstick the actions proven against the defendant [beating with bare hand other detainees and making detainees kneel, in the Concentration camp of Auschwitz-Birkenau, where the defendant herself was an inmate, with the role of custodian of Block 7] we shall find that even if some of these actions could be considered inhumane from known aspects, they do not, under the circumstances, reach the severity of the actions which the legislator intended to include in the definition of "crimes against humanity" in Article 1 of the Law' (§7).

[20] It is worth citing the relevant passage, for that Trial Chamber proved alert to the principle of specificity. It stated the following: 'This Trial Chamber notes that no elements [for defining rape] other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws' (§177).

process is effected by national courts, it suffers from the another flaw: each court tends to apply the general notions of criminal law proper to the legal system within which such court operates. Hence, the possibility frequently arises of a contradictory and 'cacophonic' interpretation or application of international criminal rules.

Fortunately, the draftsmen of the ICC Statute made a significant contribution, when they endeavoured to define as precisely as possible the various categories of crimes. (However, as the Statute is not intended to codify international customary law, one ought always to take it with a pinch of salt, for in some cases it may go beyond existing law.)

For the time being international criminal rules still make up a body of law in need of legal precision and some major refinement at the level of definitions and general principles. To take account of these features and at the same time safeguard the right of the accused, currently some notions play a role that is far greater than in most national systems: the defence of *mistake of law* (see *infra*, 13.4), the principle of *strict interpretation* (barring extensive or broad constructions of criminal rules; see *infra*, 7.4.3), the principle of *favor rei* (imposing that in case of doubt a rule should be interpreted in such a manner as to favour the accused; see *infra*, 7.4.4). These notions act as *countervailing factors*, aimed at compensating for the present flaws and lacunae of international criminal law.

### 7.4.2 THE PRINCIPLE OF NON-RETROACTIVITY

#### A. General

As stated above, a logical and necessary corollary of the doctrine of strict legality is that criminal rules may not cover acts or conduct undertaken prior to the adoption of such rules. Otherwise the executive power, or the judiciary, could arbitrarily punish persons for actions that were legally allowed when they were carried out. By contrast, the ineluctable corollary of the doctrine of substantive justice is that, for the purpose of defending society against new and unexpected forms of criminality, one may go so far as to prosecute and punish conduct that was legal when taken. These two approaches lead to contrary conclusions. The question is: which approach has been adopted in international law?

It seems indisputable that the London Agreement of 1945 provided for two categories of crime that were new: crimes against peace and crimes against humanity. The IMT did act upon the Charter provisions dealing with both categories. In so doing, it applied *ex post facto* law; in other words, it applied international law retroactively, as the defence counsel at Nuremberg rightly stressed.[21] The Tribunal gave two justifications for its application of the Charter provision relating to crimes against peace.

[21] See the Motion adopted by all defence counsel on 19 November 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946* (Nuremberg, 1947), vol. I, at 168–9.

(In contrast it did not offer any justification relating to *ex post facto* application of the provisions on crimes against humanity. It is striking that the Tribunal did not consider it fitting to articulate its general view with regard to this class of offences. Probably this was also due to the fact that in their joint Motion of 19 November 1945, all defence counsel insisted on crimes against peace being contrary to the *nullum crimen sine lege* principle, whereas they passed over in silence crimes against humanity.)

First, the Tribunal stated that the Charter was 'the expression of international law existing at the time of its creation; and to that extent [it was] itself a contribution to international law' (at 218). This, however, was not the case so far as crimes against peace and crimes against humanity were concerned. Indeed, the reasoning developed by the IMT to prove that as early as 1939 aggression amounted to an international crime (in addition to being an international wrongful act) is unconvincing.

The second proposition of the Tribunal—again, only articulated with regard to 'crimes against peace' but also applicable to crimes against humanity—was that, as stated above, 'the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice' (at 219). This proposition is no doubt valid for grave atrocities and inhuman acts. In the case of newly established crimes, however, the courts would have been wise to refrain from meting out the harshest penalty, namely the death sentence, to defendants found guilty of these new crimes only.[22]

Nevertheless, many tribunals sitting in judgment over Germans in the aftermath of the Second World War,[23] as well as the German Supreme Court in the British Occupied Zone,[24] took up and endorsed the legal reasoning of the IMT, for all its deficiencies. This stand, while it had scant persuasive force with regard to the past, nonetheless contributed to the slow consolidation of the principle of non-retroactivity in international criminal law.

Subsequently, a general rule prohibiting the retroactive application of criminal law gradually evolved in the international community. This rule was laid down in numerous human rights treaties[25] and in some of the 1949 Geneva Conventions,[26] as well as the First Additional Protocol (Article 75(4)(c)), all relating of course to criminal trials held at the domestic or national level. The provisions of these treaties were not without faults. In particular, they all contained a reference to international law that

[22] As stated above, this view was forcefully defended by Röling, the Dutch member of the Tokyo International Tribunal, in his dissenting opinion appended to the Tokyo judgment (at 1048 ff.).

[23] See in particular the *Justice* case (at 974–85), *Einsatzgruppen* (at 458–9), *Flick and others* (at 1189), *Krauch and others* (*I. G. Farben* case) (at 1097–8, 1125), *Krupp* (at 1331), *High Command* (at 487), *Hostages* (at 1238–42).

[24] See the *Bl.* case (at 5), the *B. and A.* case (at 297), the *H.* case (at 232–3), the *N.* case (at 335), and *Angeklagter H.* (at 135).

[25] See such treaties as the 1950 European Convention on Human Rights (Article 7), the 1966 UN Covenant on Civil and Political Rights (Article 15), the Inter-American Convention on Human Rights (Article 9), and the African Charter of Human and Peoples' Rights (Article 7, para. 2).

[26] See for instance Article 99 of the Third Convention and Article 67 of the Fourth Convention.

was either devoid of any legal significance or questionable.[27] Nevertheless, gradually the view crystallized that international criminal proceedings should also be subject to the prohibition on retroactive application of criminal law. This was implicitly enshrined in the Statutes of the ICTY and the ICTR (see for instance §§29 and 34 of the UN Secretary-General's Report on the Statute of the ICTY), while it was laid down in terms in Article 22(1) of the Statute of the ICC.

Thus, the principle of non-retroactivity of criminal rules is *now* solidly embedded in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime. This of course does not entail that courts are barred from refining and elaborating upon, by way of legal construction, *existing* rules. The ICTY Appeals Chamber clearly set out this notion in *Aleksovski* (*Appeal*). After commenting on the significance and legal purport of the *nullum crimen* principle, it added that this principle

> does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime. (§127.)

### B. Expansive adaptation of some legal ingredients of criminal rules to new social conditions

One should duly take account of the nature of international criminal law, to a large extent made up of customary rules that are often found, or spelled out, or given legal determinacy by courts. In short, that body of law to a large extent consists of judge-made law (with no doctrine of precedent). Consequently, one should reconcile the principle of non-retroactivity with these inherent characteristics of international criminal law. In this respect a landmark ruling of the European Court of Human Rights in *CR* v. *United Kingdom* may prove of great assistance. It is therefore appropriate briefly to summarize the case and the Court's holding.

In 1989 a British national went back to see his estranged wife, who had been living for some time with her parents, and attempted to have sexual intercourse with her against her will; he also assaulted her, squeezing her neck with both hands. He was charged with attempted rape and assault occasioning actual bodily harm, and convicted. Before the European Court he repeated the claim already advanced before British courts, that at the time when the facts occurred, marital rape was not prohibited in the UK. Indeed, at that time a British Statute only prohibited as rape sexual

[27] Take for instance Article 15(2) of the 1966 UN Covenant on Civil and Political Rights, whereby 'Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'. Here, the reference to this category of 'general principles of law' is, to say the least, questionable, because in fact such principles of law do not contain any specific prohibition of crimes, which can only be found in *customary* international law. As pointed out above, those principles may only be drawn upon to fill gaps in treaty law or in customary rules (see *supra*, 2.4.5). Hence, the reference to those 'principles' would be legally meaningful only if it is taken to refer to 'general international law'.

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intercourse with a woman who did not consent to it if such intercourse was 'unlawful' (see section 1(1) of the Sexual Offences (Amendment) Act 1976); hence the question turned on determining whether forced marital intercourse was 'unlawful'. Various English courts had ruled, until 1990, that a husband could not be convicted of raping his wife, for the status of marriage involved that the woman had given her consent to her husband having intercourse with her during the subsistence of the marriage and could not unilaterally withdraw such consent. In contrast, Scottish courts had first held that that view did not apply where the parties to a marriage were no longer cohabiting, and then ruled, in 1989, that the wife's *implied* consent was a legal fiction, the real question being whether as a matter of fact the wife consented to the acts complained of. The word 'unlawful' in the Act referred to above was deleted in 1994 by the Criminal Justice and Public Order Act. This being the legal situation in the UK, before the European Court the applicant argued that the British courts had gone beyond a reasonable interpretation of the existing law and indeed extended the definition of rape in such a way as to include facts that until then had not constituted a criminal offence.

Both the European Commission and the European Court held instead that the British courts had not breached Article 7(1) of the European Convention on Human Rights ('No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'). The Commission noted, in its report (adopted by 14 votes to 3), that the applicant's wife had withdrawn from co-habitation and they were de facto separated and intended to seek a divorce; hence:

> there was a basis on which it could be anticipated that the courts could hold that the notional consent of the wife was no longer implied. In particular, given the recognition by contemporary society of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies . . . this adaptation in the application of the offence of rape was reasonably foreseeable to an applicant with appropriate legal advice. (§60.)

The Commission consequently found that:

> the judgments of the domestic courts in the applicant's case did not go beyond legitimate adaptation of the ingredients of a criminal offence to reflect the social conditions of the time and . . . the applicant was not as a result convicted of conduct which did not constitute a criminal offence at the time it was committed. (§62.)

The Court, by a unanimous ruling, held in general that the European Convention could not be read 'as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen' (§34). With regard to the specific case at issue, the Court noted that:

> There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very

essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords—that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim—cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. . . . What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom. (§§41–2.)[28]

In a subsequent case, *Cantoni* v. *France*, the Court restated the above principles. It insisted on the notion that, in order for criminal law (that is, a statutory provision or a judge-made rule) to be in keeping with the *nullum crimen* principle, it is necessary for the law to meet the requirements of accessibility and foreseeability. It added two important points. First, a criminal rule may be couched in vague terms. When this happens, there may exist 'grey areas at the fringe of the definition':

This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 [of the European Convention on Human Rights, laying down the *nullum crimen* principle], provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. (§33.)

The second point related to the notion of foreseeability. The Court noted that the scope of this notion:

depends to a considerable degree on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed (see *Groppera Radio AG and others* v. *Switzerland*, §68). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see among other authorities, the *Tolstoy Miloslavsky* v. *the UK*, §37). This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risk that such activity entails. (§35.)[29]

It would seem that the following legal propositions could be inferred from the Court's reasoning. First, while *interpretation and clarification* of existing rules is

[28] See also *S.W.* v. *United Kingdom*, §§37–47.

[29] In the case at issue the applicant was the owner of a supermarket, convicted of unlawfully selling pharmaceutical products in breach of the Public Health Code. In his application he had contended that the definition of medicinal product contained in the relevant provision of that Code was very imprecise and left a wide discretion to the courts.

always admissible, adaptation is only compatible with legal principles subject to stringent requirements. Secondly, such requirements are that the *evolutive adaptation*, by courts of law, of criminal prohibitions, namely the extension of such legal ingredients of an offence as *actus reus* in order to cover conduct previously not clearly considered as criminal must: (i) be in keeping with the rules of criminal liability relating to the subject matter, more specifically with the rules defining 'the essence of the offence'; (ii) conform with, and indeed implement and actualize, fundamental principles of international criminal law or at least general principles of law; and (iii) be reasonably foreseeable by the addressees; in other words the extension, although formally speaking it turns out to be to the detriment of the accused, could have been reasonably anticipated by him, as consonant with general principles of criminal law. To put it differently, courts may not create a new criminal offence, with new legal ingredients (a new *actus reus* or a new *mens rea*). They can only adapt provisions envisaging criminal offences to changing social conditions as long as this adjustment (resulting in the broadening of *actus reus* or, possibly, in lowering the threshold of the subjective element, for instance, from intent to recklessness, or from recklessness to culpable negligence) is consonant with, or even required by, *general principles.*

This process, particularly if it proves to be to the detriment of the accused (which is normally the case) must presuppose the existence of a *broad* criminal prohibition (for instance, the prohibition of rape) and no clear-cut and explicit enumeration, in law, of the acts embraced by this definition. It is in the penumbra left by law around this definition that the adaptation may be carried out. Admittedly, the frontier between such adaptation process and the analogical process, which is instead banned (see below), is rather thin and porous. It falls to courts to proceed with great caution and determine on a case-by-case basis whether the adaptation under discussion is legally warranted and consonant with general principles, and in addition does not unduly prejudice the rights of the accused.

Perhaps an instance of the expansive interpretation of existing law can be seen in the judgment delivered by the ICTY Appeals Chamber in *Tadić (Interlocutory Appeal)*, where the Appeals Chamber unanimously held that some customary rules of international law criminalized certain categories of conduct in *internal* armed conflict (see §§94–137).[30] It is well known that until that decision many commentators, States as

[30] Before pointing to practice and *opinio juris* supporting the view that some customary rules had evolved in the international community criminalizing conduct in internal armed conflict, the Appeals Chamber emphasized the rationale behind this evolution, as follows: 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight' (§97).

well as the ICRC, held the view that violations of the humanitarian law of internal armed conflict did not amount to war crimes proper, for such crimes could only be perpetrated within the context of an international armed conflict. The ICTY Appeals Chamber authoritatively held that the contrary was true and clearly identified a set of international customary rules prohibiting as criminal certain classes of conduct. Since then this view has been generally accepted.

Similarly, it would seem that, contrary to the submission made by defence counsel in *Hadzihasanović and others*,[31] an expansive interpretation (corroborated by a logical construction) should warrant the contention that persons may be held accountable under the notion of command responsibility even in *internal* armed conflicts. Two arguments support this proposition. First, generally speaking the notion is widely accepted in international humanitarian law that each army or military unit engaging in fighting either in an international or in an internal armed conflict must have a commander charged with holding discipline, ensuring compliance with the law, and executing the orders from above (with the consequence that whenever the commander culpably fails to ensure such compliance, he may be called to account). The notion at issue is crucial to the existence and enforcement of the whole body of international humanitarian law, because without a chain of command and a person in control of each military unit, anarchy and chaos would ensue and no one could ensure compliance with law and order. Secondly and with specific regard to the Statute of the ICTY, Article 7(3) of this Statute is couched in sweeping terms and clearly refers to the commission by subordinates of any crime falling under the jurisdiction of the Tribunal: any time such a crime has been perpetrated involving the responsibility of a superior, this superior may be held accountable for criminal omission (of course, if he is proved to have the requisite *mens rea*: see *infra*, 10.4.4). If this is so, it is sufficient to show that crimes perpetrated in internal armed conflicts fall under the Tribunal's jurisdiction, as held in 1995 in *Tadić* (*Interlocutory Appeal*), for inferring that as a consequence a superior's responsibility for failing to prevent or punish such crimes falls under the Tribunal's jurisdiction.

### 7.4.3 THE BAN ON ANALOGY

National courts (particularly in civil law countries) as well as international courts normally refrain from applying international criminal law by analogy, that is, they do not extend the scope and purport of a criminal rule to a matter that is unregulated by law (*analogia legis*). In national law the prohibition on the application of criminal rules by analogy (which was not provided for in the German Nazi State or in the Soviet Union, and was banned in China only in 1997, when a new Criminal Code was enacted) is rooted in the need to safeguard citizens and in particular to prevent their being punished for actions that were not considered illegal when they were

[31] See the Decision on Challenge to Jurisdiction issued by ICTY Trial Chamber II on 7 December 2001, at 3–4.

performed. By the same token, the prohibition is intended to restrict the so-called *arbitrium judicis*, that is, arbitrary judicial decisions.

The same principle applies in international law. There, the ban on analogy derives from the general prohibition of analogical application of *treaties*, stemming from the principle of respect for State sovereignty.[32] This principle imposes the requirement that a treaty between two States may not be applied by analogy to the relations between one of those States and a third one. However, in the specific field of international criminal law the prohibition of analogy has a different rationale: the need to protect individuals from arbitrary behaviour of States or courts, which is another side, or a direct consequence, of the exigency that no one be accused for an act that at the time of its commission was not a criminal offence. In other words, the primary rationale is to safeguard the rights of the accused as much as possible. To satisfy this requirement, analogy is prohibited with regard to both treaty and customary rules. Such rules (for instance, norms proscribing certain specific crimes against humanity) may not be applied by analogy to classes of acts that are unregulated by law.

Article 22(2) of the ICC Statute thus codifies existing customary law where it provides that 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the persons being investigated, prosecuted or convicted'. For example, one is not allowed to apply by analogy the rule prohibiting a specific weapon (such as blinding weapons) to a new weapon or, at any rate, to another weapon not prohibited. Nor may one apply by analogy a rule prohibiting a particular use of a specific weapon (for instance, the use of napalm and other incendiary weapons contrary to Protocol III to the 1980 UN Convention on Conventional Weapons) to another use of that weapon. Consequently, one is not allowed to criminalize the use of those weapons when their use was permitted.

As the aforementioned provision of the ICC Statute makes clear, a prohibition closely bound up with that of analogy is the ban on broad or *extensive interpretation* of international criminal rules, and the consequent duty for States, courts, and other relevant officials and individuals to resort to *strict interpretation.* This principle entails that one is not allowed to broaden surreptitiously, by way of interpretation, the content of criminal rules, so as to make them applicable to instances not specifically envisaged by the rules.

An example of strict construction can be found in some post-Second World War cases relating to the notion of crimes against humanity. In *Altstötter and others* a US Military Tribunal sitting at Nuremberg held that that notion, as laid down in Control Council Law no. 10,

> must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authorities. As we construe it, that

[32] See D. Anzilotti, *Corso di diritto internazionale* (1928), 4th edn (Padua: Cedam, 1955), 105–10.

section [of the aforementioned Law] provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organized or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecution on political, racial or religious grounds. (At 284–5.)

The finding was cited with approval in *Flick and others*, handed down by another US Military Tribunal sitting at Nuremberg (at 1216), where the Tribunal also held that under a strict interpretation of the same notion, crimes against humanity do not encompass offences against property, but only those against persons (at 1215).[33]

*Three qualifications* must however be set out restricting the ban on analogy.

First, international law only prohibits the so-called *analogia legis* (that is, the extension of a rule so as to cover a matter that is formally unregulated by law). It does not bar the regulation of a matter not covered by a specific provision or rule, by *resorting to general principles* of international criminal law, or to general principles of criminal justice, or to principles common to the major legal systems of the world.[34] National and international courts or tribunals have repeatedly affirmed that it is permissible to rely upon such principles for establishing whether an international rule covers a specific matter in dispute. To be sure, the question has always been framed as one of *interpretation*, rather than analogical application. Nevertheless, whatever the terminology employed, the fact remains that gaps or lacunae have been filled by resort to those principles. It should however be clear that drawing upon general principles should never be used to criminalize conduct that was previously not prohibited by a criminal rule. It may only serve to spell out and clarify, or give a clear legal contour to, prohibitions that have already been laid down in either customary law or treaties. In other words, this sort of 'analogical method' may only be used for the *interpretation* of existing rules, not for the creation of new classes of criminal conduct. To hold the contrary would mean to admit serious departures from the *nullum crimen* principle, contrary to the whole thrust of current international criminal law.

Secondly, in quite a few cases international rules themselves invite or request analogy, through the *ejusdem generis* canon of statutory construction (whereby when in a legal rule general words follow the enumeration of a particular class of persons or things, the general words must be construed as applying to persons or things of the same kind or class as those enumerated). For instance, the customary and treaty rules prohibiting and penalizing as crimes against humanity 'other inhumane acts', as well as the provisions of the 1949 Geneva Conventions criminalizing as 'grave breaches' of the Convention 'inhuman acts' in addition to torture, impose upon the interpreter the need to look at acts and conduct analogous in gravity to those prohibited. This indeed

[33] Subsequently the Dutch Special Court of Cassation took up in *Albrecht* (at 397–8) and in *Bellmer* (at 543) as well as in *Haass* (at 432) the same strict interpretation advanced in *Altstötter and others*.

[34] Resort to general principles of law recognized by civilized nations is termed by Anzilotti (op. cit., 106–7) *analogia juris*. It should be noted, however, that according to the celebrated international lawyer those general principles did not constitute an autonomous source of international law.

was the reasoning of the Tel Aviv District Court in *Ternek*.[35] The draftsmen of the ICC Statute took the same logical approach when they criminalized in Article 7(1)(k) 'other inhumane acts *of a similar character* intentionally causing great suffering, or serious injury to body or to mental or physical health' (emphasis added).

Thirdly, in some cases international law allows a logical approach that at first glance runs foul of the ban on analogy, but which is in fact permissible because it applies to general principles. An example will better explain this proposition. In the case of a new weapon that does not fall under any specific prohibition precisely because of its novel features, analogical extension of an existing *treaty* ban is not allowed, as pointed out above. Nevertheless, one is authorized to enquire whether the new weapon is at variance with the *general principle* proscribing weapons that are inherently indiscriminate or cause unnecessary suffering. For this purpose, one may justifiably look at those weapons that have been prohibited by treaty because they either are indiscriminate or cause superfluous sufferings. The object of this enquiry will not be the application of these treaty prohibitions by analogy, but rather a better ascertainment of whether the characteristics of the new weapon are such as to make them contrary to the general principle. It would seem that the District Court of Tokyo in *Shimoda and others* took precisely this approach.[36]

### 7.4.4 THE PRINCIPLE OF FAVOURING THE ACCUSED (*FAVOR REI*)

Another principle is closely intertwined with the ban on analogy, and is designed to invigorate it. This is the principle requiring, in the case of conflicting interpretations of a rule, the construction that favours the accused (*favor rei*): see also ICC Statute, Article 22(2). An ICTR Trial Chamber upheld this principle in *Akayesu* with regard to the interpretation of the word 'killing' in the Genocide Convention and the Statute of the ICTR.[37] An ICTY Trial Chamber reaffirmed the principle in *Krstić*. The question

[35] See *supra*, note 19.

[36] After noting that the use of an atomic bomb was 'believed to be contrary to the principle of international law prohibiting means of injuring the enemy which cause unnecessary suffering or are inhuman', the District Court of Tokyo noted that the bomb was a new weapon. It then pointed out that the employment of asphyxiating, poisonous, and other gases and bacteriological methods of warfare was prohibited, noting that it could 'safely be concluded that besides poisons, poisonous gases and bacteria, the use of means of injuring the enemy which cause injury at least as great as or greater than these prohibited materials is prohibited by international law'. The Court concluded that 'it is not too much to say that the sufferings brought about by the atomic bomb are greater than those caused by poisons and poisonous gases; indeed the act of dropping this bomb may be regarded as contrary to the fundamental principle of the law of war which prohibits the causing of unnecessary suffering' (at 1694–5).

[37] With regard to the word '*meurtre*' (in French) and 'killing' in English, contained in the phrase 'killing members of the group' (as a category of genocide), the Trial Chamber noted the following: 'The Trial Chamber is of the opinion that the term "killing" used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term "*meurtre*", used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda, which stipulates in its Article 311 that "Homicide committed with intent to cause death shall be treated as murder". Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the

was how to interpret the notion of 'extermination' as a crime against humanity. The Chamber pointed out that the ICC Statute provides that extermination may embrace acts 'calculated to bring about the destruction of *part* of the population', namely only a limited number of victims; it stressed that under customary law extermination generally involves a large number of victims. It went on to hold as follows:

> The Trial Chamber notes that this definition [that is, that contained in the ICC Statute] was adopted after the time the offences in this case were committed. In accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned. (§502.)

It should be noted that the principle of *favor rei* has also been conceived of as a standard governing the *appraisal of evidence*: in this case the principle is known as *in dubio pro reo* (in case of doubt, one should hold for the accused). For instance, in *Flick and others*, a US Military Tribunal sitting at Nuremberg held that it would be guided among other things by the standard whereby 'If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken' (at 1189).[38]

## 7.5 THE PRINCIPLE OF LEGALITY OF PENALTIES (*NULLA POENA SINE LEGE*)

It is common knowledge that in many States, particularly in those of civil law tradition, it is considered necessary to lay down in law a tariff relating to sentences for each crime, so as: (i) to ensure the uniform application of criminal law by all courts of the State, and (ii) to make the addressees cognizant of the possible punishment that may be meted out if they transgress a particular criminal provision.

This principle is not applicable at the international level, where these tariffs do not exist. Indeed States have not yet agreed upon a scale of penalties, due to widely differing views about the gravity of the various crimes, the seriousness of guilt for each criminal offence, and the consequent harshness of punishment. It follows that courts enjoy much greater judicial discretion in punishing persons found guilty of international crimes. However, some statutes of international tribunals set forth limitations on the absolute discretion of judges. Thus, for instance, Article 24(1) of the ICTY Statute provides, first, that penalties will be limited to imprisonment (thus ruling out the death sentence), and, secondly, that 'In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice

version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which "*meurtre*" (killing) is homicide committed with the intent to cause death' (§§500–1).

[38] Another US Military Tribunal sitting at Nuremberg upheld the principle in *Krauch and others* (*I. G. Farben* case) (at 1108).

regarding prison sentences in the courts of the former Yugoslavia'. This last provision was applied in various cases, for instance in *Erdemović* and *Tadić* (*Sentencing judgment 1997*) (§§7–10), *Tadić* (*Sentencing judgment 1999*) (§§10–13), *Delalić and others* (§§1193–212), *Kupreškić and others* (§§839–47), although it was generally not held mandatory. Article 23 of the ICTR Statute is identical, except in referring of course to the general practice regarding prison sentences in the courts of Rwanda.

As for the Statute of the ICC, Article 23 provides that 'A person convicted by the Court may be punished only in accordance with this Statute' and Article 77 confines itself to envisaging imprisonment for a maximum of 30 years, while at the same time admitting life imprisonment 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. It thus implicitly rules out the death penalty, but does not establish a scale of sentences, nor does it suggest that the Court should take into account the scale of penalties of the relevant territorial or national State. The Court is thus left with a very broad margin of appreciation.

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# FIVE

# Personality, statehood and recognition

Much has been said already of the fact that international law is concerned primarily with the rights and duties of states, and there is no doubt that states are the major legal persons (subjects) of international law. Over the last three decades, however, international law has become concerned with the rights and duties of other legal persons, such as international organisations, ethnic groups, pre-independent territorial entities (e.g., the Palestine Autonomous Area), individuals and multinational companies. In this chapter we shall examine the concept of personality in international law and examine some of its 'subjects' in more detail. As we shall see, one of the most important issues when discussing personality is the role of 'recognition' and Part Two of this chapter will examine some of the problems arising in international and national law from the concept of 'recognition' of foreign states, governments and international organisations.

## Part One: Personality and Statehood in International Law

### 5.1 THE CONCEPT OF PERSONALITY IN INTERNATIONAL LAW

Generally speaking, a subject of international law is a body or entity which is capable of possessing and exercising rights and duties under international law. Yet, as Professor Brownlie has pointed out (*Principles of International Law*, 1998, p. 57), this is a somewhat circular definition, for the answer to the question 'who has international rights and duties?' is 'the subjects of international law'. This circularity has led some commentators to suggest that it is impossible to define or explain legal personality purely by reference to rules of international law because of the *a priori* nature of the concept. In other words, in the final analysis personality may depend on some 'extra-

legal' concept such as 'effective existence' or 'political recognition' rather than pre-determined legal criteria. The short answer to the problem is to assert that a subject of international law is a body or entity recognised or accepted as being capable of exercising international rights and duties. This does not take the search for a theory of international personality a great deal further, but it does enable us to examine the actual practice of international law in our search for its 'subjects'.

The main capacities of an international legal person are first, the ability to make claims before international (and national) tribunals in order to vindicate rights given by international law. Secondly, to be subject to some or all of the obligations imposed by international law. Thirdly, to have the power to make valid international agreements (treaties) binding in international law. Fourthly, to enjoy some or all of the immunities from the jurisdiction of the domestic courts of other states, this being an attribute of an international legal person as distinct from one governed by national law. In practice it is only states and certain international organisations (e.g. the UN) that have all of these capacities to the fullest degree. Other subjects may have some of the capacities or all of the capacities in varying degrees. The most important point about international personality is, indeed, that it is not an absolute concept. International personality operates as if on a sliding scale, with various subjects of international law having various capacities for particular purposes. A 'state' is the subject of international law *par excellence* and will have all of the capacities in full measure. Other subjects, such as most international organisations and individuals, will have personality for whatever purpose is recognised under the system of international law.

This leads us to the question of how international personality is achieved. We shall see below that there are various criteria laid down by international law which must be satisfied before a 'state' can come into existence. Subject to what will be said then about the role of recognition, when these criteria are met, a state exists and has all the capacities outlined above. However, as far as the other subjects of international law are concerned, they seem to achieve their personality because it has been conferred, accepted or recognised by states. It may be that in time this personality acquires an objective status, as with the UN (see, e.g., the *Reparations for Injuries Suffered in the Service of the United Nations Case* 1949 ICJ Rep 174), but its source can be traced back ultimately to the action of states. It may be said, then, that there are two types of personality in international law: *original* personality, which belongs to states *ipso facto* once they satisfy the criteria of statehood; and *derived* personality, which flows from the recognition by states that other entities may have some competence in the field of international law. Once something is a 'state' it has legal personality under international law, but this is not necessarily true of individuals, companies or any of the other subjects of international law. As the ICJ said in their *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (WHO Case)* 1996 ICJ Rep 66, 'international organisations are subjects of international law which do not, unlike states, possess a general competence. International organisations ... are invested by the states which create them with powers, the limits of which are a function of the common

interests whose promotion those states entrust to them'. This explains clearly the concept of derived personality, and as such equally is applicable to other 'subjects' such as individuals. Note, however, that personality, once given, may be more difficult to take away. While an international organisation may be dissolved (and its derived personality with it), can the enforceable human rights of individuals be so easily subtracted?

Personality, then, is a relative concept. Generally, it denotes the ability to act within the system of international law as distinct from national law. However, the fact that the degree of personality accorded by international law can vary with each 'subject' means that one must be careful in drawing broad categories. It is equally valid to classify the subjects of international law by reference to what they may do, rather than what they are called. This should be remembered in the following discussion.

## 5.2 THE SUBJECTS OF INTERNATIONAL LAW

### 5.2.1 States

International law was conceived originally as a system of rules governing the relations of states *inter se*. Consequently, states are the most important and most powerful of the subjects of international law. They have all of the capacities referred to above and it is with their rights and duties that the greater part of international law is concerned. It is vital, therefore, to know when an entity qualifies as a state. Or, to put it another way, when is an entity entitled to all of the rights and subject to all of the duties assigned by international law to 'states'?

To produce a satisfactory definition of statehood is not easy. The answer does not necessarily lie in a roll call of the United Nations or any other international organisation. At present, there are 188 members of the UN, but this does not include Switzerland. In fact, at one time, it was not even correct to say that membership of the UN was a sure mark of statehood; thus, the Ukraine and Byelorussia have been members of the UN since 1945, although both were undeniably part of the Soviet Union until 1991. Necessarily, membership of the United Nations depends on political considerations as well as legal facts, although in general terms membership of the UN appears to have taken on a much more important role since the end of the cold war and in this context reference must be made to the discussion of 'recognition' below. So, it now seems that the admittance of 'new' states to the UN is to be treated as a sign that they have achieved statehood in international law. This is certainly true, for example, in the cases of North and South Korea, the former republics of the Soviet Union, the 'former Yugoslavian Republic of Macedonia' and Estonia, Latvia and Lithuania. On the other hand, the admittance of Liechtenstein and San Marino was simply an example of existing states joining the UN. Perhaps the best way to look at it is that membership of the UN will now entail a presumption of statehood which it would be very difficult to dislodge. Certainly this is the UK view for it is clear that the admission of North and South Korea constituted for the UK an acceptance of their statehood in international law. Conversely, it remains true

that non-membership of the UN does not of itself constitute a denial of statehood, for there may be many reasons why a state chooses or is forced to stay outside the UN system. An example of the former is Switzerland and of the latter, Taiwan. In respect of other international organisations, multilateral conference or treaty regime, each will have its own rules concerning membership or participation and these may not even pretend to be limited to states. Lastly, what of other entities such as the Turkish Republic of Northern Cyprus that claim to be sovereign states but are ignored by most of the international community? Are these states under international law?

In fact, if we were to conduct a straw poll of every government (assuming we could agree on how many there were), we would find that opinions as to the number of states varied considerably. This is not surprising in the political world of international law, but it does reveal that it is difficult to identify criteria for statehood that are universally accepted, even in principle. Moreover, even if this were possible, each state's application of those criteria to the facts of any given case would vary considerably. This would, in turn, affect the scope of the disputed entity's rights in international law. If, for example, the UK considered Taiwan to be an independent state then, in its relations with the UK, Taiwan would have the rights and duties of a state. If, however, the People's Republic of China took the opposite view then Taiwan would not have the full capacities of statehood in its relations with China. This is the reciprocal and bilateral nature of international law and it can give rise to several different degrees of personality for the same territory in respect of its relations with different states.

These are factors which must be borne in mind in the following discussion of the definition of statehood. They do not mean that questions of statehood are purely subjective which each established state may answer for itself when a new candidate is presented. What they do reveal is that states may pick and choose whether to have *full* relations with any other subject of international law. If a territory qualifies as a state according to the criteria discussed below, we can say that it has the legal ability to exercise all of the rights and duties of a state under international law. It will be subject to all the general obligations and have all the general rights of states in international law. On the other hand, whether the new state actually exercises all of its capacities on an individual level with every other state will depend on whether, in the estimation of those existing states, it has satisfied the criteria.

The starting point for a discussion of the criteria of statehood is Art. 1 of the Montevideo Convention on Rights and Duties of States 1933. This stipulates that the 'state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states'.

*5.2.1.1 Permanent population* It is not entirely clear what is meant by a permanent population. Obviously, it does not mean that there can be no migration of peoples across territorial boundaries, nor does it mean that a territory must have a fixed number of inhabitants. Rather, it seems to suggest that there must be some population linked to a specific piece of territory on

a more or less permanent basis and who can be regarded in general parlance as its inhabitants. The territory of the Western Sahara, for example, is populated by nomadic tribes who roam freely across the desert without regard to land boundaries, yet their link with the territory is such that they may be regarded generally as its 'population' (*Western Sahara Case* 1975 ICJ Rep 12). It is also unclear whether the population has to be indigenous in the sense of originating in the territory. For example, the Falkland Islands are populated primarily by the descendants of UK nationals who arrived as a consequence of colonisation in the mid-nineteenth century. Is this sufficient to constitute a 'population' for our criteria? The question becomes of great significance if the Islands are to be regarded as candidates for self-determination, for generally that concept has been applied to indigenous peoples gaining liberty from 'foreign' masters.

*5.2.1.2 Defined territory* It would seem to be essential that for a 'state' to exist there should be a defined territory. A state must have some definite physical existence that marks it out clearly from its neighbours. This does not mean that there must be complete certainty over the extent of territory. Even today there are innumerable border disputes between states over the precise line of the frontier, but this says nothing about their status as states. For example, the dispute between India and Pakistan over Jammu-Kashmir has continued since both states gained independence from the UK, but this has not affected their statehood. Similarly, a refusal to define the extent of the state precisely is not fatal to statehood. Israel has traditionally refused to put maximum limits on her claims to territory in 'Palestine' and this might be thought to come close to having no defined territory at all. In practice, however, there is no doubt that Israel is a state for there is a certain core of territory which undoubtedly is 'Israel'. Similarly, the fact that an existing or emerging state's territory is under threat or even factually subsumed by an aggressive neighbour does not destroy or prevent the existence of statehood. Kuwait was no less a state for its occupation by Iraq, and Bosnia-Herzegovina is in law no less a state despite the fractures in its territorial integrity caused by internal and external forces.

*5.2.1.3 Government* In order for a state to function as a member of the international community it must have a practical identity. This is the government, which is primarily responsible for the international rights and duties of the state. It is not surprising, therefore, that one criterion of statehood should be that a territory have an effective government. These executive authorities must be effective within the defined territory and exercise control over the permanent population. This does not mean that the 'government' must be entirely dominant within the territory, so long as it is capable of controlling the affairs of the 'state' in the international community. In addition, some commentators have argued that there is a further requirement that the government is likely to become permanent, although there is little support for this in the practice of states, and even less agreement about how it would be assessed.

While it is clear that the criterion of effective government must be satisfied *before* a territory can become a state, this does not mean that an established state loses its statehood when it ceases to have an effective government. There are examples too numerous to mention where a government does not have complete or even substantial control over the territory but its statehood on the international plane is not in issue. Civil war may mean that there is no effective government, but the state *per se* continues to exist as a subject of international law with all of its capacities intact, as with Lebanon in the 1980s, Liberia in the 1990s and Somalia at the turn of the century. Indeed, during a civil war it may be that a state has two 'governments', each of which is recognised by (different) other states as being entitled to represent it. In these circumstances, the conduct of international relations on behalf of the state becomes complicated and in practical terms may disintegrate into a pattern of bilateral arrangements between the competing governments and their respective supporters.

*5.2.1.4 Capacity to enter into legal relations* This is a requirement that often causes great difficulty, at least as a matter of theory. It has been suggested that it denotes 'independence', so that a territory cannot be regarded as a state so long as it is under the control, direct or indirect, of another state. Yet, if this is what this criterion means, it is quite unrealistic, for there is scarcely a state that does not depend to some degree on the goodwill, financial aid or political support of others. Are we to say that the territories of Central America are not states because of the influence of their powerful neighbour, or that the former Soviet republics are not states because of their close links with Russia? It is unlikely that this is what is meant by 'capacity to enter into relations'. The better view is that this criterion means 'legal independence', not factual autonomy. Thus, a 'state' will exist if the territory is not under the lawful sovereign authority of another state. Hong Kong is under the legal authority of China and, whatever else it is (it has a territory, population and 'government'), it is not a state. On the other hand, Slovakia and the Czech Republic are no longer legally united and, despite being heavily dependent on each other, both are regarded as sovereign states. In this sense, states with legal independence have the legal capacity to enter relations with other states on their own behalf as a matter of right. Whether they are able to exercise that legal capacity in practice is not relevant.

*5.2.1.5 Manner of attainment of capacity to enter into legal relations* One of the more interesting questions in this regard is whether it matters how a state gains its separate existence. In other words, is the legal independence which is sufficient to justify statehood to be presumed from factual independence or are other criteria applicable? If, for example, Hong Kong declared its own independence and China was unable to reassert its authority, would this be sufficient to raise the presumption of legal capacity thus leading to statehood? Likewise, how is the international community to assess the claims of independence of the Turkish Republic of Northern Cyprus? This is a problem which in recent years has come to the fore, not least because of the break up of the

former federal states of Yugoslavia and the Soviet Union. The vital question is whether factual 'independence', however achieved, will give rise to a presumption of legal independence (legal capacity), or whether any illegality in the attainment of factual independence necessarily prevents such legal capacity arising? At the outset, it must be appreciated that this is a many-sided issue and that rules of international law are just one of a number of factors that may influence a final decision about the 'statehood' of an aspirant territory. Politics and economics are just two of the other relevant considerations.

(a) If the territory declaring factual independence is able to claim the right of self-determination, then it seems that this is sufficient to attain legal independence and (subject to the other criteria) 'statehood'. A former colonial territory has the right to achieve independence by virtue of this principle and it seems not to matter whether this is done voluntarily with the assent of the former colonial power or against its wishes. A recent example is the emergence of the Federated State of Micronesia, arising out of the old Pacific Trust Territory which had been administered by the US following the defeat of Japan in World War II. As ever, however, matters are not cut and dried and many international lawyers would argue that the right of self-determination is available in circumstances far beyond the 'old colonial' situation. Thus, if self-determination is now to be regarded as a right of 'peoples', any ethnic group qualifying as a 'people' could claim self-determination and, if desired, independence and statehood. The natural consequence of this is the acceptance of a right of secession, whereby defined groups in an existing state declare independence under self-determination and claim statehood in international law. Effectively, this is the position in respect of the former federal republics of the Soviet Union and Yugoslavia, whose constituent territories have seceded and obtained independence in their own right, and, in a non-federal context, with the secession of an independent Eritrea from Ethiopia. In this respect, the opinions of the EC Arbitration Commission on Yugoslavia (which deals with matters arising from the dissolution of the federal state) are instructive. Contrary to what many international lawyers would argue, the Commission has adopted a relatively narrow view of self-determination, secession and statehood. Thus, while accepting that former territories of federal states which fulfil the other traditional requirements of statehood (the Montevideo conditions) enjoyed the right of self-determination, leading to statehood if desired, the Commission rejected the idea that ethnic groups and minorities as such enjoyed a right of self-determination. Simply put, 'peoples' enjoyed the right of self-determination as a step to statehood if linked to a pre-existing territorial unit. Otherwise, such peoples enjoyed the right under international law to have their identity as a separate ethnic group recognised by the 'mother' state, but not in a way that guaranteed them independent statehood. So, coming back to our initial question, *lawful* self-determination is an appropriate way in which a territory may achieve legal capacity and hence statehood in international law bearing in mind that what amounts to 'lawful' self-determination is a matter of controversy.

(b) If we are prepared to accept that the method by which factual independence is achieved is relevant in determining statehood in international law, there is a further problem to be addressed. What if the factual criteria of statehood (population, territory, government) are established but they have been achieved in a manner regarded as unlawful under international law? In this sense, it may be that the criteria of the Montevideo Convention are not of themselves enough to establish statehood in international law. They may be necessary but are not sufficient. There is some evidence to suggest that states must achieve their statehood lawfully before it will be fully effective in international law, and there are several general principles of international law which could have an impact here. For example, international law prohibits the use of armed force and the practice of racial discrimination as well as laying down the principle of self-determination. If a territory satisfies the factual criteria of statehood but also violates one of these general principles, it may not qualify as a state. The area known as the Turkish Republic of Northern Cyprus appears to have a population, territory and government, but it is not regarded as a state in international law because it was born of an illegal use of force by Turkey in 1974. Similarly, Southern Rhodesia was not regarded as a state because of the violation of the principle of self-determination (in that it was the white minority, not the black majority, that achieved power) and the homelands of Venda, Ciskei, Transkei and Bophuthatswana were never regarded as states in international law because their establishment by South Africa in pursuance of *apartheid* violated the principle of non-racial discrimination. On the other hand, there is the case of Bangladesh. Following serious internal disturbances in 1971, India invaded East Pakistan, then part of a Pakistan federal state. Although India herself did not annex the territory, the result of its intervention was the emergence of the independent state of Bangladesh. Following the above theory, this would seem to be an example of the creation of a state by unlawful means — the use of armed force. Yet, within three months Bangladesh had been recognised by over 90 other states and in the following year it was admitted as a full member of the United Nations. It is true that there was a population, territory and an effective government (although the latter was maintained initially by Indian force of arms), but how can we ignore the illegality in the manner of the state's creation? Once again, we are faced with the hard reality that principles of international law do not always govern state conduct or community reaction to it, and that, even in the field of statehood, principle can give way to pragmatism.

*5.2.1.6 Recognition* One of the most important ways in which this pragmatism takes effect is through the concept of international recognition, discussed more fully in Part Two of this chapter. However, for the moment it is important to realise that subsequent recognition of the 'statehood' or 'sovereignty' of an aspirant state by members of the international community may be sufficient to cure a defect in an otherwise imperfect claim to statehood. In other words, even if a people within a territory have not satisfied in full the objective criteria of the Montevideo Convention, or have achieved them

through unlawful means, they may still acquire statehood in international law because the formal defect or the violation of international law is 'waived' by the community at large. Effectiveness, that is the ability to operate as a state may, in certain circumstances, take priority over formal legality. Recent examples of collective recognition playing an important role in statehood, even perhaps where the factual criteria of the Montevideo Convention have not been satisfied, include the admission of some of the former Yugoslav republics to the United Nations and the apparent acceptance of the statehood of Bosnia-Herzegovina by the ICJ in the *Prevention of Genocide Case* (1993) 32 ILM 888. It should also be noted that recognition may be relevant for determining subsidiary questions connected with statehood. Thus, Russia has been universally accepted as capable of succeeding to the Soviet Union's place on the Security Council and this was done purely informally through acquiescence of the old Soviet Republics and acceptance by other members of the Council and UN.

Of course, we must be very careful not to accept the principle of the curative effect of recognition without some refinement. As a matter of principle, it is undesirable that recognition should be able to cure defects in any of the criteria of statehood other than that of lawful legal independence. Territory, population and government are in essence factual prerequisites which really do need to be established before there can be any possibility of statehood. Is it desirable, for example, that recognition could promote the statehood of a territory where there was no effective government that could fulfil that state's international obligations? The situation in the recognised state of Bosnia in 1992/3 is a poignant reminder of this. On the other hand, legal capacity and legality of creation are conditions rooted in law, not fact, and there is no reason why they may not be waived by those entitled to enforce a breach of the law — that is, by other states. While this may be a practical solution that has been applied in some cases (e.g. the international recognition of Bangladesh, despite the unlawful use of force), it will not be applicable universally. There are still concerns when admitting the curative effect of recognition, similar to those we shall encounter when examining the constitutive theory of recognition in more detail (see below Part Two). For example, how many states must recognise the 'illegal' state and why? Does membership of an international organisation have any significance?

*5.2.1.7 Extinction of statehood* Lastly, one must note the near practical impossibility of an involuntary loss of statehood. If an entity ceases to possess any of the qualities of statehood examined above, this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Liberia and Afghanistan did not mean that there were no such states. Likewise, if a state is 'extinguished' through the illegal action of another state, it will remain a state in international law. The occupation and acquisition of territory through the use of force is illegal and territory gained in this manner does not belong to the conqueror. The UN enforcement action which successfully evicted Iraq from Kuwait in 1990/1 was based upon this principle and it was the reason why Estonia, Latvia and Lithuania's

claim to statehood was successful after the collapse of the Soviet Union in 1991. Usually, however, it is governments rather than states which cease to exist through the illegal use of force and then it becomes very much a question of international politics as to whether the 'new' government is accepted by the community at large as capable of acting on behalf of the state. Cambodia, for example, has not ceased to exist by reason of the invasion of Vietnam in 1979, but for many years there was a difference of opinion among the international community as to which body was its lawful government. Likewise, there is no doubt that Yugoslavia exists as a state, but the UN has not recognised the Serbia-Montenegro federal government as being entitled to represent the state at the United Nations.

Of course, it is possible for an entity to cease to be an independent state through lawful means. This may take the form of a voluntary submission to the sovereignty of another state or the merger of two states in an entirely new body. Into this latter category comes the abortive attempt of Egypt and Syria to form the United Arab Republic and the successful union of the small Gulf states to form the United Arab Emirates. Similarly, the unification of West and East Germany and of North and South Yemen falls into this category.

### 5.2.2 Other territorial entities

The relative nature of international personality, whereby a 'subject' may have certain rights and duties for certain purposes, means that states are not the only territorial entities that can be regarded as subjects of international law.

*5.2.2.1 Treaty creations* There have been several examples of the creation by international treaty of artificial territorial entities having international personality. Former examples include the cities of Danzig, Berlin and Vienna. Such territories may be granted limited international personality by the states who would otherwise be entitled to exercise sovereign authority and they may have some or all of the capacities of 'a state' in international law. The nature and extent of their personality will depend on the terms of the treaty by which they were created. In the case of Berlin, for example, its status was regulated by the Four Powers Treaty for the Governance of Berlin 1946 between France, the USSR, the USA and the UK, although now, of course, Berlin is part of the sovereign state of Germany. In fact, it was not until the Unification Treaty of November 1990 that full sovereignty was restored to Germany in the measure in which it had existed before World War II. However, whatever the content of the personality of such special entities, it is clearly a form of derived personality and will depend entirely on the acquiescence of the states involved in their administration.

*5.2.2.2 Territorial entities as agencies of states* Although there are no current examples, it is possible that two states might agree to administer jointly a territory through an autonomous local administration. This local body could be granted limited capacities in international law to act on behalf of the territory. Such a joint exercise of sovereign authority, or condominium, would be suitable where sovereignty was disputed or unresolved, as with the

Falkland Islands. The most recent example was the New Hebrides, where authority was shared between France and the UK until it became independent as the state of Vanuatu.

*5.2.2.3 Territories per se* As well as those entities just described, there are several other types of territory which may enjoy some measure of international personality. In fact, because of the relative nature of international personality, each aspirant territory should be judged on its own and the categories of international legal persons should not be regarded as closed or exhausted by previous examples. Once common were protectorates, whereby an established state assumed responsibility for certain of the international activities — usually foreign affairs — of another territory or state. In the *Rights of US Nationals in Morocco Case* (*US* v *France*) 1952 ICJ Rep 176, the Court confirmed that Morocco had not lost its personality by virtue of a protectorate agreement, but merely that it had entered into a contractual relationship with France whereby the latter would conduct some of its international responsibilities. Also in this category were the former Mandated territories of the League of Nations and the equivalent Trusteeship territories of the United Nations. These territories were home to 'non self-governing peoples' who had personality for the special purpose of achieving independence and ensuring that the mandate/trusteeship was properly administered (*Namibia Case* 1971 ICJ Rep 16). With the independence of the islands of the Pacific Trust Territory (see e.g. the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau) and the independence of Namibia in 1990, the UN Trusteeship scheme has ended. Nevertheless, other examples remain. The Palestinian Authority, exercising jurisdiction over the Palestine Autonomous Area, has a certain amount of international personality, concluding treaties and agreements with other states and the United Nations. It is not yet generally regarded as the government of an independent state despite its link to a clearly defined territory. It is a new form of international person, a sort of pre-state.

### 5.2.3 International organisations

In order that the very many international organisations can carry out their allotted tasks, it is apparent that they must enjoy some measure of international personality. This will vary according to the organisation, its objectives and the terms of its constitution or constituent treaty. In the *Reparations Case* 1949 ICJ Rep 174, one of the issues was whether the United Nations could recover reparations in its own right for the death of one of its staff while engaged on UN business. The Court confirmed that personality was essential if the UN was to discharge its functions effectively. This included the capacity to bring claims, to conclude international agreements and to enjoy privileges and immunities from national jurisdictions (see also UN Charter Art. 105). According to the Court, when the UN was created in 1945, its founding members conferred upon it an objective personality such that it became a subject of international law even in respect of those states coming into being after its creation. So, it seems that the UN is to be regarded as a subject of

international law even in respect of non-members, for the Court's emphasis on objective legal existence suggests that the personality of the UN is no longer dependent on the recognition of states. The independent legal personality of the UN has recently been confirmed by the ICJ in its Advisory Opinion on the *Applicability of Article VI of the Convention on the Privileges and Immunities of the United Nations* (1989) ICJ Rep 177, wherein the immunity of a UN officer was confirmed, even in respect of action taken against him by his own government. Conversely, of course, it is quite possible for the current members to dissolve the Organisation, as they did with the League of Nations in 1945.

It is not only the UN itself that enjoys international personality. The European Communities (e.g. *Re European Road Transport Agreement Case*, (22/70) [1971] CMLR 335; *Maclaine Watson* v *Dept of Trade* [1988] 3 All ER 257, though not, it seems, the European Union *per se*, see (1994) 65 BYIL 597), the Organisation of American States (OAS), the Organisation of African Unity (OAU) and the specialised agencies of the UN all have some separate capacity to act on the international plane in order to achieve their purposes. For example, many UN organs have the power to request an Advisory Opinion from the IC: e.g. the General Assembly in *The Legality of the Use of Nuclear Weapons Case* 1996 and the Economic and Social Council in the *Privileges and Immunities Case*, and many subsidiary organs enter into treaties and agreements with states, as with UNRWA and its agreements with Syria, Egypt, Jordan and Israel. Once again, the class of such persons is not closed and one must examine the precise powers and responsibilities of any international organisation to see if it has any international personality and in what degree.

The *Advisory Opinion on Nuclear Weapons (WHO Case)* also provides valuable guidance on the content of the personality of international organisations. As noted at the outset of this chapter, the personality of organisations is not one of 'general competence': it is not a personality for all purposes. As a form of derived personality, the 'constitution' of the organisation (usually a treaty) will set out explicitly some of the attributes of international personality that the organisation is to enjoy (e.g., PCIJ *Advisory Opinion on the Jurisdiction of the European Commission of the Danube*, PCIJ Ser. B No. 14). For example, the power to make treaties, to bring claims, etc. In addition, however, it is now settled law that an international organisation will enjoy implied powers, being that degree of international competence that is required to enable it to achieve its purposes even if these are not explicitly stated in the constituent treaty. As stated in the *WHO Case*, 'the necessities of international life may point to the need for organisations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organisations can exercise such powers, known as implied powers'. So, in the *WHO Case* itself, the World Health Organisation undoubtedly had the international competence to request the ICJ to give an Advisory Opinion, but only in respect of matters explicitly or impliedly within its competence. This did not include a request for an Advisory Opinion on the legality of the threat or use of nuclear weapons.

### 5.2.4 Individuals

It has been emphasised elsewhere that international law is concerned primarily with the relations of states. Traditionally, this has meant that there has been little scope for the international personality of individuals, and states have guarded jealously their right to deal with their own nationals while honouring the right of other states to deal with theirs. So it was that despite some isolated examples, it was not until after the Second World War that individuals could be regarded as having international personality in any meaningful sense, and then substantially because international law began to impose personal obligations on individuals separately from those attaching to the state which they represented. While this personality has grown both in quality and quantity, it remains true that states approach issues concerning the personality of individuals with some hesitation. Its future development depends on the continuing agreement of states, tacit or express.

The clearest example of the personality of individuals in modern international law is the responsibility which each individual bears for war crimes (acts contrary to the law of war), crimes against the peace (planning illegal war etc.) and crimes against humanity (genocide etc.). These are matters for which the individual is responsible personally under international law, irrespective of the laws of his own country. She may be tried according to that law by an international court, as with the Nuremberg and Tokyo War Crimes Tribunals and their modern equivalents, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993) and the International Tribunal for Rwanda (1994). These last two may come to be seen as the beginning of a new trend in international law encompassing a greater readiness to see individuals bear personal responsibility in equal measure to the way that they have been granted individual human rights. Of course, the important point here is not that the individual is responsible (he may well be in national law), but that responsibility is founded in international law, independent of the law of any state. As well as this, there is also responsibility for other criminal acts, the most established of which is piracy. A pirate is *hostis humani generis* (an enemy of all mankind) and he may be arrested and tried by any state regardless of his nationality. The state of which the pirate is a national cannot complain, because under international law piracy is a crime of universal jurisdiction. The same may be true of aircraft hijackers.

This form of individual international personality is about to undergo a radical transformation. At present, these international crimes are generally prosecuted in national courts, and then only if the local law has accepted the possibility of the exercise of such a jurisdiction (see, e.g., the *Pinochet* cases in the UK and *Nulyarimma* v *Thompson* in Australia, Chapter 4). There are instances of international tribunals being given jurisdiction over persons for specific purposes or arising out of specific events (e.g., the Tokyo and Nuremberg War Crimes Trials, the Yugoslavian and Rwandan War Crimes Tribunals), but there has been no general enforcement of an international criminal jurisdiction by an international tribunal. This is about to change.

There now exists a Statute for an International Criminal Court, which is open for ratification by states and which will come into effect when 60 states have so ratified. This will establish a permanent court having criminal jurisdiction over individuals according to international law. As at 1 October 2000, there were 20 such ratifications (which does not yet include the UK, but will do so in due course) and the existence of the Court is now assured, despite the persistent objections of the United States. The Court ('ICC') will have jurisdiction 'over the most serious crimes of concern to the international community as a whole' (Art. 1) which includes genocide, crimes against humanity and war crimes. Although the Court generally will not be able to exercise jurisdiction if a state is proceeding with the matter, it is clear that the establishment of the ICC is a significant step forward both in terms of the personality of individuals under international law and, more importantly, in terms of punishing and deterring the commission of the substantive offences.

In addition to the imposition of duties and responsibilities on individuals, international law also grants personality in the form of rights. The most obvious is the expanding law of human rights. In some cases, these rights exist in the abstract, devoid of mechanisms for enforcement, but in others they are accompanied by a procedural capacity before an international tribunal by which the rights may be vindicated in concrete form. Such substantive and procedural rights are commonly granted by treaty, as with the European Convention on Human Rights 1959 and its Protocols (see generally Chapter 12). A similar procedural personality exists under the International Covenant on Civil and Political Rights 1966, whereby an individual has the right to petition the Human Rights Committee directly if his state of nationality has signed the Optional Protocol.

It is clear that such international personality as individuals do have is contingent on the agreement of states and its content and scope will derive from their will. However, although it is *possible* for such capacity to be withdrawn, it would be politically very damaging, and consequently practically very difficult, to remove capacity once granted, especially in the field of human rights. In so far as such personality involves only duties or responsibilities (as with war crimes etc.), it might be thought that individuals are objects of the law, rather than its subjects. However, this is not strictly accurate, for it misses the point that the individual is subject to a jurisdiction which is purely international. This jurisdiction is not rooted in the national laws of any state, even though identical local laws may exist. Thus, the individual is a subject of international law when certain duties are placed upon him directly by that law and when he is accorded certain rights.

### 5.2.5 Corporations

In the course of their commercial activities, states will deal not only with each other but with companies and trading concerns from all around the world. Normally, their legal relations with such bodies will be governed by the national law of one or more states. In the normal course of events, the state is in the same position as any other litigant, and just because it chooses to act with a non-state body does not confer any degree of international personality

on the latter. International personality exists only when relationships are governed by international law. So a contract between the UK government and a German company for the construction of a battleship would not ordinarily confer international legal personality on the company. The contract would be governed by the national law of either Germany or the UK, and both the government and the company would be subject to the national law.

However, that said, there are circumstances in which the contractual relationship between a state and a corporation will be governed by international law. For example, a concession agreement for the extraction of oil might be an 'internationalised' contract subject to rules of international law (e.g. *Texaco* v *Libya* (1977) 53 ILR 389) or states may have agreed that certain types of dispute with companies be settled by an international panel of judges applying international rules. Thus, the Convention on the Settlement of Investment Disputes 1964 established a permanent machinery whereby participating states and corporations could settle any differences arising out of investment agreements. Participation in such bodies, where the rights and duties of the company may be judged according to international law, entails international personality. Once again, the existence and extent of this personality depends ultimately on the agreement and recognition of states.

### 5.2.6 Miscellaneous

The relative nature of international personality means that the subjects of international law are many and varied. Moreover, because so much depends on the actions of states, new subjects are quite likely to arise as international law becomes more sophisticated. Governments in exile, belligerent or insurgent communities (e.g. Irish nationalists), representative organisations (e.g. the Palestine Liberation Organisation (PLO) and its successor, the Palestinian Authority) and historical bodies (e.g. Holy See, Order of St John) may all have personality of one degree or another. Obviously, the further one moves away from the established subjects of international law, the more international personality depends on recognition and acceptance by states. Indeed, it is quite possible for a body to have different degrees of personality in respect of different states. Before diplomatic developments in the Middle East, the PLO enjoyed a varied status according to the political orientation of the states with whom it had relations: see, for example, the US Congress's legislative moves against PLO facilities at UN Headquarters in New York which led to an Advisory Opinion (*Obligation to Arbitrate on UN Headquarters Agreement Case* 1988 ICJ Rep 12) addressing the possibility of international responsibility for the host country, because as UN host it could not ignore the limited international personality of the PLO. This case is a good illustration of how it may be *practically* impossible for a state to ignore completely the personality of an emerging subject of international law whatever its own political position.

Personality, then, denotes the capacity to act in some measure under international law. It is a flexible and open-ended concept that can mean different things in different circumstances. States have international person-

ality in the fullest measure and the United Nations is not far behind. Other organisations will have that degree of personality that enables them to discharge effectively their functions. The degree of personality enjoyed by the other subjects of international law will depend on many factors — a constituent treaty, a constitution and, importantly, recognition by states.

## Part Two: Recognition

In international society, historically it has been the practice for one state to recognise formally the existence of another state or government. As far as recognition of states is concerned, this may be because a former colonial territory has gained independence, as with many countries of the Commonwealth, or because part of an existing state has gained its independence from the federal authorities, as with Bangladesh and the former republics of the Soviet Union and Yugoslavia. Similarly, recognition of a government may be necessary when a new administration comes to power unconstitutionally or a civil war gives rise to competing administrations, as in The Sudan in the early 1990s. Recognition may be either *de jure* (as of right) or *de facto* (accepting the fact of). The latter implies that there may have been something unlawful in the manner of creation of the new state or government but that its effective existence demands that it be treated as an international person. An example was the UK's *de facto* recognition of the Bolshevik government of the USSR in 1921. In practice, however, the distinction between *de jure* and *de facto* recognition is diminishing in importance and, indeed, in the case of states it is hardly relevant. The act of recognition itself may take various forms. It may consist of a formal pronouncement, an official letter to the newly recognised entity, a statement before a national court or it may be inferred from the opening of full diplomatic relations. Generally, participation in a multilateral conference with an unrecognised state (or an unrecognised government of an established state) does not amount to implied recognition, although it is certainly evidence that the entity in question has achieved some measure of international personality. A vote in favour of the admission of a new state to the UN may amount to implied recognition, as was the case with the UK's vote in favour of the admission of the former Yugoslav Republic of Macedonia to the United Nations on 8 April 1993.

Essentially, the act of recognition is a political act. The decision whether to recognise will be one for the executive authorities of each state and will be influenced by political, economic and legal considerations. Morocco, for example, refused to recognise the Saharan Arab Democratic Republic (Western Sahara) because it has a claim to that territory, even though the 'state' is a member of the OAU. However, as we shall see, it is more likely that disputes of this nature will occur in respect of governments rather than states, especially where an existing state suffers a civil war or similar upheaval, as with Somalia in 1993 (see *Somalia (A Republic)* v *Woodhouse Drake & Carey (Suisse)* SA [1993] 1 All ER 371). In this section we are not concerned primarily with the political motivation for recognition. We are interested in the legal effects of recognition and will attempt to discover the legal consequences of an act of recognition in international and national law.

## 5.3 RECOGNITION IN INTERNATIONAL LAW

As far as their relations *inter se* are concerned, the fact that State A has recognised State B means that each accepts the other as entitled to exercise all the capacities of statehood in international law. Again, if State A has recognised a new government in State B, this means that it will treat the latter as entitled to represent that state in international law. Between two states, then, recognition is a necessary precondition to full optional bilateral relations, such as diplomatic representation and treaty agreements. Conversely, the lack of diplomatic relations between two states need not say anything about recognition. This may be a by-product of a completely different dispute — as with the lack of diplomatic relations between Libya and the UK through much of the 1990s after the Lockerbie bombing. Furthermore, on a more general level, there is a debate as to the effects of recognition on the legal status of the body being recognised. Essentially, this has resolved itself into two theories: the declaratory theory and the constitutive theory of recognition.

### 5.3.1 Declaratory theory

According to the declaratory theory, the general legal effects of recognition are limited. When an existing state 'recognises' a new state, this is said to be nothing more than an acknowledgment of pre-existing legal capacity. The act of recognition is not decisive of the new entity's claim to statehood, because that status is conferred by operation of international law. The international legal personality of a state does not depend on its recognition as such by other states. It is conferred by rules of international law and, whether or not a state or government is actually recognised by other states, it is still entitled to the rights and subject to the general duties of the system. For example, in the *Tinoco Arbitration* (*Great Britain* v *Costa Rica*) (1923) 1 RIAA 369, Great Britain made certain claims against Costa Rica arising out of obligations undertaken by the Tinoco government. This government had not been recognised by Great Britain, but the arbiter, Judge Taft, held that the fact of non-recognition did not preclude the claim. In his opinion, non-recognition was evidence, perhaps strong evidence, that the entity had not yet attained the alleged status in international law, but the ultimate test was a factual one based on internationally accepted criteria. So, if the unrecognised entity was effective, it could still be the object of international claims and was bound by the duties imposed by international law. Recognition itself did not determine personality under international law. A similar view was taken by the *EC Arbitration Commission on Yugoslavia* [1993] 92 ILR 162, in its opinions on the status of the former Yugoslavian republics. Although noting the importance of recognition by such bodies as the European Community, the Commission affirmed in general the declaratory theory and its application to the situation in Yugoslavia (but see, however, the EC Guidelines discussed below).

In general, this theory accords with international practice. For example, the fact that certain Arab states did not recognise Israel did not prevent them

making international claims against her, and the same is true of North and South Korea although both are now members of the UN. Of course, the fact that one state has not recognised another may have consequences in national law (see below) and it may mean that the non-recognising state is not prepared to enter into treaties, diplomatic relations or other bilateral arrangements with the non-recognised body. Yet, this is merely an example of the relative nature of the rights and duties of international law: it does not mean that the unrecognised body has no international personality. If the entity satisfies the criteria for statehood or personality discussed above, especially those concerning actual and effective control, it will be a 'state' or 'government', irrespective of recognition. According to the declaratory theory of recognition, the effective body will be subject to, and be able to claim, the general duties and rights accorded to a state or government under international law.

### 5.3.2 Constitutive theory

The constitutive theory denies that international personality is conferred by operation of international law. On the contrary, the act of recognition is seen as a necessary precondition to the existence of the capacities of statehood or government. So, if Taiwan is not recognised as a state, it is not a state; and Eritrea became a state only when it was recognised as such by the international community in 1993. The practical effect of the constitutive theory is that if a 'state' or 'government' is not recognised by the international community, it cannot have international personality. Recognition is said to 'constitute' the state or government. For example, in the *International Registration of Trademark (Germany) Case* (1959) 28 ILR 82, a West German national court ruled that a trademark originating in East Germany was not entitled to protection (under International Conventions of 1883 and 1934) in its territory. The reason was that West Germany did not recognise the statehood of East Germany. According to the court, an entity which actually exists does not thereby become a state in international law without some form of recognition of its existence. In other words, recognition of statehood was essential to international personality.

The main strength of the constitutive theory is that it highlights the practical point that states are under no obligation to enter into bilateral relations with any other body or entity. West Germany did not have to recognise East Germany and, if it did not, there would be no bilateral relations between the 'states'. However, clearly non-recognition did not mean that West Germany could ignore general rules of law in its dealings with East Germany, nor on a proper analysis did it mean that East Germany was not a state. The *Trademark Case* was decided by a national court and was concerned with the protection by West German law of rights originating in East Germany. Non-recognition of East Germany meant that such rights would not be protected *in West Germany*. It did not mean that an international court, applying international law, would find that West Germany had no *international* obligation to protect trade-marks originating in East Germany. In fact, in this case, non-recognition said nothing about the statehood of East

Germany, merely its status in West German courts. Likewise, the fact that the OAU may admit a new member by simple majority vote, as they did in the case of the Saharan Arab Democratic Republic, does not support the constitutive theory. It means, rather, that this entity is entitled to the privileges of membership. It may be evidence of statehood but it does not constitute it. In principle, the same is true of admission to membership of the United Nations which is open only to states. *Ex hypothesi*, they must be states before they are admitted, not emerge as such as a consequence of being admitted.

Furthermore, it is clear that the constitutive theory raises insoluble theoretical and practical problems. First, there is no doubt that recognition is a political act, governed only in part by legal principle. For example, the United States did not recognise the Soviet government until 1933, even though it had been effective within the state for at least 10 years. Likewise, how long will it be possible to maintain that Taiwan is merely a province of China, the respective 'governments' of which are in dispute as to which is the legitimate authority of the whole. Secondly, we must ask ourselves whether it is consistent with the operation of *any* system of law that legal personality under it should depend on the subjective assessment of third parties. Surely, legal personality must be an objective fact capable of resolution by the application of rules of law. Thirdly, assuming we accept the constitutive theory, in practical terms what degree of recognition is required in order to 'constitute' a state? Must there be unanimity among the international community (cf. Israel), or is it enough that there be a majority, substantial minority or just one recognising state? Again, is membership of an international organisation tantamount to collective recognition and, if so, which organisations? Are some states or groups of states (e.g. USA, the EU) more 'important' when it comes to recognition? These are practical problems which the constitutive theory must answer, yet cannot. Some commentators have attempted to meet these criticisms by supposing that there is a 'duty' to recognise once a state or government has fulfilled the criteria laid down by international law. However, not only is it impossible to find any support for the existence of this 'duty' in state practice, in real terms it is little different from the declaratory theory. If there really is a legal duty to recognise, then recognition itself is irrelevant to international personality.

### 5.3.3 Some conclusions

As far as the constitutive and declaratory theories are concerned, the latter seems to be more in accord with international practice, although in this regard significant developments have occurred with the dissolution of the Soviet and Yugoslavian Federations. There is no doubt that the constituent republics of both of these federal states craved international recognition, both during and after the break up of their respective metropolitan countries. This is significant in itself because clearly the authorities of these territories regarded recognition as important, if only as means to gain international aid. In response to these demands, the European Community issued Guidelines

on the Recognition of New States in Eastern Europe and the Soviet Union and a Declaration on Yugoslavia. In these, the EC indicated its approach to the recognition of new states arising out of the turmoil in eastern Europe (see (1991) 62 BYIL 559). What is so interesting about these guidelines is that the EC put forward requirements for recognition that went far beyond the conditions of statehood found in the Montevideo Convention. Thus, recognition was to be dependent on respect for established frontiers, respect for human rights, guarantees of minority rights, acceptance of nuclear non-proliferation and a commitment to settle disputes peacefully. Of course, this does not necessarily mean that the EC was suggesting that a territory could not be a state until these conditions were complied with. Possibly, the point was that the EC would not *treat* a territory as a state until such conditions and concerns were met. However, even if these Guidelines were not meant to reiterate a constitutive theory of recognition (and on one reading they were), they are important because formal recognition of statehood was no longer to be dependent simply on the fulfilment of the factual Montevideo conditions, but rather on the quality of the political and economic life within a territory (expressed in terms of its commitment to certain values, e.g., human rights guarantees etc.). This certainly is a novel departure for the UK government, whose practice in the past has been to recognise statehood on the basis of the Montevideo rules, these being more or less objective in character. A similar approach is evident in the UK's recognition of Yugoslavia (Serbia and Montenegro) on 9 April 1996, where much is made of the fulfilment of certain value-laden conditions by the new state. Of course, the EC position might have been no more than an exceptional response to an exceptional situation, but the near affirmation of the constitutive theory and the definite use of 'subjective' criteria perhaps indicate an increased use of recognition as a weapon to achieve political ends.

These recent developments are all the more disquieting when we appreciate that the constitutive theory fails to clarify that there is a difference between the *exercise* of bilateral relations and the *capacity* to act under international law. The former may well depend on recognition (and this is what the EC may have meant) whereas the latter generally does not. An unrecognised entity may not be able to make a treaty with the UK (exercise of rights) even though formally it has the power to do so (capacity). As international lawyers, our prime concern is the latter, although, as ever, a word of caution is needed. We must remember that it is practice rather than theory which is important. The range and efficacy of rights and duties under international law depends ultimately on what states themselves actually do. We have seen in Part One of this chapter that collective recognition (typically through admission to the UN) may cure defects in the mode of creation of a state, but we have also seen that non-recognition of Israel by some Arab states did not prevent them from claiming that Israel had violated international law. Likewise, the dissolution of the federal states of Eastern Europe has brought new life to an old argument and has highlighted just how important recognition and admission to the UN is regarded by emerging states themselves. In short, while the declaratory theory may hold more water, it is not watertight.

## 5.4 RECOGNITION OF STATES AND GOVERNMENTS IN NATIONAL LAW

There is a very real distinction between the effects of recognition in international law and its effects in national law. In international law, State A may have no choice other than to accept the fact of existence of State B, but national law is a different legal system. Whether the executive, administrative or judicial authorities of State A pay any regard to the acts of State B (or its government) on the national plane may depend entirely on whether it has been formally recognised. In practice, the legal effects or consequences of recognition in national law depend on the laws of each state. In this section we will be concerned primarily with the effects of recognition (or rather non-recognition) in the United Kingdom, but some reference will be made to the practice of other countries.

### 5.4.1 Types of recognition in the United Kingdom

*5.4.1.1 States* In national law, whether a territorial entity claiming to be a state is recognised as such by the United Kingdom is a matter for the executive authorities. Numerous examples exist, but the formal recognition by the UK of Eritrea in 1993 and Yugoslavia (Serbia and Montenegro) in 1996 are good illustrations, as is the UK's refusal to recognise Chechen claims to independence from the Russian Federation. As a matter of UK constitutional law, the conduct of foreign affairs is for the government and not for the judiciary and it is imperative that all the organs of the state 'speak with one voice'. Consequently, in domestic legal proceedings where there is some doubt about the status of an entity as a 'state', a request will be made by the court to the Foreign Office, who may issue an executive certificate. This certificate will specify whether or not the 'state' is recognised as such by the UK and it is conclusive (e.g. *Luther* v *Sagor* [1921] 3 KB 532). Any attempts to circumvent this exclusive competence are dealt with firmly, as in *R* v *The Commissioners for the Inland Revenue, ex parte Resat Caglar* where the Foreign Office made it clear that 'Her Majesty's Government views with concern the suggestion that the "TRNC" [Turkish Republic of Northern Cyprus] should be held by the court to be a "foreign state" [within s. 321 of the Income and Corporation Tax Act 1988] notwithstanding that it is not recognised as such by her Majesty's Government'. Neither the court nor the parties can challenge the determination made in the certificate and the court is bound to act on the basis of the information supplied.

*5.4.1.2 Governments* It frequently happens that a new government may come to power in an existing state by unconstitutional means — for example, by civil war or *coup d'état*. If this happens, it is essential to know whether the new administration is to be treated as a 'government' for the purposes of UK national law. Previously, the practice of the UK was the same as that for states: a request was made to the Foreign Office and a conclusive certificate was issued (e.g. *Luther* v *Sagor*). Essentially, the criterion applied by the UK

in deciding whether to recognise a new government was whether the alleged government was in effective control of the territory it claimed to represent, although only *de facto* recognition would be accorded if there was some doubt about the permanence of the new administration or some concern as to the manner in which it came to power. Although UK practice was not entirely consistent, generally recognition of a new government by the UK did not signify approval, merely that it was effective within the territory. However, despite repeated government statements clarifying the point, the practice of recognising governments was often misunderstood as signifying approval of particular governments and the distinction between *de jure* and *de facto* recognition did not seem to clarify matters. This led to a change in practice.

In 1980, the UK joined many other states, including the USA, in adopting the so-called Estrada Doctrine. This means that the UK no longer accords formal recognition to governments. It will continue to recognise states in accordance with international practice but, when a new government comes to power unconstitutionally, the UK will not formally make a statement of recognition. According to the practice statement issued in 1980, Her Majesty's Government has 'concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able to exercise effective control of the territory of the State concerned, and seem likely to do so'.

This does not mean, of course, that the substantive issue goes away. It will still be necessary for many purposes in national law to decide whether a body is entitled to be regarded as the 'government' of a state. The point is, rather, that national courts will not have the benefit of an executive certificate to settle the matter. It would seem, then, that in future a UK court will have to decide the matter for itself on the basis of the nature of the dealings which the UK government has with the new administration. That this is not necessarily an easy task is illustrated by two cases decided after the change in UK practice, although as we shall see the approach of the second is much to be preferred and now seems to be settled law. In the first case, *Gur Corporation* v *Trust Bank of Africa* [1986] 3 WLR 583, the court had to determine whether the 'Government of Ciskei' was a sovereign government so that it could act as claimant in a UK court. The court twice requested guidance from the Foreign Office and twice were met with the answer that the UK no longer recognised governments and that 'the attitude of Her Majesty's Government is to be inferred from the nature of its dealings with the regime concerned and in particular whether [the UK] deals with it on a government to government basis'. This did not deter the court from utilising the answers contained in the Foreign Office replies as a means of determining the issue and they purportedly followed the earlier case of *Carl Zeiss Stiftung* v *Rayner and Keeler (No. 2)* [1967] 1 AC 853. These two cases are discussed below in more detail, but for now the important point is that the UK court seemed reluctant to make its own decision. It was quite obviously predisposed to rely on an executive statement, even though there was no prospect of

formal recognition of the 'government'. This was not surprising given the traditional reluctance of UK courts to interfere with matters connected with foreign affairs, but it is unfortunate that the court missed the opportunity to lay down guidelines for other cases. In fact, the case seemed to imply that when in future the Foreign Office supplied details of the 'course of dealings' which Her Majesty's Government had with a disputed 'government', a UK court would regard such evidence as virtually conclusive of the entity's status. In other words, *Gur* suggested simply that express recognition of governments had been replaced by implied recognition of governments.

Fortunately, an opportunity arose for a UK court to re-examine the matter. In *Somalia (Republic)* v *Woodhouse Drake & Carey (Suisse) SA* [1993] 1 All ER 371, an interim government of Somalia sought control over certain funds belonging to the Republic of Somalia. Somalia was at that time in a state of civil war, with no faction in effective control of the state. The judge had to decide whether the claimants were the 'government of Somalia' in order that they might recover the funds and, of course, due to the change in practice, there was no executive certificate to aid him. There was evidence before the court that the UK government had virtually no dealings with the claimants as a government and that, in fact, the UK view was that there was no effective government in Somalia at all. In the end, Hobhouse J agreed that there was no effective government of Somalia and the claimants' application was refused. Importantly, however, the judge identified the factors that a court should take into account when deciding whether an alleged 'government' was a sovereign government for the purpose of an action in UK courts. These were:

(a) whether the entity was the constitutional government of the state;
(b) the degree, nature and stability of administrative control, if any, which it exercised over the territory of the state;
(c) whether the British government had any dealings with that government and, if so, the nature of those dealings; and
(d) in marginal cases the extent of international recognition that it had as the government of that state.

Clearly, this is an important statement of principle in a number of respects. First, it makes it clear that a UK court is able, and willing, to make its own determination as to the status of an alleged foreign government. The court is not bound by the UK government's unofficial view, nor even by the 'nature of the dealings' that the UK has with the alleged government. Secondly, a UK court will pay regard to those factors that are important when sovereignty is in issue as a matter of international law, *viz* legality, effectiveness and, in marginal cases, recognition. This is also to be greatly welcomed, not least because it is pleasing to see a UK court recognise the validity of principles of international law. Thirdly, there is the possibility — although it did not occur in this case — that a UK court will take a different view of the status of a 'government' than that expressed unofficially by the UK government. An example might be where the UK refuses to deal with a government because

of political or ideological differences, but where that government is generally regarded as representing a state in international law. If this does happen, the 'one voice' principle referred to above will be no more, at least in relation to governments. All in all then, the decision in *Somalia* was a timely affirmation of the objective nature of personality in international law and puts into practice, at last, the full meaning of the 1980 change in UK practice on recognition of governments. It has been followed, without criticism, in *Sierra Leone Telecommunications* v *Barclays Bank plc* [1998] 2 All ER 821.

### 5.4.2 Effects of non-recognition in the United Kingdom

*5.4.2.1 De facto or de jure recognition* As a preliminary point, it should be noted that because the United Kingdom no longer recognises governments formally, the distinction between *de facto* and *de jure* recognition has largely disappeared. Previously, it was possible for two governments of one state to be recognised by the UK at the same time, one *de jure* and one *de facto*, as in *The Arantzazu Mendi* [1939] AC 256. Indeed, the type of recognition which was accorded may have had consequences for the jurisdiction of the court. For example, a *de facto* government appeared to enjoy immunity from the jurisdiction of national courts only in respect of persons or property actually in the territory of the state concerned (*Haile Selassie* v *Cable & Wireless Co. (No. 2)* [1939] Ch 182) and *de jure* recognition was retroactive (i.e. applicable to acts done before the formal act of recognition) only in spheres within the actual control of the *de jure* government (*Gdynia Ameryka Linie* v *Boguslawski* [1953] AC 11), unless it was unlawful under the local law of the *de facto* government (*Civil Air Transport* v *Central Air Transport* [1953] AC 70). These distinctions, which were primarily based on practical and political considerations, are now largely irrelevant.

*5.4.2.2 General effects* In the United Kingdom, the fact that a state or government is 'recognised' is of vital importance in determining its right to be treated as a sovereign authority within the UK national legal system. (In respect of governments, 'recognised' means accepted as a sovereign government by the courts under the *Somalia* principle.) If a state or government is not recognised or accepted as a sovereign authority it will not be able to sue in its own name (*City of Berne* v *Bank of England* 9 Ves. 347), its laws and administrative acts will not be accepted as valid (*Carl Zeiss Stiftung* v *Rayner & Keeler (No. 2)*), it may not claim immunity from the execution of judgments and it will not be immune in appropriate cases from the exercise of civil or criminal jurisdiction by UK courts. It is only recognised states and governments of sovereign states that enjoy these privileges. Moreover, it is important to realise that the consequences of non-recognition as a state or non-acceptance as a government can cause particular hardship to individual litigants and may interfere greatly with the normal conduct of inter-state affairs. For example, in *Adams* v *Adams* [1970] 3 All ER 572, a UK court refused to recognise a divorce granted in Southern Rhodesia because the UK did not recognise that country as a sovereign state. Obviously, this appears

rather difficult to justify, at least if one does not regard the 'one voice' principle as very persuasive. The practical difficulties caused by non-recognition should not be underestimated, but fortunately a trio of developments has softened the harshness of the non-recognition doctrine. Two are the product of common law and one is statutory (sections 5.4.2.3, 5.4.2.4 and 5.4.2.5 below).

*5.4.2.3 Acts of perfunctory administration* In *Hesperides Hotels* v *Aegean Turkish Holidays* [1978] QB 205, the claimants claimed damages for trespass in respect of two hotels owned by them, but now occupied by the Turkish-Cypriot defendants. The hotels were situated in that part of Cyprus under Turkish occupation following an invasion in 1974 and had been handed over to the defendants by the Turkish administration. The Foreign Office had stated in its certificate (issued for governments at that time) that the UK did not recognise the Turkish administration *de jure* or *de facto*. The effect of this should have been that no laws or administrative acts of the Turkish authorities could be considered valid in a UK court. In fact, the action was dismissed because the court lacked jurisdiction over the substantive issue. However, Lord Denning MR went on to challenge the non-recognition doctrine. In his view, the court could take note of certain acts of a foreign sovereign, if it was effective within a territory, even though the sovereign was not formally recognised by the UK. Furthermore, the court could conduct its own inquiry to see whether the body was effective. Obviously, this *dictum* was not part of the *ratio decidendi* of the case, but it represented a significant departure from accepted doctrine. The acts which the court could take notice of included marriages, divorces and property transactions involving private individuals. Clearly, the purpose was to mitigate, *for the individual*, the consequences of non-recognition.

Lord Denning went further than the other judges in *Hesperides*, but his approach to non-recognition was supported by cases in the United States and by an earlier House of Lords decision. In *Carl Zeiss Stiftung* v *Rayner & Keeler (No. 2)*, Lord Wilberforce had stated that in so far as the East German 'government' was not recognised, he should wish seriously to consider whether this resulted in the absolute invalidity of all its acts. Indeed, he would wish to consider whether 'where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question'. Again, this was an *obiter dictum* and the matter has not been taken further by later cases. Necessarily, the procedural change in UK practice concerning recognition of governments will have an effect on the substance of this issue, at least where aspirant governments, if not states, are concerned. For example, now that a UK court has accepted that the status of a foreign 'government' is for it alone to decide (see above *Somalia (Republic)* v *Woodhouse Drake & Carey (Suisse) SA*), it will be possible to give effect to those laws of the foreign government which are primarily concerned with the rights and duties of individuals in a case

concerning those individuals irrespective of whether the court would have accepted in other circumstances the legitimacy of avowedly governmental acts. However, given that recognition of a state remains firmly within the control of the UK executive authorities, it is uncertain whether Lord Denning's approach will be adopted for non-recognised states.

*5.4.2.4 Acts of a delegated sovereign* In 1967, the UK did not recognise the German Democratic Republic (East Germany or GDR) as an independent state. Again, this meant that all legislative, judicial and administrative acts of that country could not be recognised in UK courts. In *Carl Zeiss Stiftung* v *Rayner & Keeler (No. 2)*, the defendants alleged that the claimants had no standing to sue because the administrative act whereby they (the claimants) had been created was an act of an unrecognised sovereign, the GDR. In essence, it was alleged that for a UK court the East German company did not exist. The remarks of Lord Wilberforce on the consequences of non-recognition have been noted above, yet this was not the reason why the court was able to accept the validity of 'East German' laws.

According to their Lordships, the acts of the GDR could be given effect as the acts of a delegated sovereign legislature. As the replies from the Foreign Office indicated, East Germany (the USSR Zone of Occupation after the Second World War), was then legally under the sovereign authority of the USSR. The UK did indeed recognise the USSR as a sovereign body. Therefore, the acts of an East German administration could be accepted as valid in a UK court because they were the acts of a body to whom power had been validly delegated by a sovereign (and recognised) authority, the USSR. Of course, this was something of a legal fiction, because the Soviet Union regarded East Germany as independent, but it did serve to mitigate the harsh effects of the non-recognition doctrine. On the other hand, the decision has been widely criticised because it does seem to cut against the 'one voice' principle and there is some evidence that it was not consonant with UK policy at that time. It was not until 1973 that the UK finally recognised East Germany and now there is a single unified German state, having full sovereignty in its own right.

Subsequently, in *Gur Corporation* v *Trust Bank of Africa*, the concept of delegated authority was applied once again. In this case, the live issue was whether the 'Government of Ciskei' could sue as claimant in its own name in an English court. This was refused at first instance on the ground that the 'government' was not a sovereign authority. On appeal, the court twice requested a certificate from the Foreign Office. As we have seen, this was refused on the ground that the UK no longer formally recognised foreign governments. However, the Court of Appeal found in the Foreign Office replies enough information to enable them to determine that the 'Government of Ciskei' was acting under the delegated authority of a sovereign legislature, this being the recognised government of South Africa. Applying the *Carl Zeiss Case*, the 'Government of Ciskei' was allowed to sue in its own name because it was a body to whom power had been validly delegated. Once again, there are difficulties with this line of reasoning. First, the Court of

Appeal seemed unaware or unable to accept that there had been a change in UK policy. Its reliance on the Foreign Office replies for the finding of delegated authority is unfortunate, both because the replies do not clearly support this conclusion and because the court could have conducted its own inquiry. Now this inquiry will be different because of the *Somalia* case. Secondly, the finding that the 'Government of Ciskei' was an agent of the South African government was entirely contradicted by the Status of Ciskei Act 1981 which, as a legislative Act of a recognised sovereign (South Africa), the court should have respected. In fact, the Court of Appeal ignored that part of the Ciskei Act which granted independence and took note only of that part which accorded with their interpretation of the Foreign Office replies. As we have seen, these should not have been regarded as conclusive. Thirdly, it must be recognised that the delegated authority doctrine is a legal fiction. Its effect in the *Carl Zeiss Case* was to allow an individual claimant to gain a normal remedy against an individual defendant which would have otherwise been lost. There was no question of recognising East Germany as such. In the *Gur Case*, the theory was used to allow a rogue 'government' to sue in its own name *just as if* it were a sovereign body. Surely, this is entirely inconsistent with the whole purpose of the non-recognition doctrine, which is to prevent exactly what happened in the *Gur Case*. In sum, then, the decision in the *Gur Case* is difficult to reconcile with the change in practice in 1980. Moreover, while there may be some merit in using the theory of delegated authority to prevent injustice or hardship to individuals, it should not be taken further.

*5.4.2.5 The Foreign Corporations Act 1991* The third way in which the consequences of non-recognition are mitigated in the UK is, perhaps, the most significant. We have seen already that should a state be unrecognised — for whatever reason — it is likely that none of its legislative, executive, judicial or administrative acts will be accepted as valid by a UK court. Consequently, a company incorporated in an unrecognised state would have had no legal personality as far as UK law was concerned and could not sue or be sued in UK courts. Obviously, this could cause unwarranted hardship to individuals as well as being destructive of the confidence necessary to foster international commerce. This was precisely the problem faced in *Carl Zeiss* and it was avoided by the fiction of delegated sovereignty. Now a UK court would not have to go to such lengths. The Foreign Corporations Act 1991 enables companies incorporated under the laws of a territory which the UK does not recognise as a state to be given legal personality within the UK legal system. Simply put, the consequences of UK non-recognition of the company's 'home' state will not apply if that company is incorporated under the laws of a territory that has a 'settled legal system'. The foreign corporation will be able to sue and be sued, whatever the status of its mother country. Moreover, according to the Minister responsible for piloting this Act through Parliament, it was intended to ensure that matters of legal personality within domestic law should not be complicated by matters of foreign policy. Here, then, is explicit recognition that there is no necessary reason why the courts

of the UK and the Executive should 'speak with one voice', even in matters relating to statehood.

An early test of the efficacy of the Foreign Corporations Act was provided by *R* v *The Minister of Agriculture, Fisheries & Food, ex Parte S.P. Anastasiou (Pissouri) and Others* (not reported). In this case, a company (Cypfruvex) registered in the Turkish Republic of Northern Cyprus (TRNC), a state not recognised by the UK, sought to intervene in judicial review proceedings in the UK. In applying the Act to determine whether the company had status before a UK court, Popplewell J interpreted it as requiring affirmative answers to three questions: first, was there an identifiable territory not recognised by the UK; secondly, did this territory possess a settled legal system; and thirdly, was the relevant company incorporated by the laws of that territory? As there was little doubt that all three conditions were satisfied, Popplewell J would permit Cypfruvex to intervene. Clearly, this is an interpretation and application of the Act that is entirely consistent with its purpose: *viz* to give legal recognition to a company from an unrecognised state irrespective of the UK government's view of that state's legitimacy. It is obvious that although UK government spokesmen repeatedly referred to this Act as settling an issue of 'private international law' only, there is no doubt that this statute embodies a significant change in UK practice and attitudes towards non-recognition in national law. It is, in effect, the next logical step after the UK had ceased to recognise governments. Unfortunately, the pragmatic approach typified by the Foreign Corporations Act is not universal. The main issue in *S.P. Anastasiou* (the acceptance by the UK of TRNC customs certificates) was referred to the European Court of Justice in order to determine whether acceptance of such certificates was a breach of Community law. Subsequent to Popplewell J's decision, the ECJ ruled that such certificates could not be accepted because of the unrecognised status of the TRNC. This European decision, which places a premium on policy, may come to be regarded as a retrograde step given the many other ways in which the role of recognition in national legal systems has been downplayed in recent years.

*5.4.2.6 International organisations or entities* Lastly, it should be remembered that the problems caused by lack of recognition are not confined to entities established under the law of disputed states or governments. The passing of the Foreign Corporations Act was in part motivated by the decision of the Court of Appeal in *Arab Monetary Fund* v *Hashim*. As we have seen, in that case the Arab Monetary Fund was initially denied personality in the UK legal system because it was created by a treaty which had not been transformed into UK law (i.e. it came from an unrecognised legal system — international law). Although subsequently reversed on other grounds, the case highlighted that lack of legal personality, be it because the institution was incorporated under international law or under the law of an unrecognised state, could cause serious and unwarranted interference with international commerce as well as hardship for individual litigants. As discussed in Chapter 4, it is to be hoped that developments in the case law, particularly *Westland Helicopters Ltd* v *Arab Organisation for Industrialisation* [1995] 2 All ER 387,

will reduce the circumstances in which constitutional niceties force the UK legal system to reject the legal creations of international law.

As we have seen in the discussion in Part One of this Chapter, the matter of recognition is closely bound up with the concept of international personality. As far as states are concerned, 'recognition' of their existence may have some part to play in their emergence as fully operational subjects of international law, but generally it is more relevant to the opening of optional bilateral relations. Recognition of statehood may enhance the exercise of the capacities of statehood, but only rarely does it determine their existence. However, recognition by states of the existence of other types of legal person can be decisive, especially since the degree and extent of personality can vary from subject to subject. Moreover, on the national level, an act of recognition by the state of jurisdiction can determine finally the capacity of the 'state' or 'government' to act within the national legal system. In the United Kingdom, non-recognition of statehood still has some important consequences for the 'state', so that it is effectively barred from enforcing any rights and duties in UK courts. Conversely, the position of legal persons created by the unrecognised state has been much improved by developments in common law and statute. In respect of governments, the UK practice of not formally recognising their existence may encourage a relaxation in the effects of the 'non-recognition' doctrine, especially now that the court will determine for itself the substantive issue of whether the alleged government is 'sovereign'. All in all, there is a general trend to scale down the role of recognition in the national legal system, although as the discussion in Part One of this chapter made clear, recognition in international law may grow in importance as it is used as a lever to encourage emerging states to conform with certain regional values.

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# AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

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# 5 States and governments

## States

Since international law is primarily concerned with the rights and duties of states, it is necessary to have a clear idea of what a state is, for the purposes of international law.[1] The answer to this question is less simple than one might suppose. However, it should be noted that in practice, disputes tend to focus on factual issues rather than on the relevant legal criteria.[2]

The 1933 Montevideo Convention on Rights and Duties of States provides in Article 1:

> The State as a person of international law should possess the following qualifications:
>
> (a) a permanent population;
> (b) a defined territory;
> (c) government; and
> (d) capacity to enter into relations with other States.[3]

The first three criteria (a)–(c) correspond to established international practice and to the so-called doctrine of the three elements ('Drei-Elementen-Lehre') formulated by the German writer Georg Jellinek at the end of the nineteenth century.[4] They will be considered first before discussing suggestions for additional criteria.

### Defined territory

The control of territory is the essence of a state.[5] This is the basis of the central notion of 'territorial sovereignty', establishing the exclusive competence to take legal and factual measures within that territory and prohibiting foreign governments from exercising authority in the same area without consent. A leading case in this connection is the *Island of Palmas* case. The case concerned a dispute between the Netherlands and the United States on sovereignty over an island about halfway between the Philippines and the now Indonesian Nanusa Islands. The parties referred the issue to the Permanent Court of Arbitration in The Hague. Max Huber, the President of the Permanent Court of International Justice, was appointed as the sole arbitrator. In his award of 4 April 1928 Judge Huber noted on the concept of territorial sovereignty:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and

1 *Harris CMIL*, 102–26; J. Crawford, The Criteria for Statehood in International Law, *BYIL* 48 (1976–7), 93–182; J.A. Andrews, The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century, *LQR* 94 (1978), 408–27; Crawford, *The Creation of States in International Law*, 1979; 30–86; H. Mosler, Subjects of International Law, *EPIL* 7 (1984), 442–59; J.A. Barberis, *Los sujetos del derecho internacional actual*, 1984; K. Doehring, State, *EPIL* 10 (1987), 423–8; P.K. Menon, The Subjects of Modern International Law, *Hague YIL* 3 (1990), 30–86; N.L. Wallace-Bruce, *Claims to Statehood in International Law*, 1994; S. Magiera, Government, *EPIL* II (1995), 603–7. On state sovereignty see the literature in Chapter 2 above, 17–18.

2 I. Brownlie, *Principles of Public International law*, 4th edn 1990, 72. On the need for a simplified definition in international law to be able to conform to the principle of equality of states, see Doehring, *op. cit.*, 423–4.

3 165 LNTS 19.

4 G. Jellinek, *Allgemeine Staatslehre*, 3rd edn 1914, 396 *et seq.*

5 M.N. Shaw, Territory in International Law, *NYIL* 13 (1982), 61–91; S. Torres Bernardez, Territorial Sovereignty, *EPIL* 10 (1987), 487–94; C.K. Rozakis, Territorial Integrity and Political Independence, *ibid.*, 481–7. On the acquisition of territory see Chapter 10 below, 147–8.

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> inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian .[6]

It is important to note that the concept of territory is defined by geographical areas separated by borderlines from other areas and united under a common legal system (e.g. Denmark and Greenland; France and Martinique, East and West Pakistan before the secession of Bangladesh in 1971). It includes the air space above the land (although there is no agreement on the precise upper limit)[7] and the earth beneath it, in theory, reaching to the centre of the globe. It also includes up to twelve miles of the territorial sea adjacent to the coast.[8]

Thus, the delimitation of state boundaries is of crucial importance.[9] But absolute certainty about a state's frontiers is not required; many states have long-standing frontier disputes with their neighbours.[10] In the *North Sea Continental Shelf* cases, the International Court of Justice held:

> The appurtenance of a given area, considered as an entity, in no way governs the precise determination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not .[11]

What matters is that a state consistently controls a sufficiently identifiable core of territory. Thus, Israel was soon clearly recognized as a state, in spite of the unsettled status of its borders in the Arab-Israeli conflict.[12]

### Population

The criterion of a 'permanent population' is connected with that of territory and constitutes the physical basis for the existence of a state.[13] For this reason alone, Antarctica, for example, cannot be regarded as a state. On the other hand, the fact that large numbers of nomads are moving in and out of the country, as in the case of Somalia, is in itself no bar to statehood, as long as there is a significant number of permanent inhabitants.[14]

The size of the population, as well as the size of territory, may be very small. This raises the problem of so-called mini-states which have been admitted as equal members to the United Nations.[15] The Vatican City, the government of which is the Holy See, the administrative centre of the Catholic Church, is a special case. In spite of its small population, the Vatican (or the Holy See) entertains diplomatic relations with many other states, has concluded international agreements and joined international organizations (but it is not a UN member). Many state functions, however, are actually performed by Italy.[16]

Who belongs to the 'permanent population' of a state is determined by the internal law on nationality, which international law leaves to the

**6** *Island of Palmas* case, *RIAA* II 829, at 839 (1928). See See also P.C. Jessup, The Palmas island Arbitration, *AJIL* 22 (1928), 735–52; R. Lagoni, Palmas Island Arbitration, *EPIL* 2 (1981), 223–4; *Harris CMIL*, 173–83. See also Chapters 7, 109–10 and 10, 148, 150, 156 below.

**7** See Chapter 13 below, 206.

**8** See Chapter 12 below, 178–80.

**9** M. Bothe, Boundaries, *EPIL* I (1992), 443–9.

**10** See the articles by E.J. de Aréchaga, T. Schweisfurth, I. Brownlie, W. Hummer, R. Khan, and H.D. Treviranus/R. Hilger in *EPIL* I (1992), 449 *et seq.*

**11** Judgment of 20 February 1969, *ICJ Rep.* 1969, 3, at 33, para. 46. On the cases see Chapters 3, 44, 46 above and 12 below, 193, 196.

**12** See P. Malanczuk, Israel: Status, Territory and Occupied Territories, *EPIL* II (1995), 1468–508; Malanczuk, Jerusalem, *EPIL* 12 (1990), 184–95. On the Arab–Israeli conflict see also Chapters 10, 153 and 22, 417, 422–3 and text below, 77.

**13** Brownlie (1990), *op. cit.*, 73.

**14** See *Restatement (Third)*, Vol. 1, para. 201, at 73.

**15** See D. Orlow, Of Nations Small: The Small State in International Law, *Temple ICLJ* 9 (1995), 115–40; J. Crawford, Islands as Sovereign Nations, *ICLQ* 38 (1989), 277 *et seq.* On the membership of mini-states in the United Nations, see Chapter 21 below, 370.

**16** See H.F. Köck, Holy See, *EPIL* II (1995), 866–9; K. Oellers-Frahm, Grenzen hoheitlichen Handelns zwischen der Republik Italien und dem Vatikan, *ZaöRV* 47 (1987), 489 *et seq.* For a recent international treaty concluded by the Holy See establishing diplomatic relations with a state see Holy See-Israel: Fundamental Agreement of 30 December 1993, *ILM* 33 (1994), 153–9.

discretion of states, except for a number of limited circumstances.[17] Many states have a multinational composition as regards population. Thus, it would be absurd to legally require any ethnic, linguistic, historical, cultural or religious homogeneity in the sense of the antiquated political concept of the nation-state.[18] Issues connected with such factors again arise under the topic of self-determination and the rights of minorities and indigenous peoples,[19] but are not relevant as criteria to determine the existence of a state. A state exercises territorial jurisdiction over its inhabitants and personal jurisdiction over its nationals when abroad.[20] The essential aspect, therefore, is the common national legal system which governs individuals and diverse groups in a state.

### Effective control by a government

Effective control by a government over territory and population is the third core element which combines the other two into a state for the purposes of international law.[21] There are two aspects following from this control by a government, one internal, the other external. Internally, the existence of a government implies the capacity to establish and maintain a legal order in the sense of constitutional autonomy. Externally, it means the ability to act autonomously on the international level without being legally dependent on other states within the international legal order.

The mere existence of a government, however, in itself does not suffice, if it does not have effective control. In 1920, the International Committee of Jurists submitted its Report on the status of Finland and found that it had not become a sovereign state in the legal sense

> until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.[22]

Thus, the 'State of Palestine' declared in 1988 by Palestinian organizations was not a state, due to lack of effective control over the claimed territory.[23] However, the historic Israeli–Palestinian accord concluded on 14 September 1993 and the subsequent agreements may ultimately, if the peace process is sustained, result in some form of Palestinian statehood, although this issue is controversial between the parties and subject to further negotiations.[24]

The requirement of effective control over territory is not always strictly applied; a state does not cease to exist when it is temporarily deprived of an effective government as a result of civil war or similar upheavals. The long period of *de facto* partition of the Lebanon did not hinder its continued legal appearance as a state. Nor did the lack of a government in Somalia, which was described as a 'unique case' in the resolution of the Security Council authorizing the United Nations humanitarian intervention,[25] abolish the international legal personality of the country as such. Even when all of its territory is occupied by the enemy in wartime, the state continues

**17** See Chapter 17 below, 263–6.
**18** See Th. M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, *AJIL* 90 (1996), 359–83.
**19** See Chapters 6, 105–8 and 19, 338–41 below.
**20** See Chapter 7 below, 110–11.
**21** See Magiera, *op. cit.*
**22** LNOJ, Special Supp. No. 3 (1920), 3.
**23** See J. Salmon, Declaration of the State of Palestine, *Palestine YIL* 5 (1989), 48–82; F. Boyle, The Creation of the State of Palestine, *EJIL* 1 (1990), 301–6; J. Crawford, The Creation of the State of Palestine: Too Much Too Soon?, *ibid.*, 307–13; Malanczuk (1995), *op. cit.*, at 1491–2.
**24** For the documents see *ILM* 32 (1993), 1525 *et seq.*; *ILM* 34 (1995), 455 *et seq.*; see also E. Benevisti, The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement, *EJIL* 4 (1993), 542–54; R. Shihadeh, Can the Declaration of Principles Bring About a 'Just and Lasting Peace'?, *ibid.*, 555–63; A. Cassese, The Israel-PLO Agreement and Self-Determination, *ibid.*, 555–63; Y.Z. Blum, From Camp David to Oslo, *Israel LR* 28 (1994), 211 *et seq.*; F.A.M. Alting v. Geusau, Breaking Away Towards Peace in the Middle East, *LJIL* 8 (1995), 81–101; E. Cotran/C. Mallat (eds), *The Arab-Israeli Accords: Legal Perspectives*, 1996; P. Malanczuk, Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law, *EJIL* 7 1996, 485–500.
**25** See Chapter 22 below, 402–5.

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to exist, provided that its allies continue the struggle against the enemy, as in the case of the occupation of European states by Germany in the Second World War.[26] The allied occupation of Germany and Japan thereafter also did not terminate their statehood.[27]

The circumstance that the temporary ineffectiveness of a government does not immediately affect the legal existence of the state not only makes it clear that it is necessary to distinguish between states and governments, but also reflects the interest of the international system in stability and to avoid a premature change of the status quo, since the government may be able to restore its effectiveness. The other side of the same coin is that the requirement of government is strictly applied when part of the population of a state tries to break away to form a new state. There is no rule of international law which forbids secession from an existing state; nor is there any rule which forbids the mother state from crushing the secessionary movement, if it can. Whatever the outcome of the struggle, it will be accepted as legal in the eyes of international law.[28] These propositions (and some others in the present chapter) may need modification when one side is acting contrary to the principle of self-determination, but the principle of self-determination has a limited scope, and the propositions remain true in most cases.[29] But, so long as the mother state is still struggling to crush the secessionary movement, it cannot be said that the secessionary authorities are strong enough to maintain control over their territory with any certainty of permanence. Intervention by third states in support of the insurgents is prohibited.[30] Traditionally, therefore, states have refrained from recognizing secessionary movements as independent states until their victory has been assured; for instance, no country recognized the independence of the southern states during the American civil war (1861–5).[31] In recent years, however, states have used (or abused) recognition as a means of showing support for one side or the other in civil wars of a secessionary character; thus in 1968 a few states recognized Biafra as an independent state after the tide of war had begun to turn against Biafra; recognition was intended as a sign of sympathy. Particularly controversial in the context of the Yugoslavian conflict has been the drive for early recognition of Slovenia and Croatia, which Germany and Austria justified as being an attempt to contain the civil war, but which was seen by other states as premature action which actually stimulated it.[32]

The notion of effective government is interlinked with the idea of independence, often termed 'state sovereignty',[33] in the sense that such government only exists if it is free from direct orders from and control by other governments. Indeed, some authors require independence as an additional criterion for statehood.[34] In international law, however, the distinction between independent and dependent states is based on external appearances and not on the underlying political realities of the situation; as long as a state appears to perform the functions which independent states normally perform (sending and receiving ambassadors, signing treaties, making and replying to international claims and so on), international law treats the state as independent and does not investigate the possibility that the state may be acting under the direction of another state. An independent state becomes a dependent state only if it enters into a treaty or some

**26** See Chapter 10 below, 151. See also M. Rotter, Government-in-Exile, *EPIL* II (1995), 607–11.

**27** See Chapter 10, 151–2 and text below, 83–4.

**28** C. Haverland, Secession, *EPIL* 10 (1987), 384.

**29** See Crawford (1979), *op. cit.*, 103–6, 247–68 and Chapter 19 below, 326–41.

**30** See Chapter 19 below, 319–22, 336–8.

**31** P. Malanczuk, American Civil War, *EPIL* I (1992), 129–31.

**32** See M. Weller, The International Response to the Dissolution of the Socialist Republic of Yugoslavia, *AJIL* 86 (1992), 569–607; P. Radan, Secessionist Self-Determination: The Cases of Slovenia and Croatia, *AJIA* 48 (1994), 183–95. See also Chapters 11, 167 and 22, 409–15 and text, 89–90 below.

**33** On the theory of sovereignty, see Chapter 2 above, 17–18.

**34** See Brownlie (1990), *op. cit.*, 73–4.

other legal commitment whereby it agrees to act under the direction of another state or to assign the management of most of its international relations to another state. It may seem artificial to have described Afghanistan, for instance, as an independent state, at the time when everybody knew that Afghanistan was forced to follow Soviet policy on all important questions;[35] however, if international law tried to take all the political realities into account, it would be impossible to make a clear distinction between dependent and independent states, because all states, even the strongest, are subject to varying degrees of pressure and influence from other states. Therefore, although sometimes amounting to little more than a mere legal fiction, the vast majority of states are considered to be 'independent' in this sense.

Moreover, it is important to note that, in principle, international law is indifferent towards the nature of the internal political structure of states, be it based on Western conceptions of democracy and the rule of law, the supremacy of a Communist Party, Islamic perceptions of state and society, monarchies or republics, or other forms of authoritarian or non-authoritarian rule.[36] The rule is crude and only demands that a government must have established itself in fact. The legality or legitimacy of such an establishment are not decisive for the criteria of a state. Although the Holy Alliance in Europe after the Napoleonic Wars had sought a different solution,[37] revolutions and the overthrow of governments have become accepted in international law; the only relevant question is whether they are successful. The choice of a type of government belongs to the domestic affairs of states and this freedom is an essential pre-condition for the peaceful coexistence in a heterogeneous international society. Thus, international law also does not generally inquire into the question whether the population recognizes the legitimacy of the government in power. Nor is it concerned with the actual form of government, democratic in one sense or another or not so. Certain qualifications in this respect may arise from the recognition of the principle of self-determination of peoples,[38] but this is not pertinent to the question of whether or not a state exists.[39]

### Capacity to enter into relations with other states

The last criterion (d) in the Montevideo Convention suggested by the Latin American doctrine finds support in the literature[40] but is not generally accepted as necessary. Guinea-Bissau, for example, was recognized in the 1970s by the United States and by Germany on the basis of only the first three elements. The *Restatement (Third)* of the American Law Institute, however, basically retains this criterion, although with certain qualifications:

> An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.[41]

In fact, even the Montevideo Convention suggests a different perspective in Article 3:

> The political existence of the State is independent of recognition by the other

**35** See I. Jahn-Koch, Conflicts, Afghanistan, in *Wolfrum UNLPP I*, 176–88. See Chapter 19 below, 322–3.
**36** But on new theories on the requirements of democracy, see Chapter 2 above, 31.
**37** See Chapter 2 above, 11–12.
**38** See Chapter 19 below, 326–40.
**39** On the UN sponsored intervention to restore an elected government in Haiti, see Chapter 22 below, 407–9.
**40** See also Akehurst, 6th edn of this book, 53.
**41** See *Restatement (Third)*, Vol. 1, para. 201, Comment e, at 73.

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States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.[42]

Although this statement is more directly relevant to the dispute on various theories of the legal effect of recognition,[43] it also implies that the existence of a state does not primarily rest on its relations to other states and its own foreign policy capacity.

There are several examples of dependent states, which have only a limited capacity to enter into international relations and are usually mentioned as a special category. For example, colonies in the process of becoming independent[44] often had a limited capacity to enter into international relations. In practice, the formal grant of independence was usually preceded by a period of training, during which the colonial power delegated certain international functions to the colony, in order to give the local leaders experience of international relations. Protectorates were another example.[45] The basic feature of a protectorate is that it retains control over most of its internal affairs, but agrees to let the protecting state exercise most of its international functions as its agent. However, the exact relationship depends on the terms of the instrument creating the relationship, and no general rules can be laid down. Protectorates were generally a by-product of the colonial period, and most of them have now become independent. Trusteeships and 'associated territories' that were placed under the control of the United Nations after the Second World War were also limited in their capacity to conduct foreign relations.[46]

### Self-determination and recognition as additional criteria

Some authors refer to other additional factors that may be relevant as criteria for states, such as self-determination and recognition. These, however, are not generally regarded as constitutive elements for a state and it is agreed that what matters in essence is territorial effectiveness.[47]

For reasons which will be explained later,[48] the better view appears to be that recognition is usually no more than evidence that the three requirements listed above are satisfied. In most cases the facts will be so clear that recognition will not make any difference, but in borderline cases recognition can have an important effect. For instance, recognition of very small states such as Monaco and the Vatican City is important, because otherwise it might be doubted whether the territory and population of such states were large enough to make them states in the eyes of international law. Similar considerations apply in the case of secessionary struggles; outright victory for one side or the other will create a situation which international law cannot ignore, and no amount of recognition or non-recognition will alter the legal position; but in borderline cases such as Rhodesia (now Zimbabwe) between 1965 and 1979, where the mother state's efforts to reassert control are rather feeble, recognition or non-recognition by other states may have a decisive effect on the legal position.[49]

**42** Article 3, Montevideo Convention.
**43** See text below, 83–6.
**44** See Chapter 2 above, 28.
**45** G. Hoffmann, Protectorates, *EPIL* 10 (1987), 336–9.
**46** See Chapter 19 below, 327–32.
**47** See also M.N. Shaw, *International Law*, 3rd edn 1991, 138.
**48** See text below, 82–90.
**49** See Chapter 22 below, 393–5.

### Federal states

Unions of states can take several forms, but one of the most important forms nowadays is the federal state (or federation), as exemplified, for example, by the constitutional systems of the United States, Canada, Australia, Switzerland and Germany.[50] There is no uniform model of federal states, many of which are 'federal' in name only, due to effective centralization, but the basic feature of a federal state is that authority over internal affairs is divided by the constitution between the federal authorities and the member states of the federation, while foreign affairs are normally handled solely by the federal authorities.[51]

International law is concerned only with states capable of carrying on international relations; consequently the federal state is regarded as a state for the purposes of international law, but the member states of the federation are not. If a member state of the federation acts in a manner which is incompatible with the international obligations of the federal state, it is the federal state which is regarded as responsible in international law. For instance, when a mob lynched some Italian nationals in New Orleans in 1891, the United States admitted liability and paid compensation to Italy, even though the prevention and punishment of the crime fell exclusively within the powers of the State of Louisiana, and not within the powers of the federal authorities.[52]

Although the normal practice is for foreign affairs to be handled solely by the federal authorities, there are a few federal constitutions which give member states of the federation a limited capacity to enter into international relations. For instance, in 1944 the constitution of the former USSR was amended so as to allow the Ukraine and Byelorussia (two member states of the USSR) to become members of the United Nations alongside the USSR; the purpose and effect of this device was to give the USSR three votes instead of one.[53] There has been no other comparable example of a member state of a federation exchanging diplomats on this level. The representation of the German Bundesländer on the European level in Brussels is of a different nature.[54] The constitution of the United States permits a constituent state to make compacts or agreements with foreign powers – with certain minor exceptions – only with the consent of Congress, but these are limited in scope and content. It does not allow the exchange of ambassadors (only commercial representatives) or to generally engage in relations with a foreign government.[55] In recent years the province of Quebec has signed treaties on cultural questions with France and other French-speaking countries, under powers reluctantly delegated by the federal authorities of Canada.[56] In Europe, however, there have been interesting developments of direct transfrontier cooperation between entities on the local and regional level.[57]

## Governments

A state cannot exist for long, or at least cannot come into existence, unless it has a government. But the state must not be identified with its government; the state's international rights and obligations are not affected by a

**50** For the international law aspects see W. Rudolf, Federal States, *EPIL* II (1995), 362–75; R. Dehousse, *Fédéralisme et Relations Internationales*, 1991.

**51** For the situation in the United States see *Restatement (Third)*, Vol. 1, para. 202, Reporters' Notes, 76.

**52** J.B. Moore, *A Digest of International Law*, 1906, Vol. 6, 837–41. On state responsibility see Chapter 17 below, 255–72.

**53** See J.N. Hazard, Soviet Republics in International Law, *EPIL* 10 (1987), 418–23.

**54** See P. Malanczuk, European Affairs and the 'Länder' (States) of the Federal Republic of Germany, *CMLR* 22 (1985), 237–72; D. Rauschning, The Authorities of the German Länder in Foreign Relations, *Hague YIL* 2 (1989), 131–9; A. Kleffner-Riedel, Die Mitwirkung der Länder und Regionen im EU-Ministerrat, *BayVBl.* 126 (1995), 104–8.

**55** *Restatement (Third)*, Vol. 1, para. 201, Reporters' Notes, 76.

**56** R. Lane/P. Malanczuk, Verfassungskrise und Probleme des Föderalismus in Kanada, *Der Staat* 20 (1981), 539–70; on recent secessionist tendencies see S. Dion, The Dynamic of Secessions: Scenarios After a Pro-Separatist Vote in a Quebec Referendum, *CJPS* 28 (1995), 533–51; Ch. F. Doran, Will Canada Unravel?, *FA* 75 (1996), 97–109.

**57** U. Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, 1988; N. Levrat, *Le Droit applicable aux accords de coopération transfrontière entre collectivités publiques infra - étatiques*, 1994.

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change of government. Thus the post-war governments of West Germany and Italy have paid compensation for the wrongs inflicted by the Nazi and Fascist regimes. The same principle is also illustrated by the *Tinoco* case.[58] Tinoco, the dictator of Costa Rica, acting in the name of Costa Rica, granted concessions to British companies and printed banknotes, some of which were held by British companies. After his retirement, Costa Rica declared that the concessions and banknotes were invalid. The United Kingdom protested on behalf of the British companies, and the two states referred the case to arbitration.[59] The arbitrator held that Tinoco had been the effective ruler of Costa Rica, and that his acts were therefore binding on subsequent governments; the fact that his regime was unconstitutional under Costa Rican law, and that it had not been recognized by several states, including the United Kingdom, was dismissed as irrelevant.

## Recognition of states and governments in international law

Recognition is one of the most difficult topics in international law.[60] It is a confusing mixture of politics, international law and municipal law. The legal and political elements cannot be disentangled; when granting or withholding recognition, states are influenced more by political than by legal considerations, but their acts do have legal consequences. What is not always realized, however, is that the legal effects of recognition in international law are very different from the legal effects of recognition in municipal law.[61] Once this distinction is grasped, the whole topic of recognition should become easier to understand; apparent conflicts between two sets of cases will be easily resolved when it is realized that one set is concerned with international law and the other with national law.[62]

Another reason why recognition is a difficult subject is because it deals with a wide variety of factual situations; in addition to recognition of states and governments, there can also be recognition of territorial claims,[63] the recognition of belligerency or of insurgents,[64] the recognition of national liberation movements, such as the Palestine Liberation Organization,[65] or the recognition of foreign legislative and administrative acts.[66] In the present section of the book it is proposed, for purposes of simplicity, to concentrate on recognition of states and governments.

Today a clear distinction must be made between the recognition of a *state* and the recognition of a *government*. The recognition of a state acknowledges that the entity fulfils the criteria of statehood. The recognition of a government implies that the regime in question is in effective control of a state. The basic difference is that the recognition of a government necessarily has the consequence of accepting the statehood of the entity which the regime is governing, while the recognition of a state can be accorded without also accepting that a particular regime is the government of that state.[67]

### Recognition of states

When a new state comes into existence, other states are confronted with the problem of deciding whether or not to recognize the new state.

**58** *RIAA* I 369, 375. See H. Bülck, Tinoco Concessions Arbitration, *EPIL* 2 (1981), 275–6. For further discussion of the *Tinoco* case, see text below, 84, 88.

**59** On arbitration see Chapter 18 below, 293–8.

**60** See *Harris CMIL*, 139–51; H. Lauterpacht, *Recognition in International Law*, 1947; I. Brownlie, Recognition in Theory and Practice, in R.St.J. Macdonald/D.M. Johnston (eds), *The Structure and Process of International Law*, 1983, 627–42; J.A. Frowein, Recognition, *EPIL* 10 (1987), 340–8; Frowein, Non-Recognition, ibid, 314–6; C. Warbrick, Recognition of States, *ICLQ* 41 (1992), 473–82; Part 2, *ICLQ* 42 (1993), 433–42; J. Verhoeven, La Reconnaisssance internationale: déclin ou renouveau?, *AFDI* 39 (1993), 7–40; P.K. Menon, *The Law of Recognition in International Law: Basic Principles*, 1994.

**61** In other countries the legal effects of recognition are not the same as in Great Britain: D.P. O'Connell, *International Law*, 2nd edn 1970, 172–83. For the legal effects of recognition under English law, see Akehurst, 6th edn of this book, 67–9. See also F.A. Mann, The Judicial Recognition of an Unrecognised State, *ICLQ* 39 (1990), 348 *et seq.* and text below, 86–8.

**62** On the relation between international law and national law see Chapter 4 above, 63–74.

**63** See Chapter 10 below, 154–5.

**64** E.H. Riedel, Recognition of Belligerency, *EPIL* 4 (1982), 167–71; Riedel, Recognition of Insurgency, *ibid.*, 171–3. See also Chapters 6, 104–5 and 19, 319–22, below.

**65** See F.L.M. van de Craen, Palestine Liberation Organization, *EPIL* 12 (1990), 278–82 and Chapters 6, 104–5 and 19, 336–8 below.

**66** See W. Meng, Recognition of Foreign and Legislative Acts, *EPIL* 10 (1987), 348–52; K. Lipstein, Recognition and Execution of Foreign Judgments and Arbitral Awards, *EPIL* 9 (1986), 322–6.

**67** See *Restatement (Third)*, Vol. 1, para. 202, 84–5.

Recognition means a willingness to deal with the new state as a member of the international community. The first example in history was the recognition in 1648 by Spain of the United Netherlands, which had declared their independence in 1581. Another well-known example is the dispute between France and Britain on the status of the United States when it declared its independence. At that time Britain took the view that title to territory could never be established by revolution or war without recognition by the former sovereign. It was the view of France, however, which was based on the doctrine of effectiveness, that became the accepted principle in the nineteenth century.[68]

68 Frowein (1987), *op. cit.*, 341.
69 Lauterpacht, *op. cit.*, 47.
70 See Chapter 2 above, 11–12.

### *Legal effects of recognition in international law*

The question of the legal effects of recognition has given rise to a bitter theoretical quarrel. According to the constitutive theory, advanced in particular by Anzilottii and Kelsen, a state or government does not exist for the purposes of international law until it is recognized; recognition thus has a constitutive effect in the sense that it is a necessary condition for the 'constitution' (that is, establishment or creation) of the state or government concerned. Thus, an entity is not a state in international law until it has secured its general recognition as such by other states. The constitutive theory is opposed by the declaratory theory, according to which recognition has no legal effects; the existence of a state or government is a question of pure fact, and recognition is merely an acknowledgment of the facts. If an entity satisfies the requirements of a state objectively, it is a state with all international rights and duties and other states are obliged to treat it as such. An intermediate position was formulated by Lauterpacht who, on the basis of the constitutive theory, argued that other states had an obligation to recognize an entity meeting the criteria of a state.[69]

Historically, the constitutive theory has more to be said for it than one might suppose. During the nineteenth century, international law was often regarded as applying mainly between states with a European civilization; other countries were admitted to the 'club' only if they were 'elected' by the other 'members' – and the 'election' took the form of recognition. There were also occasions (for example, during the period of the Holy Alliance, immediately after 1815) when some states tended to treat revolutionary governments as outlaws, which were likewise excluded from the 'club' until they were recognized.[70]

Even today, recognition can sometimes have a constitutive effect, although state practice is not always consistent. If the establishment of a state or government is a breach of international law, the state or government is often regarded as having no legal existence until it is recognized. For instance, for many years the Western powers refused to recognize the existence of the German Democratic Republic (East Germany), mainly because they considered that its establishment by the Soviet Union was a breach of the Soviet Union's obligations under treaties made between the allies concerning the administration of Germany after the Second World War. The recognition of the German Democratic Republic by the Western powers in 1973 had a constitutive effect as far as the Western powers were

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concerned; recognition cured the illegality of the German Democratic Republic's origins, and converted it from a legal nullity into a state.[71]

However, in most cases the establishment (even the violent establishment) of a new state or government is not a breach of international law; there is no general rule of international law which forbids a group of people from overthrowing the government of their state, or to break away and form a new state, if they have the strength to do so.[72] In such cases the existence of a state or government is simply a question of fact, and recognition and non-recognition usually have no legal effects. For instance, in the *Tinoco* case, Chief Justice Taft, the arbitrator, held that Tinoco's regime was the government of Costa Rica because it was clearly in effective control of Costa Rica, and the fact that it had not been recognized by several states, including the United Kingdom, made no difference. Nevertheless, Chief Justice Taft indicated that recognition or non-recognition would have assumed greater importance if the effectiveness of Tinoco's control over Costa Rica had been less clear, because 'recognition by other powers is an important evidential factor in establishing proof of the existence of a government'.[73] Similarly, recognition can play an evidentiary role when it is uncertain whether a body claiming to be a state fulfils the factual requirements of statehood. Where the facts are clear, as in the *Tinoco* case, the evidential value of recognition or non-recognition is not strong enough to affect the outcome; in such circumstances recognition is declaratory. But in borderline cases, where the facts are unclear, the evidential value of recognition can have a decisive effect; in such circumstances recognition is semi-constitutive.

On the other hand, recognition has little evidential value if the granting or withholding of recognition by other nations is not based on an assessment of the government's control over the country:

> when recognition *vel non* of a government is by such nations determined by inquiry, not into its . . . governmental control, but into its illegitimacy or irregularity of origin [as in the *Tinoco* case], their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned.[74]

The prevailing view today is that recognition is declaratory and does not create a state.[75] This was already laid down in the Montevideo Convention of 1933 on the Rights and Duties of States[76] and has also been taken up in Article 12 of the Charter of the Organization of American States:

> The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence.[77]

It has been observed that the two theories are of little assistance in explaining recognition or determining the position of non-recognized entities in practice, and that the practical differences between them are not very significant.[78] Under the declaratory theory, it is still in fact left to other states to decide whether an entity satisfies the criteria of statehood. The declaratory theory leaves unresolved the difficulty of who ultimately

**71** See G. Ress, Germany, Legal Status After the Second World War, *EPIL* II (1995), 567–81; T. Schweisfurth, Germany, Occupation After the Second World War, *ibid.*, 582–90; T. Eitel, Germany, Federal Republic of, Treaties with Socialist States (1970–4), *ibid.*, 561–7; G.v. Well, Germany and the United Nations, in *Wolfrum UNLPP I*, 558–65. On the reunification of Germany and the problems of state succession see Chapter 11 below, 167–8.

**72** See text above, 78 and Chapter 19 below, 326–40.

**73** *Tinoco* case, *op. cit.*

**74** *Ibid.*, at 381.

**75** See Frowein (1987), *op. cit.*, 342; *Restatement (Third)*, Vol. 1, para. 202, Comment b, at 77–8, noting, however, 'As a practical matter, however, an entity will fully enjoy the status and benefits of statehood only if a significant number of other states consider it to be a state and treat it as such, in bilateral relations or by admitting it to major international organizations.'

**76** Article 3, see text above, 79–80.

**77** On the OAS see Chapter 6 below, 95.

**78** Frowein (1987), *op. cit.*, 343.

determines whether an entity meets the objective test of statehood or not. Granting formal recognition to another state is a unilateral act which is in fact left to the political discretion of states, mostly to the executive branches which national courts generally tend to follow.[79]

The relevance of the constitutive theory, on the other hand, has been diminished by the acceptance of the obligation of other states to treat an entity with the elements of statehood as a state.[80] The main reasons in state practice for delays in recognition have been, in particular, the question whether the new state was viable, really independent from another state which had helped to create it, or established in violation of Article 2(4) of the UN Charter prohibiting the use of force.[81]

The viability of a new state is especially at issue in cases of secession leading to a longer period of civil war. Premature recognition in such cases may even constitute a violation of international law and of the rights of the mother country. Most states refused to recognize the secession of Biafra form Nigeria in 1967–70. On the other hand, in the decolonization process there were many examples of the recognition of a territory as a new state while the colonial power was still in military control of it (e.g. Algeria, Guinea-Bissau).[82] In the case of Rhodesia, where a white minority government declared independence without the consent of the colonial power and backing of the whole population, the United Nations Security Council called upon 'all states not to recognize this illegal act'.[83] This was a mandatory decision taken under Chapter VII of the Charter and binding upon all members of the UN under Article 25 of the Charter. The Smith regime remained unrecognized for a long period until the state of Zimbabwe was established and accepted under a majority government in 1979–80.

Examples of the perceived lack of independence of a new entity are the non-recognition by other states of the pre-war puppet-state of Manchukuo created by Japan, of Croatia established by Nazi Germany, the long delay of Western states in recognizing East Germany due to the influence of the USSR, and the refusal of the international community to recognize the South African homelands declared to be sovereign states by South Africa.[84] In the cases of the independence of Transkei, declared by South Africa,[85] and of the independent state in northern Cyprus in 1983 by Turkish Cypriot authorities,[86] the UN Security Council called for non-recognition, which was generally followed by the international community.

In most of the relatively few cases in which entities claiming statehood have allegedly come into existence by an illegal threat or use of force by another state, the dispute often cannot be resolved authoritatively. The secession of Bangladesh from Pakistan, supported by India's armed intervention, gave rise to different views on the legality of the intervention, but states nevertheless generally recognized or treated Bangladesh as a state, which was also admitted to the United Nations and the British Commonwealth.[87]

It should be emphasized that non-recognition as a state by other states does not imply that a *de facto* regime is entirely outside the realm of international law. Many rules are applicable in spite of non-recognition, such as the prohibition of the use of force.[88] Although the United States, which was in control of the unified command of the UN forces, refused to

**79** *Restatement (Third)*, Vol. 1, para. 202, Reporters' Notes, 80.

**80** But see, in view of recent developments, C. Simmler, Kehrt die Staatengemeinschaft zur Lehre von der konstitutiven Anerkennung zurück?, *Schr.-Reihe Dt. Gruppe AAA* 9 (1994), 75–102.

**81** See Chapters 10, 154–5 and 19, 309–11 below.

**82** *Restatement (Third)*, Vol. 1, 81.

**83** SC Res. 216 and 217 of 12 and 20 November 1965. Frowein (1987), *op. cit.*, at 342, notes that the lack of self-determination by the whole population was seen as justifying non-recognition. See also Chapter 22 below, 393–5.

**84** See Chapter 22 below, 394.

**85** SC Res. 402 (1976). See E. Klein, South African Bantustan Policy, *EPIL* 10 (1987), 393–7.

**86** SC Res. 541 (1983). See Chapter 22 below, 420–2.

**87** See *Restatement (Third)*, Vol. 1, 81–2 with further references; and Chapter 19 below, 319–22.

**88** Frowein (1987), *op. cit.*, 342 and 347.

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recognize North Korea as a state – as well as the governments of China and North Korea – this was no bar to signing an armistice agreement ending the Korean War in 1953.[89] The non-recognition of North Korea was also no obstacle in the later Pueblo incident to the contention raised by the United States that North Korea had violated international law by attacking a US ship.[90]

Recognition of another state does not lead to any obligation to establish full diplomatic relations or any other specific links with that state.[91] This remains a matter of political discretion. Nor does the termination of diplomatic relations automatically lead to de-recognition.

### *Legal effects in domestic law*

If state A recognizes state B, this usually entails that the courts of state A will apply the law of state B and give effect to its sovereign acts.[92] In the case of non-recognition, national courts will not accept the right of the foreign state or government to sue or claim other rights of a governmental nature, but as regards private parties (for example, whether non-recognition extends to the registration of births, deaths and marriages in the foreign state), the situation varies to some extent, depending on the national framework.

Courts in Switzerland and Germany have always applied the effective law governing a foreign territory even if it was not recognized as a state. English and American courts originally had a tendency to completely disregard the law and sovereign acts of a foreign state, unless it was recognized by their governments. However, changes in the United States and Britain then went in the direction that courts could apply the law of a non-recognized entity if the executive confirmed that this was not harmful to the foreign policies behind the non-recognition.[93]

## Recognition of governments

International law allows states to exercise great discretion when granting or withholding recognition, especially when a new government comes into power in an existing state by violent means. Recognition is accorded to the head of state, and so no problem of recognition arises when a revolution does not affect the head of state (for example, the military coup in Greece in April 1967, which overthrew the Prime Minister but not the King). Nor does any problem of recognition arise when there is a constitutional change in the head of state, for example, when a British monarch dies and is succeeded by the eldest son, or when a new President of the United States is elected. States have often used recognition as an instrument of policy; for instance, the United States has often regarded recognition as a mark of approval, and in President Wilson's time it withheld recognition from Latin American regimes which had come to power by unconstitutional means, such as Tinoco's regime in Costa Rica.[94]

A refusal to recognize is sometimes based on a belief that the new state or government is not in effective control of the territory which it claims, but a refusal to recognize can also be based on other factors; for instance, the United States at one time refused to recognize foreign governments simply because it disapproved of them; in the eyes of the United States,

**89** See Chapter 22 below, 351–2.

**90** *Restatement (Third)*, Vol. 1, 81. See J. Kokott, Pueblo Incident, *EPIL* 11 (1989), 268–71.

**91** Frowein (1987), *op. cit.*, 343. See also Chapter 8 below, 123–4.

**92** See *Harris CMIL*, 151–72.

**93** See Akehurst, 6th edn of this book, Chapter 5. See also the Statement of Interest, dated 29 November 1995, of the US Department of State in *Meridien International Bank Ltd v. Government of Liberia* which declared that allowing the (second) Liberian National Transitional Government (LNTG II) access to American courts was consistent with US foreign policy, M. Nash (Leich), *AJIL* 90 (1996), 263–5.

**94** See text above, 82, 84.

recognition was a mark of approval. The United Kingdom, on the other hand, usually recognized all governments which were in actual control of their territory, without necessarily implying any approval of such governments.

Because non-recognition of foreign governments has often been used as a mark of disapproval, recognition of a foreign government has sometimes been misinterpreted as implying approval, even in cases where no approval was intended. In order to avoid such misinterpretations, some states have adopted the policy of never recognizing governments (although they continue to grant or withhold recognition to foreign states). This policy originated in Mexico, where it is known as the Estrada Doctrine. In 1930, the Secretary of Foreign Relations of Mexico declared that: 'the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that such course is an insulting practice.'[95]

This statement reflects the fact that the change of government in a state is legally an internal matter, whether in conformity with the national constitution or not, and does not concern international law or other states. The same policy has been applied in recent years by several other states, including France, Spain and the United States; in 1977 the Department of State Bulletin noted that

> in recent years US practice has been to deemphasize and avoid the use of recognition in cases of changes of governments and to concern ourselves [instead] with the question of whether we wish to have diplomatic relations with the new governments.[96]

In 1980 the British Foreign Secretary announced that the United Kingdom also would adopt this policy:

> we have decided that we shall no longer accord recognition to governments.
>
> The British government recognise states . . .
>
> Where an unconstitutional change of régime takes place in a recognised state, governments of other states must necessarily consider what dealings, if any, they should have with the new régime, and whether and to what extent it qualifies to be treated as the government of the state concerned. Many of our partners and allies take the position that they do not recognise governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British governments has been that we should make and announce a decision formally 'recognising' the new government.
>
> This practice has sometimes been misunderstood, and, despite explanations to the contrary, our 'recognition' interpreted as implying approval. For example, in circumstances where there may be legitimate public concern about the violation of human rights by the new régime . . . it has not sufficed to say that an announcement of 'recognition' is simply a neutral formality.
>
> We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to governments. Like them, we shall continue to decide the nature of our dealings with régimes which come to power unconstitutionally in the light of our assessment of whether they are able . . . to exercise effective control of the territory of the state concerned, and seem likely to continue to do so.[97]

**95** M. Whiteman, *Digest of International Law*, Vol. 2, 1963, at 85.
**96** J.A. Boyd, *Digest of United States Practice of International Law*, 1977, 19.
**97** *House of Lords Debates*, Vol. 408, cols 1121–2, announcement made on 28 April 1980.

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At first sight the Estrada Doctrine appears to abolish the entire system of recognition of governments. In practice, however, it probably merely substitutes implied recognition for express recognition; recognition is not announced expressly, but can be implied from the existence of diplomatic relations or other dealings with a foreign government.[98] In fact, implied recognition is a long accepted practice. However, recognition should only be deduced from acts which clearly show an intention to that effect. The establishment of full diplomatic relations is probably the only one unequivocal act from which full recognition can be inferred. All other forms of contact do not necessarily imply recognition.[99]

Most states which have adopted the Estrada Doctrine in the past have not applied it consistently; sooner or later they succumb to the temptation of announcing recognition of a foreign government, in order to demonstrate their support for it, or in the hope of obtaining its goodwill.[100]

### *De jure* and *de facto* recognition

One of the most confused aspects of recognition is the distinction between *de jure* and *de facto* recognition. For a start, the expressions '*de jure* recognition' and '*de facto* recognition', although commonly used, are technically incorrect; '*de jure* recognition' really means recognition of a *de jure* government; the words *de jure* or *de facto* describe the government, not the act of recognition. The terminology implies that a *de facto* government does not have the same legal basis as a *de jure* government. But it is difficult to find any body of legal rules by which this legal basis can be determined.

The distinction between *de jure* and *de facto* recognition usually arises in the case of governments. It is sometimes said that a state can be recognized only *de jure*, but there are a few examples of states being recognized *de facto*; for instance, Indonesia was recognized *de facto* by several states while it was fighting for its independence against the Dutch in 1945–9. Similarly there are a few examples of territorial claims being given only *de facto* recognition; the United Kingdom, for example, granted only *de facto* recognition to the Soviet annexation of Estonia, Latvia and Lithuania in 1940.[101] *De facto* recognition of states and territorial claims is governed by roughly the same rules, and gives rise to roughly the same problems, as *de facto* recognition of governments. When recognition is granted by an express statement, it should probably always be treated as *de jure* recognition, unless the recognizing state announces that it is granting only *de facto* recognition. When recognition is not express, but implied, there will often be uncertainty as to the intentions of the recognizing state: did it intend to grant *de jure* recognition, or did it intend to grant *de facto* recognition?

Whatever the basis for the distinction between *de jure* and *de facto* recognition, the effects of the two types of recognition are much the same. However, if a state or government has been established (or a territorial change brought about) in violation of international law, it seems that only *de jure* recognition can cure the illegality; *de facto* recognition is insufficient to cure it.[102] If, like Chief Justice Taft in the *Tinoco* case,[103] one thinks of recognition as having an evidential value, then presumably *de jure* recognition would have greater evidential force than *de facto* recognition; but the difference is probably not very great.

**98** The Foreign Secretary seems to have adopted this interpretation in his subsequent statement on 23 May 1980. For a discussion of British practice see Akehurst, 6th edn of this book, Chapter 5 and M. Aristodemou, Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia, *EJIL* 5 (1994), 532–55; S. Talmon, Recognition of Governments: An Analysis of the New British Policy and Practice, *BYIL* 63 (1992), 231–97, and the literature cited above. On the practice in New Zealand, for example, see S. Davidson, Recognition of Foreign Governments in New Zealand, *ICLQ* 40 (1991), 162 *et seq.*

**99** Frowein (1987), *op. cit.*, 342. See also J.A. Frowein, De facto Régime, *EPIL* I (1992), 966–8.

**100** Ch. Rousseau, *Droit international public*, 1977, Vol. 3, 555–7.

**101** See also Chapters 10, 152 and 11, 165–6 below.

**102** See Chapter 10 below, 155.

**103** See text above, 82, 84, 86.

In reality, the distinction between *de jure* and *de facto* recognition has always been a source of difficulty, and in practice in most cases of the recognition of states it will not be qualified in either of these terms.[104] In the case of the recognition of governments the distinction has also become obsolete.[105] The *Restatement (Third)* thus avoids these uncertain terms.[106]

A separate matter altogether that has become more important since 1945 is the impact of the United Nations and other international organizations on the recognition of states and governments.[107] The developments in Eastern Europe, the Soviet Union and in former Yugoslavia induced the European Community and its member states to adopt a common position on guidelines for the formal recognition of new states in these areas on 16 December 1991.[108] These guidelines start from reaffirming the principles of the Helsinki Act of 1975[109] and of the Charter of Paris of 1990,[110] 'in particular the principle of self-determination'.[111] The Community and its member states

> affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Specific requirements laid down in the European Community guidelines for recognition and the establishment of diplomatic relations are:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.[112]

Recognition of 'entities which are the result of aggression' is expressly excluded and the 'effects of recognition on neighbouring states' are also to be taken into account. While non-recognition of 'entities which are the result of aggression' reflects the principle of not accepting the acquisition of territory by the use of force,[113] the meaning of the phrase that the European Union also intended to take into account the 'effects of recognition on neighbouring states' remains rather cryptic. At any rate, these guidelines, as applied by the Badinter Arbitration Commission, served to

**104** Frowein (1987), *op. cit.*, 342.
**105** *Ibid.*, 345.
**106** *Restatement (Third)*, Vol. 1, 80.
**107** See Frowein (1987), *op. cit.*, 343–4; 345–6; J. Dugard, *Recognition and the United Nations*, 1987; V. Gowland-Debbas, Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine: An Application of the Legitimizing Function of the United Nations, *BYIL* 61 (1990), 135 *et seq.* On membership in the UN, see Chapter 21 below, 363–73.
**108** See European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, *ILM* 31(1992), 1485–7; A. Pellet, The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples, *EJIL* 3 (1992), 178–85; L.S. Eastwood, Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia, *Duke JCIL* 3 (1993), 299–349, M.M. Kelly, The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict, *Temple ICLJ* 23 (1993), 63–88; R. Rich, Recognition of States: The Collapse of Yugoslavia and the Soviet Union, *EJIL* 4 (1993), 36–65; D. Türk, Recognition of States: A Comment, *ibid.*, 66–71; P. Hilpold, Die Anerkennung der Neustaaten auf dem Balkan, *AVR* 31 (1993), 387–408; Weller, *op. cit.*; Radan, *op. cit.*; S. Hille, Mutual Recognition of Croatia and Serbia (& Montenegro), *EJIL* 6 (1995), 598–610. See also text above, 78 and Chapters 11, 165–7 and 22, 409–15 below.
**109** Text in *ILM* 14 (1975), 1292–1325. See M. Coccia/K. Oellers-Frahm, Helsinki Conference and Final Act on Security and Cooperation in Europe, *EPIL* II (1995), 693–705. See also Chapter 3 above, 54 and Chapter 6 below, 94.
**110** Charter of Paris for a New Europe, *ILM* 30 (1991), 190–228.
**111** Guidelines on the Recognition of New States, *op. cit.*, at 1487. On the principle of self-determination, see Chapter 19 below, 326–40.
**112** *Ibid.*, at 1487.
**113** See Chapter 10 below, 151–5.

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determine the policy of European Union member states with regard to the recognition of the new states emerging from the break-up of former Yugoslavia. Without entering into the complicated details of the recognition process on this basis, it should only be noted that, as far as the Serbian-controlled Federal Republic of Yugoslavia was concerned, in 1995 the European Union made it one of the conditions for its recognition that all successor states to former Yugoslavia had recognized each other.

The case of the former Yugoslav Republic of Macedonia is instructive. Macedonia had held a referendum on independence on 8 September 1991 and confirmed this on 17 November 1991.[114] Greece was concerned about the name of the new state and the use of the Star of Vergina on the new republic's flag, because it feared possible claims to its own province of Macedonia.[115] The former Yugoslav Republic of Macedonia was admitted to the UN on 8 April 1993, however, leaving the dispute over the proper name of the country undecided.[116] Greece and the former Yugoslav Republic of Macedonia finally settled their dispute by an Interim Accord of 13 September 1995 and a Memorandum of 13 October 1995.[117] Greece subsequently lifted the embargo it had imposed upon Macedonia and the European Commission withdrew the case it had filed with the European Court of Justice on 22 April 1994 challenging the legality of the embargo under Community law.[118] On 8 April 1996, the Federal Republic of Yugoslavia and Macedonia accorded each other mutual recognition. The Federal Republic of Yugoslavia was subsequently recognized first by France, then by Britain and other EU member states, including by Germany on 17 April 1996.[119] The difficult problems of 'state succession' in the case of former Yugoslavia will be dealt with in a broader perspective in chapters below.[120]

**114** The Advisory Opinion No. 6 of 11 January 1992 of the Arbitration (Badinter) Commission of the European Community (Carrington) Conference on Peace in Yugoslavia concerning the status of Macedonia is in *ILM* 31 (1992), 1507.

**115** See D.M. Poulakides, Macedonia: Far More Than a Name to Greece, *Hastings ICLR* 18 (1995), 397–443.

**116** UN Doc. GA 47/225.

**117** *ILM* 34 (1995), 1461 (Introductory Note by P.C. Szasz).

**118** ECJ Case No. C-120/94 R, Order of 29 June 1994.

**119** *FAZ* of 18 April 1996, 1, 7. The text of the Agreement between Macedonia and the Federal Republic of Yugoslavia is in *ILM* 35 (1996), 1246. On the normalization of relations between Croatia and the Federal Republic of Yugoslavia see *ibid.*, 1219.

**120** See Chapters 11, 167, 21, 372–3 and 22, 409–15 below.