COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE REGIONAL MUNICIPALITY OF WATERLOO
Applicant (Appellant)

THE ATTORNEY GENERAL OF ONTARIO
Appellant (Intervener)

-and-

JOSEPHINA DUGAS, TERRA-LYNN WEBER, AVERY AMENT, AARON PRICE, JEREMY LINTON, JEREMY NICHOL, JAMES HAMMOND, JAKOB STUBBS, JAMES DAVIS, JASON PAUL, NOAH HELSBY, JOSEPH BRADLEY, JOSEPH SADLER, JULIE YOUNG, KYLE YORK, MEGAN LOPES, STEPHANIE MCMILLAN, JEFFREY COUTO, JORDAN CAMM, TERRANCE COLE, XANDER HARKER, CHARLES KOCHER, ALINE JEFFERY, MICHAEL JEFFERY, AND PERSONS UNKNOWN

Respondents (Respondents in Appeal)

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COUR INTERNATIONALE DE JUSTICE

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AFFAIRE
AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE
DÉMOCRATIQUE DU CONGO)

ARRÊT DU 30 NOVEMBRE 2010

2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC
REPUBLIC OF THE CONGO)

JUDGMENT OF 30 NOVEMBER 2010

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AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE DU CONGO)

AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)

30 NOVEMBER 2010

JUDGMENT

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COUR INTERNATIONALE DE JUSTICE

2010
30 novembre
Rôle général
n° 103

ANNÉE 2010

30 novembre 2010

AFFAIRE AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE DU CONGO)

Contexte factuel général.

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INTERNATIONAL COURT OF JUSTICE

YEAR 2010

2010
30 November
General List
No. 103

30 November 2010

CASE CONCERNING AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)

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*

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*

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*

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*

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ARRÊT

Présents : M. OWADA, *président*; M. TOMKA, *vice-président*; MM. AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, *juges*; MM. MAHIOU, MAMPUYA, *juges* ad hoc; M. COUVREUR, *greffier*.

En l'affaire Ahmadou Sadio Diallo,

entre

la République de Guinée,

représentée par

le colonel Siba Lohalamou, ministre de la justice, garde des sceaux,

comme chef de la délégation;

M^me^ Djénabou Saïfon Diallo, ministre de la coopération;

M. Mohamed Camara, premier conseiller chargé des questions politiques à l'ambassade de Guinée auprès des pays du Benelux et de l'Union européenne,

comme agent;

M. Alain Pellet, professeur à l'Université Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, associé de l'Institut de droit international,

comme agent adjoint, conseil et avocat;

M. Mathias Forteau, professeur à l'Université Paris Ouest, Nanterre-La Défense, secrétaire général de la Société française pour le droit international,

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

M. Jean-Marc Thouvenin, professeur à l'Université Paris Ouest, Nanterre-La Défense, directeur du Centre de droit international de Nanterre (CEDIN), avocat au barreau de Paris, cabinet Sygna Partners,

M. Luke Vidal, avocat au barreau de Paris, cabinet Sygna Partners,

M. Samuel Wordsworth, membre des barreaux d'Angleterre et de Paris, Essex Court Chambers,

comme conseils et avocats;

S. Exc. M. Ahmed Tidiane Sakho, ambassadeur de la République de Guinée auprès des pays du Benelux et de l'Union européenne,

M. Alfred Mathos, agent judiciaire de l'Etat,

M. Hassan II Diallo, conseiller juridique du premier ministre de la République de Guinée,

M. Ousmane Diao Balde, directeur de la division juridique et consulaire au ministère des affaires étrangères,

tions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.

JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc MAHIOU, MAMPUYA; *Registrar* COUVREUR.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Colonel Siba Lohalamou, Minister of Justice, Keeper of the Seals,

as Head of Delegation;

Ms Djénabou Saïfon Diallo, Minister of Co-operation;

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, Associate of the Institut de droit international,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, Secretary-General of the Société française pour le droit international,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Ouest, Nanterre-La Défense, Director of the Centre de droit international de Nanterre (CEDIN), member of the Paris Bar, Cabinet Sygna Partners,

Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,

Mr. Samuel Wordsworth, member of the English and Paris Bars, Essex Court Chambers,

as Counsel and Advocates;

H.E. Mr. Ahmed Tidiane Sakho, Ambassador of the Republic of Guinea to the Benelux countries and to the European Union,

Mr. Alfred Mathos, Judicial Agent of the State,

Mr. Hassan II Diallo, Legal Adviser to the Prime Minister of the Republic of Guinea,

Mr. Ousmane Diao Balde, Director of the Legal and Consular Division of the Ministry of Foreign Affairs,

M. André Saféla Leno, président de la chambre d'accusation de la cour d'appel de Conakry,
S. Exc. M. Abdoulaye Sylla, ancien ambassadeur,

comme conseillers;

M. Ahmadou Sadio Diallo,

et

la République démocratique du Congo,

représentée par

S. Exc. M. Henri Mova Sakanyi, ambassadeur de la République démocratique du Congo auprès du Royaume de Belgique, du Royaume des Pays-Bas et du Grand-Duché de Luxembourg,

comme agent et chef de la délégation;

M. Tshibangu Kalala, professeur de droit international à l'Université de Kinshasa, avocat aux barreaux de Kinshasa et de Bruxelles, député au Parlement congolais,

comme coagent, conseil et avocat;

M. Lwamba Katansi, professeur à l'Université de Kinshasa, conseiller juridique au cabinet du ministre de la justice et des droits humains,
M^me^ Corinne Clavé, avocat au barreau de Bruxelles, cabinet Liedekerke-Wolters-Waelbroeck-Kirkpatrick,
M. Kadima Mukadi, avocat au barreau de Kinshasa, cabinet Tshibangu et associés,
M. Bukasa Kabeya, avocat au barreau de Kinshasa, cabinet Tshibangu et associés,
M. Kikangala Ngoie, avocat au barreau de Bruxelles,
M. Moma Kazimbwa Kalumba, avocat au barreau de Bruxelles, avocat-conseil de l'ambassade de la République démocratique du Congo à Bruxelles,
M. Tshimpangila Lufuluabo, avocat au barreau de Bruxelles,
M^me^ Mwenze Kisonga Pierrette, chef du service juridique et du contentieux à l'ambassade de la République démocratique du Congo à Bruxelles,
M. Kalume Mabingo, conseiller juridique à l'ambassade de la République démocratique du Congo à Bruxelles,

comme conseillers;

M. Mukendi Tshibangu, chargé de recherches au cabinet Tshibangu et associés,
M^me^ Ali Feza, chargé d'études au cabinet du ministre de la justice et des droits humains,
M. Makaya Kiela, chargé d'études au cabinet du ministre de la justice et des droits humains,

comme assistants,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant:

Mr. André Saféla Leno, President of the Indictments Division of the Court of Appeal of Conakry,
H.E. Mr. Abdoulaye Sylla, former Ambassador,

as Advisers;

Mr. Ahmadou Sadio Diallo,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Agent and Head of Delegation;

Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member of the Kinshasa and Brussels Bars, and Deputy, Congolese Parliament,

as Co-Agent, Counsel and Advocate;

Mr. Lwamba Katansi, Professor at the University of Kinshasa, Legal Adviser, Office of the Minister of Justice and Human Rights,
Ms Corinne Clavé, member of the Brussels Bar, Cabinet Liedekerke-Wolters-Waelbroeck-Kirkpatrick,
Mr. Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu and Associés,
Mr. Bukasa Kabeya, member of the Kinshasa Bar, Cabinet Tshibangu and Associés,
Mr. Kikangala Ngoie, member of the Brussels Bar,
Mr. Moma Kazimbwa Kalumba, member of the Brussels Bar, Lawyer-Counsel, Embassy of the Democratic Republic of the Congo in Brussels,
Mr. Tshimpangila Lufuluabo, member of the Brussels Bar,
Ms Mwenze Kisonga Pierrette, Head of the Legal and Litigation Department, Embassy of the Democratic Republic of the Congo in Brussels,
Mr. Kalume Mabingo, Legal Adviser, Embassy of the Democratic Republic of the Congo in Brussels,

as Advisers;

Mr. Mukendi Tshibangu, Researcher, Cabinet Tshibangu and Associés,

Ms Ali Feza, Researcher, Office of the Minister of Justice and Human Rights,
Mr. Makaya Kiela, Researcher, Office of the Minister of Justice and Human Rights,

as Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. Le 28 décembre 1998, le Gouvernement de la République de Guinée (dénommée ci-après la «Guinée») a déposé au Greffe de la Cour une requête introductive d'instance contre la République démocratique du Congo (ci-après la «RDC», dénommée Zaïre entre 1971 et 1997) au sujet d'un différend relatif à de «graves violations du droit international» alléguées avoir été commises «sur la personne d'un ressortissant guinéen». La requête était constituée de deux parties, chacune signée par le ministre des affaires étrangères guinéen. La première partie, intitulée «requête» (ci-après «requête (première partie)»), contenait un exposé succinct de l'objet du différend, du titre de compétence de la Cour et des moyens de droit invoqués. La seconde partie, intitulée «mémoire de la République de Guinée» (ci-après «requête (seconde partie)»), spécifiait les faits à l'origine du différend, développait les moyens de droit soulevés par la Guinée et indiquait les demandes de celle-ci.

Dans la requête (première partie), la Guinée soutenait que

> «M. Diallo Ahmadou Sadio, homme d'affaires de nationalité guinéenne, a[vait] été, après trente-deux (32) ans passés en République démocratique du Congo, injustement incarcéré par les autorités de cet Etat, spolié de ses importants investissements, entreprises et avoirs mobiliers, immobiliers et bancaires puis expulsé.»

La Guinée y ajoutait que «[c]ette expulsion [était] intervenue à un moment où M. Diallo Ahmadou Sadio poursuivait le recouvrement d'importantes créances détenues par ses entreprises sur l'Etat et les sociétés pétrolières qu'il abrite et dont il est actionnaire». L'arrestation, la détention et l'expulsion de M. Diallo constituaient, entre autres, selon la Guinée, des violations

> «[du] principe du traitement des étrangers selon «le standard minimum de civilisation», [de] l'obligation de respect de la liberté et de la propriété des étrangers, [et de] la reconnaissance aux étrangers incriminés du droit à un jugement équitable et contradictoire rendu par une juridiction impartiale».

Dans sa requête (première partie), la Guinée invoquait, pour fonder la compétence de la Cour, les déclarations par lesquelles les deux Etats ont accepté la juridiction obligatoire de celle-ci au titre du paragraphe 2 de l'article 36 du Statut de la Cour.

2. Conformément au paragraphe 2 de l'article 40 du Statut, la requête a été immédiatement communiquée au Gouvernement de la RDC par le greffier; et, conformément au paragraphe 3 de cet article, tous les Etats admis à ester devant la Cour ont été informés de la requête.

3. Par ordonnance du 25 novembre 1999, la Cour a fixé au 11 septembre 2000 la date d'expiration du délai pour le dépôt du mémoire de la Guinée et au 11 septembre 2001 la date d'expiration du délai pour le dépôt du contre-mémoire de la RDC. Par ordonnance du 8 septembre 2000, le président de la Cour, à la demande de la Guinée, a reporté au 23 mars 2001 la date d'expiration du délai pour le dépôt du mémoire; la date d'expiration du délai pour le dépôt du contre-mémoire a été reportée, par la même ordonnance, au 4 octobre 2002. La Guinée a dûment déposé son mémoire dans le délai ainsi prorogé.

4. La Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire. La Guinée a désigné M. Mohammed Bedjaoui, et la RDC a désigné

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter "Guinea") filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the "DRC", named Zaire between 1971 and 1997) in respect of a dispute concerning "serious violations of international law" alleged to have been committed "upon the person of a Guinean national". The Application consisted of two parts, each signed by Guinea's Minister for Foreign Affairs. The first part, entitled "Application" (hereinafter the "Application (Part One)"), contained a succinct statement of the subject of the dispute, the basis of the Court's jurisdiction and the legal grounds relied on. The second part, entitled "Memorial of the Republic of Guinea" (hereinafter the "Application (Part Two)"), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea's claims.

In the Application (Part One), Guinea maintained that:

> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled".

Guinea added: "[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder". Mr. Diallo's arrest, detention and expulsion constituted, *inter alia*, according to Guinea, violations of

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization' [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the DRC by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea's request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order, the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk'a-

M. Auguste Mampuya Kanunk'a-Tshiabo. Suite à la démission de M. Bedjaoui le 10 septembre 2002, la Guinée a désigné M. Ahmed Mahiou.

5. Le 3 octobre 2002, dans le délai prescrit au paragraphe 1 de l'article 79 du Règlement de la Cour dans sa version adoptée le 14 avril 1978, la RDC a soulevé des exceptions préliminaires portant sur la recevabilité de la requête de la Guinée. Conformément au paragraphe 3 de l'article 79 du Règlement, la procédure sur le fond a alors été suspendue. Par ordonnance du 7 novembre 2002, la Cour, compte tenu des circonstances particulières de l'espèce et de l'accord des Parties, a fixé au 7 juillet 2003 la date d'expiration du délai pour la présentation par la Guinée d'un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires soulevées par la RDC. La Guinée a déposé un tel exposé dans le délai fixé, et l'affaire s'est ainsi trouvée en état pour ce qui est des exceptions préliminaires.

6. La Cour a tenu des audiences sur les exceptions préliminaires soulevées par la RDC du 27 novembre au 1er décembre 2006. Dans son arrêt du 24 mai 2007, la Cour a déclaré la requête de la République de Guinée recevable, d'une part, «en ce qu'elle a trait à la protection des droits de M. Diallo en tant qu'individu» et, d'autre part, «en ce qu'elle a trait à la protection des droits propres de [celui-ci] en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre». En revanche, la Cour a déclaré la requête de la République de Guinée irrecevable «en ce qu'elle a trait à la protection de M. Diallo pour les atteintes alléguées aux droits des sociétés Africom-Zaïre et Africontainers-Zaïre».

7. Par ordonnance du 27 juin 2007, la Cour a fixé au 27 mars 2008 la date d'expiration du délai pour le dépôt du contre-mémoire de la RDC. Cette pièce a été dûment déposée dans le délai ainsi prescrit.

8. Par ordonnance du 5 mai 2008, la Cour a autorisé la présentation d'une réplique par la Guinée et d'une duplique par la RDC, et a fixé respectivement au 19 novembre 2008 et au 5 juin 2009 les dates d'expiration des délais pour le dépôt de ces pièces. La réplique de la Guinée et la duplique de la RDC ont été dûment déposées dans les délais ainsi prescrits.

9. Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour a décidé, après s'être renseignée auprès des Parties, que des exemplaires des pièces de procédure et des documents annexés seraient rendus accessibles au public à l'ouverture de la procédure orale.

10. En raison des difficultés rencontrées dans le secteur du transport aérien à la suite de l'éruption volcanique s'étant produite en Islande dans le courant du mois d'avril 2010, les audiences publiques qui, selon le calendrier initialement arrêté, devaient se tenir du 19 au 23 avril 2010 ont eu lieu les 19, 26, 28 et 29 avril 2010. Au cours de ces audiences, ont été entendus en leurs plaidoiries et réponses:

Pour la Guinée: M. Mohamed Camara,
M. Luke Vidal,
M. Jean-Marc Thouvenin,
M. Mathias Forteau,
M. Samuel Wordsworth,
M. Daniel Müller,
M. Alain Pellet.

Pour la RDC: M. Tshibangu Kalala.

11. A l'audience, des questions ont été posées aux Parties par des membres

Tshiabo. Following Mr. Bedjaoui's resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed, and the case thus became ready for hearing on the preliminary objections.

6. The Court held hearings on the preliminary objections raised by the DRC from 27 November to 1 December 2006. In its Judgment of 24 May 2007, the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire". On the other hand, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire".

7. By an Order of 27 June 2007, the Court fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial of the DRC. That pleading was duly filed within the time-limit thus prescribed.

8. By an Order of 5 May 2008, the Court authorized the submission of a Reply by Guinea and a Rejoinder by the DRC, and fixed 19 November 2008 and 5 June 2009 as the respective time-limits for the filing of those pleadings. The Reply of Guinea and the Rejoinder of the DRC were duly filed within the time-limits thus prescribed.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided that, after ascertaining the views of the Parties, copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

10. Owing to the difficulties in the air transport sector following the volcanic eruption in Iceland during April 2010, the public hearings which, according to the schedule originally adopted, were due to be held from 19 to 23 April 2010 took place on 19, 26, 28 and 29 April 2010. At those hearings, the Court heard the oral arguments and replies of:

For Guinea: Mr. Mohamed Camara,
Mr. Luke Vidal,
Mr. Jean-Marc Thouvenin,
Mr. Mathias Forteau,
Mr. Samuel Wordsworth,
Mr. Daniel Müller,
Mr. Alain Pellet.

For the DRC: Mr. Tshibangu Kalala.

11. At the hearings, Members of the Court put questions to the Parties, to

de la Cour, auxquelles il a été répondu oralement et par écrit conformément au paragraphe 4 de l'article 61 du Règlement.

*

12. Dans la requête (seconde partie), les demandes ci-après ont été formulées par la Guinée:

> «*Au fond:* Ordonner aux autorités de la République démocratique du Congo à présenter des excuses officielles et publiques à l'Etat de Guinée pour les nombreux torts qu'elles lui ont causés en la personne de son ressortissant Ahmadou Sadio Diallo;
>
> Constater le caractère certain, liquide et exigible des créances réclamées;
>
> Constater que ces créances doivent être endossées par l'Etat congolais, conformément aux principes de la responsabilité internationale et de la responsabilité civile;
>
> Condamner l'Etat congolais à verser à l'Etat de Guinée, pour le compte de son ressortissant Diallo Ahmadou Sadio, les sommes de 31 334 685 888,45 dollars des Etats-Unis et 14 207 082 872,7 Z couvrant les préjudices financiers subis par ledit ressortissant;
>
> Verser également à l'Etat de Guinée des dommages-intérêts à hauteur de 15 % de la condamnation principale soit 4 700 202 883,26 dollars et 2 131 062 430,9 Z;
>
> Adjuger à l'Etat requérant les intérêts bancaires et moratoires aux taux respectifs de 15 % et 26 % l'an courant de la fin de l'année 1995 jusqu'à la date du parfait paiement;
>
> Condamner également ledit Etat à restituer au requérant tous les biens non valorisés répertoriés dans la rubrique des créances diverses;
>
> Ordonner à la République démocratique du Congo de présenter dans un délai d'un mois un échéancier acceptable de remboursement de ces montants;
>
> *A défaut de production de cet échéancier dans le délai indiqué ou en cas d'irrespect de celui qui serait produit, autoriser l'Etat de Guinée à saisir les biens de l'Etat congolais partout où ils se trouvent jusqu'à concurrence du principal et de l'accessoire de la condamnation.*
>
> *Mettre les frais et dépens de la présente procédure à la charge de l'Etat congolais.*» (Les italiques sont dans l'original.)

13. Au cours de la procédure écrite, les conclusions ci-après ont été présentées par les Parties:

Au nom du Gouvernement de la Guinée,

dans le mémoire:

> «La République de Guinée a l'honneur de conclure à ce qu'il plaise à la Cour internationale de Justice de dire et juger:
>
> 1. qu'en procédant à l'arrestation arbitraire et à l'expulsion de son ressortissant, M. Ahmadou Sadio Diallo, en ne respectant pas, à cette occasion, son droit à bénéficier des dispositions de la convention de Vienne de [1963] sur les relations consulaires, en le soumettant à un traitement

which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

*

12. In the Application (Part Two), the following requests were made by Guinea:

> "*As to the merits:* To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;
>
> To find that the sums claimed are certain, liquidated and legally due;
>
> To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;
>
> To order that the Congolese State pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US$31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him;
>
> To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US$4,700,202,883.26 and Z 2,131,062,430.9;
>
> To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;
>
> To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;
>
> To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;
>
> *In the event that the said schedule is not produced by the date indicated, or is not respected, authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.*
>
> *To order that the costs of the present proceedings be borne by the Congolese State.*" (Emphasis in the original.)

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial:

> "The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:
>
> (1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in

humiliant et dégradant, en le privant de l'exercice de ses droits de propriété et de direction des sociétés qu'il a fondées en RDC, en l'empêchant de poursuivre le recouvrement des nombreuses créances qui lui sont dues, à lui-même et auxdites sociétés, tant par la RDC elle-même que par d'autres co-contractants, en ne s'acquittant pas de ses propres dettes envers lui et envers ses sociétés, la République démocratique du Congo a commis des faits internationalement illicites qui engagent sa responsabilité envers la République de Guinée;

2. que, de ce fait, la République démocratique du Congo est tenue à la réparation intégrale du préjudice subi par la République de Guinée en la personne de son ressortissant;
3. que cette réparation doit prendre la forme d'une indemnisation couvrant l'ensemble des dommages causés par les faits internationalement illicites de la République démocratique du Congo, y compris le manque à gagner, et comprendre des intérêts.

La République de Guinée prie en outre la Cour de bien vouloir l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due à ce titre par la République démocratique du Congo dans une phase ultérieure de la procédure au cas où les deux Parties ne pourraient s'accorder sur son montant dans un délai de six mois suivant le prononcé de l'arrêt.»

dans la réplique:

«Pour les motifs exposés dans son mémoire et dans la présente réplique, la République de Guinée prie la Cour internationale de Justice de bien vouloir dire et juger:

1. qu'en procédant à des arrestations arbitraires et à l'expulsion de son ressortissant, M. Ahmadou Sadio Diallo, en ne respectant pas, à cette occasion, son droit à bénéficier des dispositions de la convention de Vienne de 1963 sur les relations consulaires, en le soumettant à un traitement humiliant et dégradant, en le privant de l'exercice de ses droits de propriété, de contrôle et de direction des sociétés qu'il a fondées en RDC et dont il était l'unique associé, en l'empêchant de poursuivre à ce titre le recouvrement des nombreuses créances dues auxdites sociétés, tant par la RDC elle-même que par d'autres co-contractants, en procédant à l'expropriation de fait des propriétés de M. Diallo, la République démocratique du Congo a commis des faits internationalement illicites qui engagent sa responsabilité envers la République de Guinée;
2. que, de ce fait, la République démocratique du Congo est tenue à la réparation intégrale du préjudice subi par M. Diallo ou par la République de Guinée en la personne de son ressortissant;
3. que cette réparation doit prendre la forme d'une indemnisation couvrant l'ensemble des dommages causés par les faits internationalement illicites de la République démocratique du Congo, y compris le manque à gagner, et comprendre des intérêts.

La République de Guinée prie en outre la Cour de bien vouloir l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due à ce titre par la République démocratique du Congo dans une phase ultérieure de la procédure au cas où les deux Parties ne pourraient s'accorder sur son montant dans un délai de six mois suivant le prononcé de l'arrêt.»

depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;

(3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment."

in the Reply:

"On the grounds set out in its Memorial and in the present Reply, the Republic of Guinea requests the International Court of Justice to adjudge and declare:

1. that, in carrying out arbitrary arrests of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; in expropriating *de facto* Mr. Diallo's property, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;
2. that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;
3. that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment."

Au nom du Gouvernement de la RDC,

dans le contre-mémoire :

« A la lumière des arguments susmentionnés et de l'arrêt de la Cour du 24 mai 2007 sur les exceptions préliminaires par lequel la Cour déclare la requête de la Guinée irrecevable en ce qu'elle a trait à la protection de M. Diallo pour les atteintes alléguées aux droits des sociétés Africom-Zaïre et Africontainers-Zaïre, l'Etat défendeur prie respectueusement la Cour de dire et juger que :

1) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits individuels de M. Diallo en tant que personne ;
2) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits propres de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre ;
3) en conséquence, la requête de la République de Guinée n'est pas fondée en fait et en droit. »

dans la duplique :

« Sous la réserve expresse de compléter et de commenter davantage ses moyens de fait et de droit et sans reconnaître aucune déclaration qui lui serait préjudiciable, l'Etat défendeur prie la Cour de dire et de juger que :

1) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits individuels de M. Diallo en tant que personne ;
2) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits propres de M. Diallo en tant qu'associé de la société Africontainers-Zaïre ou de prétendu associé de la société Africom-Zaïre ;
3) en conséquence, la requête de la République de Guinée n'est pas fondée en fait et en droit. »

14. Au cours de la procédure orale, les conclusions finales ci-après ont été présentées par les Parties :

Au nom du Gouvernement de la Guinée,

à l'audience du 28 avril 2010 :

« 1. Conformément aux motifs exposés dans son mémoire, sa réplique et lors des plaidoiries orales qui s'achèvent, la République de Guinée prie la Cour internationale de Justice de bien vouloir dire et juger :

a) qu'en procédant à des arrestations arbitraires et à l'expulsion de son ressortissant, M. Ahmadou Sadio Diallo, en ne respectant pas, à cette occasion, son droit à bénéficier des dispositions de la convention de Vienne de 1963 sur les relations consulaires, en le soumettant à un traitement humiliant et dégradant, en le privant de l'exercice de ses droits de propriété, de contrôle et de direction des sociétés qu'il a fondées en RDC et dont il était l'unique associé, en l'empêchant de poursuivre à ce titre le recouvrement des nombreuses créances dues auxdites sociétés, tant par la RDC elle-même que par d'autres co-contractants, en procédant à l'expropriation de fait des propriétés de M. Diallo, la

On behalf of the Government of the DRC,

in the Counter-Memorial:

> "In the light of the arguments set out above and of the Court's Judgment of 24 May 2007 on the preliminary objections, in which the Court declared Guinea's Application to be inadmissible in so far as it concerned protection of Mr. Diallo in respect of alleged violations of rights belonging to Africom-Zaire and Africontainers-Zaire, the Respondent respectfully requests the Court to adjudge and declare that:
>
> 1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
> 2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;
> 3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law."

in the Rejoinder:

> "While expressly reserving the right to supplement and expand on its grounds in fact and in law and without admitting any statement that might be prejudicial to it, the Respondent requests the Court to adjudge and declare that:
>
> 1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
> 2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africontainers-Zaire or alleged *associé* in Africom-Zaire;
> 3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law."

14. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Guinea,

at the hearing of 28 April 2010:

> "1. On the grounds set out in its Memorial, its Reply and the oral argument now being concluded, the Republic of Guinea requests the International Court of Justice to adjudge and declare:
>
> *(a)* that, in carrying out arbitrary arrests of its national, Mr. Ahmadou Sadio Diallo, and expelling him; in not at that time respecting his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations; in submitting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; in preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; and in expropriating *de facto* Mr. Diallo's

République démocratique du Congo a commis des faits internationalement illicites qui engagent sa responsabilité envers la République de Guinée;

b) que, de ce fait, la République démocratique du Congo est tenue à la réparation intégrale du préjudice subi par M. Diallo ou par la République de Guinée en la personne de son ressortissant;

c) que cette réparation doit prendre la forme d'une indemnisation couvrant l'ensemble des dommages causés par les faits internationalement illicites de la République démocratique du Congo, y compris le manque à gagner, et comprendre des intérêts.

2. La République de Guinée prie en outre la Cour de bien vouloir l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due à ce titre par la République démocratique du Congo dans une phase ultérieure de la procédure au cas où les deux Parties ne pourraient s'accorder sur son montant dans un délai de six mois suivant le prononcé de l'arrêt.»

Au nom du Gouvernement de la RDC,

à l'audience du 29 avril 2010:

«A la lumière des arguments susmentionnés et de l'arrêt de la Cour du 24 mai 2007 sur les exceptions préliminaires par lequel la Cour déclare la requête de la Guinée irrecevable en ce qu'elle a trait à la protection de M. Diallo pour les atteintes alléguées aux droits des sociétés Africom-Zaïre et Africontainers-Zaïre, l'Etat défendeur prie respectueusement la Cour de dire et juger que:

1) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits individuels de M. Diallo en tant que personne;
2) la République démocratique du Congo n'a pas commis de faits internationalement illicites envers la Guinée en ce qui concerne les droits propres de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre;
3) en conséquence, la requête de la République de Guinée n'est pas fondée en fait et en droit et donc qu'aucune réparation n'est due.»

* * *

I. Contexte factuel général

15. La Cour commencera par décrire brièvement le contexte factuel dans lequel s'inscrit la présente affaire, contexte qu'elle a déjà évoqué dans son arrêt sur les exceptions préliminaires en date du 24 mai 2007 (*Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 590-591, par. 13-15). Elle reviendra plus en détail sur chacun des faits pertinents lorsqu'elle examinera les prétentions juridiques qui s'y rattachent.

16. M. Ahmadou Sadio Diallo, citoyen guinéen, s'est installé en RDC en 1964. En 1974, il y a créé la société d'import/export Africom-Zaïre,

property, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(b) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by Mr. Diallo or by the Republic of Guinea in the person of its national;

(c) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo, including loss of earnings, and shall also include interest.

2. The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment."

On behalf of the Government of the DRC,

at the hearing of 29 April 2010:

"In the light of the arguments referred to above and of the Court's Judgment of 24 May 2007 on the preliminary objections, whereby the Court declared Guinea's Application to be inadmissible in so far as it concerned protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire, the Respondent respectfully requests the Court to adjudge and declare that:

1. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's individual personal rights;
2. the Democratic Republic of the Congo has not committed any internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;
3. accordingly, the Application of the Republic of Guinea is unfounded in fact and in law and no reparation is due."

* * *

I. General Factual Background

15. The Court will begin with a brief description of the factual background to the present case, as previously recalled in its Judgment on preliminary objections of 24 May 2007 (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 590-591, paras. 13-15). It will return to each of the relevant facts in greater detail when it comes to examine the legal claims relating to them.

16. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC in 1964. There, in 1974, he founded an import-export company, Africom-

une société privée à responsabilité limitée (ci-après «SPRL») de droit zaïrois, enregistrée au registre du commerce de la ville de Kinshasa. En 1979, M. Diallo participa, en tant que gérant de la société Africom-Zaïre, à la création d'une SPRL de droit zaïrois spécialisée dans le transport de marchandises par conteneurs, la société Africontainers-Zaïre. Cette société fut enregistrée au registre du commerce de la ville de Kinshasa et M. Diallo en devint le gérant (voir paragraphes 105-113 ci-après).

17. A la fin des années quatre-vingt, les sociétés Africom-Zaïre et Africontainers-Zaïre intentèrent, par l'intermédiaire de leur gérant, M. Diallo, des recours à l'encontre de leurs partenaires commerciaux pour tenter de recouvrer diverses créances. Les différents litiges opposant Africom-Zaïre ou Africontainers-Zaïre à leurs partenaires commerciaux se poursuivirent tout au long des années quatre-vingt-dix et restent pour l'essentiel non résolus à ce jour (voir paragraphes 109, 114, 136 et 150 ci-après).

18. Le 25 janvier 1988, M. Diallo fut arrêté et incarcéré. Le 28 janvier 1989, le procureur général de Kinshasa ordonna la libération de M. Diallo après le classement pour «inopportunité de poursuites» du dossier judiciaire.

19. Le 31 octobre 1995, le premier ministre zaïrois prit un décret d'expulsion à l'encontre de M. Diallo. Le 5 novembre 1995, ce dernier fut arrêté et mis en détention en vue de son expulsion. Après avoir été remis en liberté et arrêté à nouveau, il fut finalement expulsé du territoire congolais le 31 janvier 1996 (voir paragraphes 50-60 ci-après).

20. Ayant déclaré, dans son arrêt du 24 mai 2007, la requête de la République de Guinée recevable, d'une part, «en ce qu'elle a trait à la protection des droits de M. Diallo en tant qu'individu» et, d'autre part, «en ce qu'elle a trait à la protection des droits propres de [celui-ci] en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre» (voir paragraphe 6 ci-dessus), la Cour se penchera successivement, ci-après, sur la question de la protection des droits de M. Diallo en tant qu'individu (voir paragraphes 21-98) et sur celle de la protection des droits propres de celui-ci en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre (voir paragraphes 99-159). Elle examinera ensuite, à la lumière des conclusions auxquelles elle sera parvenue sur ces questions, les demandes de réparation présentées par la Guinée dans ses conclusions finales (voir paragraphes 160-164).

II. La protection des droits de M. Diallo en tant qu'individu

21. Dans le dernier état de ses conclusions, la Guinée soutient que M. Diallo a été victime, en 1988-1989, de mesures d'arrestation et de détention, de la part des autorités de la RDC, en violation du droit international, puis, en 1995-1996, de mesures d'arrestation, de détention et d'expulsion elles aussi contraires au droit international. Elle en conclut qu'elle est fondée à exercer la protection diplomatique, à cet égard, en faveur de son ressortissant.

Zaire, a *société privée à responsabilité limitée* (private limited liability company, hereinafter "SPRL") incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa. In 1979 Mr. Diallo took part, as *gérant* (manager) of Africom-Zaire, in the founding of a Zairean SPRL specializing in the containerized transport of goods, Africontainers-Zaire. This company was entered in the Trade Register of the city of Kinshasa and Mr. Diallo became its *gérant* (see paragraphs 105-113 below).

17. At the end of the 1980s, Africom-Zaire and Africontainers-Zaire, acting through their *gérant*, Mr. Diallo, instituted proceedings against their business partners in an attempt to recover various debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today (see paragraphs 109, 114, 136 and 150 below).

18. On 25 January 1988, Mr. Diallo was arrested and imprisoned. On 28 January 1989, the public prosecutor in Kinshasa ordered the release of Mr. Diallo after the case was closed for "inexpediency of prosecution".

19. On 31 October 1995, the Zairean Prime Minister issued an expulsion decree against Mr. Diallo. On 5 November 1995, Mr. Diallo was arrested and placed in detention with a view to his expulsion. After having been released and rearrested, he was finally expelled from Congolese territory on 31 January 1996 (see paragraphs 50-60 below).

20. Having, in its Judgment of 24 May 2007, declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire" (see paragraph 6 above), the Court will in turn consider below the questions of the protection of Mr. Diallo's rights as an individual (see paragraphs 21-98) and of the protection of his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire (see paragraphs 99-159). In the light of the conclusions it comes to on these questions, it will then examine the claims for reparation made by Guinea in its final submissions (see paragraphs 160-164).

II. Protection of Mr. Diallo's Rights as an Individual

21. In its arguments as finally stated, Guinea maintains that Mr. Diallo was the victim in 1988-1989 of arrest and detention measures taken by the DRC authorities in violation of international law and in 1995-1996 of arrest, detention and expulsion measures also in violation of international law. Guinea reasons from this that it is entitled to exercise diplomatic protection of its national in this connection.

22. La RDC soutient que la demande relative aux faits de 1988-1989 a été présentée tardivement et doit être par suite rejetée comme irrecevable. Subsidiairement, la RDC soutient que ladite demande doit être rejetée pour défaut d'épuisement des voies de recours internes ou, à défaut, rejetée au fond. La RDC conteste que le traitement subi par M. Diallo en 1995-1996 a violé ses obligations de droit international.

23. La Cour doit donc se prononcer d'abord sur l'argument de la RDC contestant la recevabilité de la demande relative aux faits de 1988-1989, avant de pouvoir, le cas échéant, examiner le bien-fondé de ladite demande. Elle devra ensuite examiner le bien-fondé des griefs invoqués par la Guinée au soutien de sa demande relative aux faits de 1995-1996, dont la recevabilité n'est plus en cause au stade actuel de la procédure.

A. La demande relative aux mesures d'arrestation et de détention prises à l'égard de M. Diallo en 1988-1989

24. Dans sa duplique, la RDC, après avoir affirmé que la Guinée n'aurait, selon elle, introduit son chef de conclusions relatif aux faits survenus en 1988-1989 que dans sa réplique, a contesté la recevabilité de cette demande dans les termes suivants :

> «Il y a manifestement introduction d'une nouvelle demande par le biais de la réplique et changement subséquent de la requête à un stade inapproprié de la procédure. Cette nouvelle demande, qui n'a aucun lien avec la demande principale relative aux événements de 1995-1996 qui sont à la base du présent différend, ouvre à l'Etat [défendeur] le droit d'invoquer ici l'exception de non-épuisement des voies de recours internes disponibles dans l'ordre juridique congolais en ce qui concerne l'arrestation et la détention de 1988-1989.»

Cette objection a été réitérée par la RDC, en des termes voisins, dans le cadre de la procédure orale.

25. Ainsi formulée, l'objection de la défenderesse revient à contester pour deux motifs distincts la recevabilité de la demande relative aux faits de 1988-1989: en premier lieu, cette demande aurait été présentée par la Guinée à un stade de la procédure qui la rendrait tardive, eu égard à son absence de lien suffisant avec la demande présentée dans la requête introductive d'instance; en second lieu, cette demande se heurterait, en tout état de cause, à l'exception tirée du défaut d'épuisement préalable, par M. Diallo, des voies de recours disponibles au sein de l'ordre juridique congolais.

26. La Cour doit examiner d'abord la première de ces deux fins de non-recevoir. Si elle conclut que la demande en cause est effectivement tardive, et doit être pour cette raison rejetée sans examen au fond, elle n'aura pas besoin d'aller plus loin. Si au contraire elle conclut que cette demande n'a pas été tardivement présentée, elle devra se demander si la RDC a le droit de soulever, à ce stade de la procédure, l'exception

22. The DRC maintains that the claim relating to the events in 1988-1989 was presented belatedly and must therefore be rejected as inadmissible. In the alternative, the DRC maintains that the said claim must be rejected because of failure to exhaust local remedies, or, otherwise, rejected on the merits. The DRC denies that Mr. Diallo's treatment in 1995-1996 breached its obligations under international law.

23. The Court must therefore first rule on the DRC's argument contesting the admissibility of the claim concerning the events in 1988-1989 before it can, if necessary, consider the merits of that claim. It will then need to consider the merits of the grievances relied upon by Guinea in support of its claim concerning the events in 1995-1996, the admissibility of which is no longer at issue in this phase of the proceedings.

A. The Claim concerning the Arrest and Detention Measures Taken against Mr. Diallo in 1988-1989

24. After asserting that it was only in the Reply that Guinea first set out arguments in respect of the events in 1988-1989, the DRC in the Rejoinder challenged the admissibility of the claim in question as follows:

> "The Applicant is clearly seeking to put forward a new claim by means of the Reply and consequently to amend the Application at an inappropriate stage of the proceedings. This new claim, which is not in any way linked to the main claim concerning the events of 1995 to 1996 forming the basis of this dispute, entitles the [Respondent] to raise the objection of failure to exhaust the local remedies available in the Congolese legal system with respect to the arrest and detention of 1988-1989."

The DRC reiterated this objection in like terms during the oral proceedings.

25. Thus enunciated, the Respondent's objection amounts to a challenge to the admissibility of the claim concerning the events of 1988-1989 on two separate grounds: first, Guinea is alleged to have raised the claim at a stage in the proceedings such that it was late, in view of the lack of a sufficient connection between it and the claim advanced in the Application instituting proceedings; second, this claim is alleged to be barred in any case by an objection based on Mr. Diallo's failure first to exhaust the remedies available in the Congolese legal system.

26. The Court must commence by considering the first of these two grounds of inadmissibility. If it concludes that the claim was in fact late and must therefore be rejected without any consideration on the merits, there will be no need for the Court to proceed any further. If, on the other hand, it concludes that the claim was not asserted belatedly, it will need to consider whether the DRC is entitled to raise, at this stage of the

de non-épuisement des voies de recours internes et, dans l'affirmative, si cette exception est fondée.

*

27. Pour décider si la demande relative aux faits de 1988-1989 a été présentée tardivement, la Cour doit d'abord rechercher à quel moment, dans la présente instance, cette demande a été présentée pour la première fois.

28. Il y a lieu, d'abord, de relever qu'aucun élément de la requête introductive d'instance, en date du 28 décembre 1998, ne se réfère aux événements de 1988-1989.

Certes, dans l'«objet du différend» tel que le définit ladite requête, il est indiqué que M. Diallo a été «injustement incarcéré ... spolié ... puis expulsé». Mais il ressort clairement du document annexé à la requête (la requête (seconde partie), voir paragraphe 1 ci-dessus) que l'«incarcération» dont il s'agit est celle qui a commencé le 5 novembre 1995 et qui se serait terminée, après une brève interruption, selon la Guinée, par l'expulsion effective de M. Diallo le 31 janvier 1996 à l'aéroport de Kinshasa. Nulle part, ni dans la requête *stricto sensu* ni dans son document annexe, il n'est question de l'arrestation et de la détention subies par M. Diallo en 1988-1989.

29. Ces faits ne sont pas davantage mentionnés dans le mémoire déposé, en application de l'article 49, paragraphe 1, du Règlement, par la Guinée le 23 mars 2001. Ledit mémoire consacre à la description des faits qui ont donné naissance au différend des développements très substantiels. En ce qui concerne les faits constitutifs d'«arrestation» et de «détention», les événements de 1995-1996 sont précisément décrits, dans la section intitulée «Les faits pertinents», alors que nulle mention n'est faite d'une détention subie par M. Diallo en 1988-1989. Sans doute, dans les «conclusions» finales du mémoire, est-il demandé à la Cour de dire qu'«en procédant à l'arrestation arbitraire et à l'expulsion de ... M. Ahmadou Sadio Diallo» la RDC a commis des faits qui engagent sa responsabilité internationale, sans autre précision quant à la date et à la nature de l'«arrestation arbitraire» en cause. Mais il est assez naturel que les «conclusions» qu'un mémoire doit contenir aux termes de l'article 49, paragraphe 1, du Règlement n'entrent pas dans le détail des faits, puisqu'elles font suite à l'exposé des faits qu'exige également la même disposition du Règlement et qu'elles doivent se comprendre à la lumière de cet exposé. Au cas particulier, l'«arrestation arbitraire» mentionnée dans les conclusions du mémoire de la Guinée ne peut être que celle que M. Diallo aurait subie, selon la demanderesse, en 1995-1996 en vue de la mise à exécution du décret d'expulsion pris à l'encontre de l'intéressé en octobre 1995, et non pas celle que M. Diallo aurait subie en 1988-1989 et dont il n'est pas fait mention.

30. C'est seulement dans les observations écrites de la demanderesse en réponse aux exceptions préliminaires soulevées par la défenderesse, obser-

proceedings, the objection of non-exhaustion of local remedies and, if so, whether that objection is warranted.

*

27. In order to decide whether the claim relating to the events in 1988-1989 was raised late, the Court must first ascertain exactly when the claim was first asserted in the present proceedings.

28. To begin, note should be taken that there is nothing in the Application instituting proceedings of 28 December 1998 referring to the events in 1988-1989.

Granted, it is stated under the heading "Subject of the Dispute" as defined in the Application that Mr. Diallo was "unjustly imprisoned . . . despoiled . . . and then expelled". But it is clear from the document annexed to the Application (the Application (Part Two), see paragraph 1 above) that the "imprisonment" in question began on 5 November 1995 and, according to Guinea, ended after a brief interruption with Mr. Diallo's physical expulsion on 31 January 1996 at Kinshasa airport. Nowhere in the Application proper or in the annex to it is there any reference to Mr. Diallo's arrest and detention in 1988-1989.

29. Nor are these facts mentioned in the Memorial Guinea filed pursuant to Article 49, paragraph 1, of the Rules of Court on 23 March 2001. That Memorial contains an extensive discussion of the facts which have given rise to the dispute. In respect of those corresponding to "arrest" and "detention", the events of 1995-1996 are described in detail, in the section "the salient facts", whereas no mention is made of any detention suffered by Mr. Diallo in 1988-1989. True, the Court is requested in the final "submissions" in the Memorial to declare that, "in arbitrarily arresting and expelling . . . Mr. Diallo" ["en procédant à l'arrestation arbitraire et à l'expulsion de . . . M. Diallo"], the DRC committed acts engaging its international responsibility, without any further specification as to the date and nature of the "arbitrary arrest" ["l'arrestation arbitraire"] in question. But it is usual for the facts not to be treated in any detail in the "submissions" which a Memorial is required to contain pursuant to Article 49, paragraph 1, of the Rules of Court, because the submissions follow the statement of facts, which the same provision of the Rules of Court also requires, and they must be read in the light of that statement. In the case at hand, the "arbitrary arrest" referred to in the submissions in Guinea's Memorial can only be the arrest Mr. Diallo suffered, according to the Applicant, in 1995-1996 in view of the carrying out of the expulsion decree issued against him in October 1995, not Mr. Diallo's alleged arrest in 1988-1989, of which there is no mention.

30. It was not until the Applicant filed its Written Observations on the preliminary objections raised by the Respondent on 7 July 2003 that

vations déposées le 7 juillet 2003, que sont mentionnées pour la première fois l'arrestation et la détention de M. Diallo en 1988-1989. Encore faut-il relever que cette mention ne figure que dans le premier chapitre, intitulé «Les faits pertinents», seulement dans le contexte du refus des autorités zaïroises de payer des sommes à Africom-Zaïre, et qu'il n'est plus question de ces événements dans les chapitres suivants, consacrés à la discussion, en droit, des exceptions d'irrecevabilité soulevées par la RDC.

31. Aux yeux de la Cour, on ne saurait considérer que la demande relative aux faits de 1988-1989 a été présentée par la Guinée dans ses «observations écrites» du 7 juillet 2003. L'objet desdites observations était de répondre aux exceptions d'irrecevabilité de la défenderesse, conformément d'ailleurs aux prescriptions de l'article 79, paragraphe 5, du Règlement dans sa version de 1978, applicable en l'espèce. En raison du caractère préliminaire de ces exceptions, lesquelles avaient été présentées par la RDC dans le délai qui lui avait été fixé pour déposer son contre-mémoire, la procédure sur le fond avait été suspendue à partir de la réception par le Greffe de l'acte contenant lesdites exceptions, en vertu de l'article 79, paragraphe 3, du Règlement, dans sa rédaction applicable à la présente instance. C'est pourquoi dans ses observations écrites du 7 juillet 2003 la Guinée se bornait à conclure, *in fine*, à ce que la Cour veuille bien «rejeter les exceptions préliminaires» et «déclarer la requête ... recevable». Se trouvant dans le cadre de la procédure incidente ouverte par les exceptions préliminaires de la RDC, la Guinée ne pouvait présenter aucune autre conclusion que celles qui portaient sur le mérite desdites exceptions et le sort que la Cour devait leur réserver. On ne peut, dans ces conditions, interpréter les «observations écrites» du 7 juillet 2003 comme introduisant dans le débat contentieux une demande additionnelle de l'Etat requérant. Il eût été, en outre, particulièrement difficile à la défenderesse de parvenir à une telle interprétation, compte tenu de l'objet de la procédure incidente. On ne saurait donc s'étonner de ce que dans la procédure orale relative aux exceptions préliminaires, pas plus que dans son contre-mémoire, la RDC n'ait fait allusion aux faits allégués par la Guinée pour la période de 1988-1989.

32. La Guinée a présenté pour la première fois sa demande relative aux faits de 1988-1989 dans sa réplique, déposée le 19 novembre 2008, postérieurement à l'arrêt de la Cour statuant sur les exceptions préliminaires. La réplique expose en détail les circonstances de l'arrestation et de la détention de M. Diallo en 1988-1989, précise que cette «affaire ... fait indubitablement partie des faits illicites à raison desquels la Guinée entend engager la responsabilité internationale du défendeur», et indique pour la première fois quelles seraient, du point de vue de la demanderesse, les obligations internationales, notamment conventionnelles, qui auraient été violées par la défenderesse à l'occasion des actes en cause. De façon significative, alors que dans les conclusions terminales de son mémoire la Guinée priait la Cour de juger «qu'en procédant *à l'arrestation arbitraire* et à l'expulsion de ... M. Ahmadou Sadio Diallo ... la RDC a commis des faits ... qui engagent sa responsabilité» (les italiques sont de

Mr. Diallo's arrest and detention in 1988-1989 were referred to for the first time. But it is to be observed that the reference appears only in the first chapter, entitled "The salient facts", solely in the context of the refusal of the Zairean authorities to pay sums to Africom-Zaire, and no further mention is made of these events in the later chapters devoted to the discussion from the legal perspective of the DRC's objections to admissibility.

31. In the opinion of the Court, the claim in respect of the events in 1988-1989 cannot be deemed to have been presented by Guinea in its "Written Observations" of 7 July 2003. The purpose of those observations was to respond to the DRC's objections in respect of admissibility, in accordance with the requirements of Article 79, paragraph 5, of the Rules of Court, in the 1978 version applicable to these proceedings. As these were preliminary objections, having been raised by the DRC within the time-limit for the filing of its Counter-Memorial, the proceedings on the merits had been suspended upon receipt by the Registry of the document setting them out, in accordance with Article 79, paragraph 3, of the Rules of Court, in the version applicable to the present proceedings. That is why Guinea confined itself in its Written Observations of 7 July 2003 to submitting at the end that the Court should "[r]eject the Preliminary Objections" and "[d]eclare the Application . . . admissible". As those were incidental proceedings opened by virtue of the DRC's preliminary objections, Guinea could not present any submission other than those concerning the merit of the objections and how the Court should deal with them. Accordingly, the "Written Observations" of 7 July 2003 cannot be interpreted as having introduced an additional claim by the Applicant into the proceedings. And it would have been especially difficult for the Respondent to have so interpreted them, given the object of the incidental proceedings. It is hardly surprising then that the DRC did not refer, either in the oral proceedings on the preliminary objections or in its Counter-Memorial, to the facts alleged by Guinea in respect of 1988-1989.

32. Guinea first presented its claim in respect of the events in 1988-1989 in its Reply, filed on 19 November 2008, after the Court had handed down its Judgment on the preliminary objections. The Reply describes in detail the circumstances surrounding Mr. Diallo's arrest and detention in 1988-1989, states that these "inarguably figure among the wrongful acts for which Guinea is seeking to have the Respondent held internationally responsible" and indicates for the first time what, from the Applicant's point of view, were the international obligations, notably treaty-based ones, breached by the Respondent in connection with the acts in question. Tellingly, whereas in the final submissions in the Memorial Guinea asked the Court to adjudge "that, in arbitrarily arresting and expelling . . . Mr. Ahmadou Sadio Diallo . . . the Democratic Republic of the Congo has committed . . . acts which engage its responsibility" [in the original French: "qu'en procédant *à l'arrestation arbitraire* et à l'expul-

la Cour), les conclusions de la réplique sont formulées à l'identique, à la différence près que les mots au singulier qui apparaissent en italiques ci-dessus sont remplacés par le pluriel: «des arrestations arbitraires».

33. En réponse à l'objection de la RDC tirée du caractère tardif de la demande qui est en discussion, la Guinée n'a donné aucune explication quant aux raisons pour lesquelles cette demande a été introduite à un stade si avancé de la procédure. Elle a fait cependant observer qu'au paragraphe 45 de son arrêt du 24 mai 2007, statuant sur les exceptions préliminaires soulevées par la défenderesse en la présente affaire, la Cour a indiqué que:

> «dans son mémoire au fond, la Guinée a exposé en détail les violations du droit international que la RDC aurait commises à l'égard de M. Diallo. Elle y invoque ainsi, entre autres, le fait que M. Diallo aurait été arrêté et détenu de manière arbitraire à deux reprises, en 1988 d'abord, et en 1995 ensuite.» (*C.I.J. Recueil 2007 (II)*, p. 600, par. 45.)

34. Dans le passage précité, la référence à l'arrestation et à la détention de 1988 — parmi les faits qui auraient été exposés dans le mémoire — est erronée. Cette erreur factuelle n'a eu aucune influence sur la conclusion à laquelle la Cour est parvenue en 2007, à savoir que la requête de la Guinée était recevable en tant qu'elle visait à exercer la protection diplomatique de M. Diallo à raison des atteintes alléguées à ses droits individuels. La Guinée n'a pas cherché à soutenir que la mention de l'année 1988 figurant au paragraphe 45 de l'arrêt de 2007 aurait un quelconque effet obligatoire à l'égard de la Cour au stade actuel de la procédure, et de toute évidence elle n'en a pas, puisque le dispositif de l'arrêt n'eût pas été différent si la mention erronée n'avait pas figuré dans le paragraphe précité.

35. Ayant déterminé à quel moment exact la demande relative aux faits de 1988-1989 a été introduite dans l'instance, la Cour est à présent en mesure de décider si cette demande doit être regardée comme tardive et par suite irrecevable. En effet, l'arrêt rendu le 24 mai 2007 sur les exceptions préliminaires de la RDC ne fait pas obstacle à ce que la défenderesse soulève à présent une objection tirée de ce que la demande additionnelle aurait été présentée tardivement, puisque ladite demande a été introduite, ainsi qu'il vient d'être dit, postérieurement à l'arrêt de 2007.

36. En ce qui concerne les demandes additionnelles introduites — par une partie requérante — en cours d'instance, la Cour a développé une jurisprudence à présent bien établie, qui prend appui sur les dispositions pertinentes du Statut et du Règlement, à savoir l'article 40, paragraphe 1, de celui-là, et les articles 38, paragraphe 2, et 49, paragraphe 1, de celui-ci.

37. L'article 40, paragraphe 1, du Statut de la Cour dispose que:

sion de . . . M. Ahmadou Sadio Diallo . . . la RDC a commis des faits . . . qui engagent sa responsabilité" (emphasis added)], the submissions in the Reply are worded identically with the sole exception that the singular term emphasized above is replaced by the plural: "arbitrary arrests" ["des arrestations arbitraires"].

33. In response to the DRC's objection based on the belated assertion of the claim in question, Guinea gave no explanation as to why this claim was introduced at such an advanced stage of the proceedings. It pointed out however that the Court stated in paragraph 45 of its Judgment of 24 May 2007 on the Respondent's preliminary objections in the present case:

> "in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995." (*I.C.J. Reports 2007 (II)*, p. 600, para. 45.)

34. The quoted passage erroneously refers to the arrest and detention in 1988 as included among the facts set out in the Memorial. This error of fact had no effect on the conclusion reached by the Court in 2007, namely, that Guinea's Application was admissible in so far as it was aimed at exercising diplomatic protection of Mr. Diallo in respect of alleged violations of his rights as an individual. Guinea has not argued that the reference to the year 1988 in paragraph 45 of the 2007 Judgment has any binding effect on the Court at the present stage of the proceedings, and it clearly has no such effect, since the operative part of the Judgment would have been no different even if the error had not appeared in the quoted paragraph.

35. Having determined exactly when the claim concerning the events in 1988-1989 was introduced into the proceedings, the Court can now decide whether that claim should be considered late and inadmissible as a result. The Judgment handed down on 24 May 2007 on the DRC's preliminary objections does not prevent the Respondent from now raising the objection that the additional claim was presented belatedly, since the claim was introduced, as just stated, after delivery of the 2007 Judgment.

36. On the subject of additional claims introduced — by an Applicant — in the course of proceedings, the Court has developed a jurisprudence which is now well settled and is based on the relevant provisions of the Statute and the Rules of Court, specifically Article 40, paragraph 1, of the former and Article 38, paragraph 2, and Article 49, paragraph 1, of the latter.

37. Article 40, paragraph 1, of the Statute of the Court provides:

«1. Les affaires sont portées devant la Cour, selon le cas, soit par notification du compromis, soit par une requête, adressées au greffier; dans les deux cas, *l'objet du différend et les parties doivent être indiqués.*» (Les italiques sont de la Cour.)

L'article 38, paragraphe 2, du Règlement de la Cour dispose que:

«2. La requête indique autant que possible les moyens de droit sur lesquels le demandeur prétend fonder la compétence de la Cour; *elle indique en outre la nature précise de la demande et contient un exposé succinct des faits et moyens sur lesquels cette demande repose.*» (Les italiques sont de la Cour.)

L'article 49, paragraphe 1, du Règlement dispose que:

«1. Le mémoire contient un exposé des faits sur lesquels la demande est fondée, un exposé de droit *et les conclusions.*» (Les italiques sont de la Cour.)

38. La Cour a considéré ces dispositions comme «essentielles au regard de la sécurité juridique et de la bonne administration de la justice» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 267, par. 69). Elle a d'ailleurs relevé qu'elles figuraient déjà, en substance, dans le texte du Statut de la Cour permanente de Justice internationale adopté en 1920 et dans le texte du premier Règlement de la même Cour adopté en 1922 *(ibid.)*.

39. Elle en a déduit que sont irrecevables les demandes additionnelles formulées en cours d'instance et qui auraient pour effet, si elles étaient prises en considération, de modifier «l'objet du différend initialement porté devant [la Cour] selon les termes de la requête» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 108). A cet égard, c'est la requête qui est pertinente, et le mémoire lui-même, «tout en pouvant éclaircir les termes de la requête, ne peut pas dépasser les limites de la demande qu'elle contient» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 267, par. 69, citant l'ordonnance de la Cour permanente du 4 février 1933 rendue en l'affaire relative à l'*Administration du prince von Pless* (*ordonnance du 4 février 1933, C.P.J.I. série A/B n° 52*, p. 14)). *A fortiori*, une demande formulée postérieurement au mémoire, comme dans la présente affaire, ne saurait modifier l'objet du différend tel qu'il est délimité par les termes de la requête.

40. Toutefois, la Cour a aussi précisé que «la nouveauté d'une demande n'est pas décisive en soi pour la question de la recevabilité», et que:

«[a]fin de déterminer si une nouvelle demande introduite en cours d'instance est recevable, [elle] doit se poser la question de savoir si, «bien que formellement nouvelle, la demande en question ne peut

> "1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case *the subject of the dispute and the parties shall be indicated*." (Emphasis added.)

Article 38, paragraph 2, of the Rules of Court states:

> "2. The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; *it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based*." (Emphasis added.)

Article 49, paragraph 1, of the Rules of Court reads:

> "1. A Memorial shall contain a statement of the relevant facts, a statement of law, *and the submissions*." (Emphasis added.)

38. The Court has deemed these provisions "essential from the point of view of legal security and the good administration of justice" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69). It has further observed that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920, and of the text of the first Rules of that Court, adopted in 1922 *(ibid.)*.

39. From these provisions, the Court has concluded that additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming "the subject of the dispute originally brought before [the Court] under the terms of the Application" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108). In this respect, it is the Application which is relevant and the Memorial, "though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69, citing the Order of the Permanent Court of 4 February 1933 in the case concerning *Prince von Pless Administration* (*Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14)). *A fortiori*, a claim formulated subsequent to the Memorial, as is the case here, cannot transform the subject of the dispute as delimited by the terms of the Application.

40. The Court has however also made clear that "the mere fact that a claim is new is not in itself decisive for the issue of admissibility" and that:

> "In order to determine whether a new claim introduced during the course of the proceedings is admissible [it] will need to consider whether, 'although formally a new claim, the claim in question can

être considérée comme étant matériellement incluse dans la demande originelle»» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 110, citant partiellement *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 265-266, par. 65).

41. En d'autres termes, la demande nouvelle n'est pas irrecevable *ipso facto*; ce qui est décisif, c'est la nature du lien entre cette demande et celle qui est formulée dans la requête introductive.

A cet égard, la Cour a aussi eu l'occasion de préciser que, pour conclure que la demande nouvelle était matériellement incluse dans la demande originelle, «il ne suffit pas qu'existent entre elles des liens de nature générale» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 695, par. 110).

L'arrêt rendu en l'affaire relative à *Certaines terres à phosphates à Nauru (Nauru c. Australie) (exceptions préliminaires, arrêt, C.I.J. Recueil 1992)* a dégagé deux critères alternatifs, en se référant d'ailleurs à des affaires précédentes.

Il faut soit que la demande additionnelle soit implicitement contenue dans la requête (comme c'était le cas de l'une des conclusions finales du demandeur dans l'affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande)* (voir *fond, arrêt, C.I.J. Recueil 1962*, p. 36)), soit que cette demande découle directement de la question qui fait l'objet de la requête (comme ce fut le cas de l'une des conclusions finales du Nicaragua dans l'affaire du *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)* précitée, par. 114).

42. Ce sont ces critères que la Cour doit à présent mettre en œuvre en l'espèce, afin de déterminer si la demande de la Guinée relative aux faits survenus en 1988-1989, qui est «formellement nouvelle» par rapport à la demande initiale, est recevable.

43. Il ne paraît pas possible à la Cour de considérer que cette demande était «implicitement contenue» dans la demande initiale telle qu'exposée dans la requête. Si l'on met de côté les atteintes alléguées aux droits des sociétés possédées par M. Diallo, relativement auxquelles la requête a été jugée irrecevable par l'arrêt rendu sur les exceptions préliminaires, et les atteintes aux droits propres de M. Diallo comme associé, dont il sera question plus loin, la demande initiale portait sur les atteintes aux droits individuels de M. Diallo qui auraient résulté, selon la Guinée, des mesures d'arrestation, de détention et d'expulsion prises à son encontre en 1995-1996. On ne voit pas comment des allégations relatives à d'autres mesures d'arrestation et de détention, prises à un autre moment et dans un autre contexte, pourraient être regardées comme «implicitement contenues» dans la requête visant les faits de 1995-1996. Il en va d'autant plus ainsi que les arrestations subies par M. Diallo en 1988-1989, d'abord, et

be considered as included in the original claim in substance'" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110, in part quoting *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 265-266, para. 65).

41. In other words, a new claim is not inadmissible *ipso facto*; the decisive consideration is the nature of the connection between that claim and the one formulated in the Application instituting proceedings.

In this regard the Court has also had the occasion to point out that, to find that a new claim, as a matter of substance, has been included in the original claim, "it is not sufficient that there should be links between them of a general nature" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 110).

Drawing upon earlier cases, the Judgment handed down in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia) (Preliminary Objections, Judgment, I.C.J. Reports 1992)* formulated two alternative tests.

Either the additional claim must be implicit in the Application (as was the case of one of the Applicant's final submissions in the case concerning *Temple of Preah Vihear (Cambodia* v. *Thailand)* (see the Judgment on the merits, *I.C.J. Reports 1962*, p. 36)) or it must arise directly out of the question which is the subject-matter of the Application (as was the case of one of Nicaragua's final submissions in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)* cited above, paragraph 114).

42. These are the tests the Court now has to apply in the present case to determine whether Guinea's claim in respect of the events in 1988-1989, which is "formally new" vis-à-vis the initial claim, is admissible.

43. The Court finds itself unable to consider this claim as being "implicit" in the original claim as set forth in the Application. Leaving aside the alleged violations of rights belonging to the companies owned by Mr. Diallo, in respect of which the Application was held inadmissible in the Judgment rendered on the preliminary objections, and the violations of Mr. Diallo's direct rights as *associé*, to be dealt with below, the initial claim concerned violations of Mr. Diallo's individual rights alleged by Guinea to have resulted from the arrest, detention and expulsion measures taken against him in 1995-1996. It is hard to see how allegations concerning other arrest and detention measures, taken at a different time and in different circumstances, could be regarded as "implicit" in the Application concerned with the events in 1995-1996. This is especially so given that the legal bases for Mr. Diallo's arrests in 1988-1989, on the one hand, and 1995-1996, on the other, were completely different. His

en 1995-1996, ensuite, sont intervenues sur des bases juridiques complètement différentes. Sa première détention a été subie dans le cadre d'une enquête criminelle, ouverte par le parquet général de Kinshasa du chef d'escroquerie. La seconde a été ordonnée aux fins de mettre à exécution un décret d'expulsion, c'est-à-dire dans le cadre d'une procédure administrative. Il en résulte, entre autres conséquences, que les règles internationales applicables — que la RDC est accusée d'avoir violées — sont partiellement différentes, et que les voies de recours internes dont l'épuisement préalable conditionne en principe l'exercice de la protection diplomatique sont également de nature différente.

44. Ce dernier point mérite spécialement de retenir l'attention. Dès lors que, comme il a été dit plus haut, la demande nouvelle n'a été introduite qu'au stade de la réplique, la défenderesse n'était plus en mesure de lui opposer des exceptions préliminaires, lesquelles ne pouvaient être présentées, selon les dispositions de l'article 79 du Règlement applicables à l'instance, que dans le délai fixé pour le dépôt du contre-mémoire (et ne peuvent l'être, selon les dispositions en vigueur depuis le 1er février 2001, que dans les trois mois suivant le dépôt du mémoire). Or, le droit pour la partie défenderesse de présenter des exceptions préliminaires, c'est-à-dire des exceptions sur lesquelles la Cour est tenue de rendre un arrêt avant que ne s'engage le débat au fond (voir *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 26, par. 47), est un droit procédural fondamental. Ce droit est lésé si l'Etat requérant présente une demande matériellement nouvelle postérieurement au contre-mémoire, c'est-à-dire à un moment où le défendeur peut encore soulever des objections à la recevabilité ou à la compétence, mais plus des exceptions préliminaires. C'est encore plus vrai dans une affaire de protection diplomatique si, comme en l'espèce, la demande additionnelle se rapporte à des faits au sujet desquels les voies de recours disponibles dans l'ordre interne sont différentes de celles qui pouvaient être mises en œuvre relativement aux faits en cause dans la demande initiale.

45. On ne saurait donc dire que la demande additionnelle relative aux faits de 1988-1989 était «implicitement contenue» dans la requête initiale.

46. Pour des raisons analogues, la Cour n'aperçoit aucune possibilité de considérer la demande nouvelle comme «découlant directement de la question qui fait l'objet de la requête». A l'évidence, le seul fait que deux questions sont proches par leur objet, en ce sens qu'elles portent sur des faits plus ou moins similaires et ont trait à des droits analogues, ne permet pas de conclure que l'une découle de l'autre. Au demeurant, comme il a déjà été souligné, les faits en cause dans les détentions subies par M. Diallo en 1988-1989 et en 1995-1996 sont d'une nature différente, le cadre juridique de droit interne est distinct dans chaque cas, et les droits garantis par le droit international sont loin de coïncider parfaitement. Il serait d'autant plus insolite de regarder la demande relative aux faits de 1988-1989 comme «découlant directement» de la question faisant

first detention was carried out as part of a criminal investigation into fraud opened by the Prosecutor's Office in Kinshasa. The second was ordered with a view to implementing an expulsion decree, that is to say, as part of an administrative procedure. Among other consequences, it follows that the applicable international rules — which the DRC is accused of having violated — are different in part, and that the domestic remedies on whose prior exhaustion the exercise of diplomatic protection is as a rule contingent are also different in nature.

44. The last point deserves particular attention. Since, as noted above, the new claim was introduced only at the Reply stage, the Respondent was no longer able to assert preliminary objections to it, since such objections have to be submitted, under Article 79 of the Rules of Court as applicable to these proceedings, within the time-limit fixed for the delivery of the Counter-Memorial (and, under that Article as in force since 1 February 2001, within three months following delivery of the Memorial). A Respondent's right to raise preliminary objections, that is to say, objections which the Court is required to rule on before the debate on the merits begins (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 47), is a fundamental procedural right. This right is infringed if the Applicant asserts a substantively new claim after the Counter-Memorial, which is to say at a time when the Respondent can still raise objections to admissibility and jurisdiction, but not preliminary objections. This is especially so in a case involving diplomatic protection if, as in the present instance, the new claim concerns facts in respect of which the remedies available in the domestic system are different from those which could be pursued in respect of the facts underlying the initial claim.

45. Thus, it cannot be said that the additional claim in respect of the events in 1988-1989 was "implicit" in the initial Application.

46. For similar reasons, the Court sees no possibility of finding that the new claim "arises directly out of the question which is the subject-matter of the Application". Obviously, the mere fact that two questions are closely related in subject-matter, in that they concern more or less comparable facts and similar rights, does not mean that one arises out of the other. Moreover, as already observed, the facts involved in Mr. Diallo's detentions in 1988-1989 and in 1995-1996 are dissimilar in nature, the domestic legal framework is different in each case and the rights guaranteed by international law are far from perfectly coincident. It would be particularly odd to regard the claim concerning the events in 1988-1989 as "arising directly" out of the issue forming the subject-matter of the Application in that the claim concerns facts, perfectly well known to

l'objet de la requête que les faits auxquels se rapporte cette demande, et qui étaient parfaitement connus de la Guinée à la date d'introduction de la requête, sont bien antérieurs à ceux au sujet desquels la requête a été présentée, dans sa partie relative à la violation alléguée des droits individuels de M. Diallo.

47. Pour l'ensemble des motifs qui précèdent, la Cour conclut que la demande relative aux mesures d'arrestation et de détention dont M. Diallo a fait l'objet en 1988-1989 est irrecevable.

48. Eu égard à la conclusion qui précède, il n'y a pas lieu pour la Cour de se demander si la RDC a le droit, au stade actuel de la procédure, d'opposer l'exception de non-épuisement des voies de recours internes à la demande en question, ni, dans l'affirmative, si cette exception est fondée.

B. La demande relative aux mesures d'arrestation, de détention et d'expulsion prises à l'égard de M. Diallo en 1995-1996

1. Les faits

49. Certains des faits relatifs aux mesures d'arrestation, de détention et d'expulsion prises à l'égard de M. Diallo entre octobre 1995 et janvier 1996 sont admis par les deux Parties; d'autres, en revanche, sont controversés.

50. Les faits sur lesquels les deux Parties sont d'accord sont les suivants.

Un décret d'expulsion a été pris le 31 octobre 1995 à l'encontre de M. Diallo. Ce décret, signé par le premier ministre du Zaïre, était ainsi motivé: «la présence et la conduite [de M. Diallo] ont compromis et continuent à compromettre l'ordre public zaïrois, spécialement en matière économique, financière et monétaire».

Le 5 novembre 1995, à la suite de la décision précitée et en vue de sa mise à exécution, M. Diallo a été arrêté et placé en détention dans les locaux des services de l'immigration.

Le 10 janvier 1996, M. Diallo a été remis en liberté.

Le 31 janvier 1996, M. Diallo a été expulsé à destination d'Abidjan, par un vol au départ de l'aéroport de Kinshasa. Il a reçu notification d'un procès-verbal, établi le même jour, indiquant qu'il faisait l'objet d'une mesure de «refoulement pour séjour irrégulier».

51. En revanche, les Parties divergent nettement en ce qui concerne, d'une part, la situation de M. Diallo entre le 5 novembre 1995, date de sa première arrestation, et sa remise en liberté du 10 janvier 1996, et, d'autre part, sa situation pendant la période qui a séparé cette dernière date de son expulsion effective le 31 janvier 1996.

En ce qui concerne la première période, la Guinée soutient que M. Diallo est resté détenu de façon ininterrompue: il aurait ainsi subi une détention de soixante-six jours d'affilée. La RDC soutient au contraire que M. Diallo a été libéré dès le 7 novembre 1995 — soit deux jours après

Guinea on the date the Application was filed, which long pre-date those in respect of which the Application (in that part of it concerning the alleged violation of Mr. Diallo's individual rights) was presented.

47. For all of the reasons set out above, the Court finds that the claim concerning the arrest and detention measures to which Mr. Diallo was subject in 1988-1989 is inadmissible.

48. In light of the above finding, there is no need for the Court to consider whether the DRC is entitled to raise, at this stage in the proceedings, an objection to the claim in question based on the failure to exhaust local remedies, or, if so, whether the objection would be warranted.

B. The Claim concerning the Arrest, Detention and Expulsion Measures Taken against Mr. Diallo in 1995-1996

1. The facts

49. Some of the facts relating to the arrest, detention and expulsion measures taken against Mr. Diallo between October 1995 and January 1996 are acknowledged by both Parties; others, in contrast, are in dispute.

50. The facts on which the Parties are in agreement are as follows.

An expulsion decree was issued against Mr. Diallo on 31 October 1995. This decree, signed by the Prime Minister of Zaire, stated that: "[the] presence and personal conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so".

On 5 November 1995, further to the above-mentioned decision and with a view to its implementation, Mr. Diallo was arrested and placed in detention in the premises of the immigration service.

On 10 January 1996, Mr. Diallo was released.

On 31 January 1996, Mr. Diallo was expelled to Abidjan, on a flight from Kinshasa airport. He was served with a notice, drawn up that day, indicating that he was the subject of a "*refoulement* on account of unauthorized residence".

51. However, the Parties disagree markedly concerning, on the one hand, Mr. Diallo's situation between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and, on the other hand, his situation during the period between this latter date and his actual expulsion on 31 January 1996.

As regards the first of these periods, Guinea maintains that Mr. Diallo remained continuously in detention: he is thus said to have been detained for 66 consecutive days. In contrast, the DRC contends that Mr. Diallo was released on 7 November 1995 — two days after his arrest — and

son arrestation — et placé sous surveillance. Selon la RDC, ayant repris ses activités nuisibles à l'ordre public, il aurait été arrêté à nouveau, à une date non précisée mais en tout cas non antérieure au 2 janvier 1996. Il aurait été remis en liberté une seconde fois le 10 janvier 1996, faute pour le service de l'immigration de pouvoir trouver un vol en partance pour Conakry dans le délai légal de huit jours suivant sa dernière arrestation. Ainsi, selon la RDC, M. Diallo n'aurait été détenu, au cours de la première période en cause, que deux jours une première fois et pas plus de huit jours une seconde fois.

En ce qui concerne la période allant du 10 janvier au 31 janvier 1996, la Guinée soutient que M. Diallo a été arrêté à nouveau le 14 janvier 1996, sur ordre du premier ministre congolais visant à la mise à exécution du décret d'expulsion, et maintenu en détention jusqu'à son renvoi à l'aéroport de Kinshasa le 31 janvier suivant, soit pendant encore dix-sept jours. La RDC, en revanche, affirme que M. Diallo est resté libre du 10 janvier au 25 janvier 1996, date à laquelle il a été interpellé pour être expulsé quelques jours plus tard, le 31 du même mois.

52. Les Parties divergent aussi sur la manière dont M. Diallo a été traité au cours de ses périodes de privation de liberté, encore que sur cet aspect du différend le désaccord porte moins sur les faits eux-mêmes que sur leur qualification. Selon la Guinée, M. Diallo aurait été détenu dans des conditions précaires et pénibles, il n'aurait pu être nourri que grâce aux visites que lui rendaient ses proches, et aurait subi des menaces de mort de la part des personnes chargées d'assurer sa garde. La RDC conteste ce dernier point ; pour le surplus, elle soutient que les conditions de détention de M. Diallo n'équivalaient pas à des traitements inhumains et dégradants contraires au droit international.

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53. En présence d'un désaccord entre les Parties portant sur la matérialité des faits pertinents aux fins du jugement de l'affaire, la Cour doit d'abord s'interroger sur la question de la charge de la preuve.

54. En règle générale, il appartient à la partie qui allègue un fait au soutien de ses prétentions de faire la preuve de l'existence de ce fait (voir, en dernier lieu, l'arrêt rendu en l'affaire relative à des *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 71, par. 162).

Mais on aurait tort de considérer cette règle, inspirée de l'adage *onus probandi incumbit actori*, comme une règle absolue, applicable en toute circonstance. L'établissement de la charge de la preuve dépend, en réalité, de l'objet et de la nature de chaque différend soumis à la Cour ; il varie en fonction de la nature des faits qu'il est nécessaire d'établir pour les besoins du jugement de l'affaire.

55. En particulier, lorsque, comme en l'espèce, il est allégué qu'une personne n'a pas bénéficié, de la part d'une autorité publique, de certaines garanties procédurales auxquelles elle avait droit, on ne saurait, en

placed under surveillance. According to the DRC, having resumed his activities in breach of public order, he was rearrested on an unspecified date, but in any event not earlier than 2 January 1996. He is then said to have been released for a second time on 10 January 1996, because the immigration service could not find a flight leaving for Conakry within the eight-day legal time-limit following his latest arrest. During the first period in question, therefore, according to the DRC, Mr. Diallo was only detained for two days in the first instance and subsequently for no longer than eight days.

With regard to the period from 10 January to 31 January 1996, Guinea maintains that Mr. Diallo was rearrested on 14 January 1996, on the order of the Congolese Prime Minister for the purpose of effecting the expulsion decree, and kept in detention until he was deported from Kinshasa airport on 31 January, i.e., for another 17 days. On the other hand, the DRC asserts that Mr. Diallo remained at liberty from 10 January to 25 January 1996, on which date he was arrested prior to being expelled a few days later, on 31 January.

52. The Parties also differ as to how Mr. Diallo was treated during the periods when he was deprived of his liberty, although on this aspect of the dispute the disagreement relates less to the facts themselves than to their characterization. According to Guinea, Mr. Diallo was held in dire and difficult conditions; he was only able to receive food because of the visits from his next of kin; and he was subjected to death threats from the persons responsible for guarding him. The DRC contests this final point; for the rest, it maintains that the conditions of Mr. Diallo's detention did not amount to inhuman and degrading treatment in breach of international law.

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53. Faced with a disagreement between the Parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

54. As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the Judgment delivered in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2010 (I)*, p. 71, para. 162).

However, it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

55. In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be dem-

règle générale, exiger du demandeur qu'il prouve le fait négatif qu'il invoque. Une autorité publique est en général à même de démontrer qu'elle a bien suivi les procédures appropriées et respecté les garanties exigées par le droit — si tel a été le cas — en produisant des documents qui font la preuve des actes qui ont été accomplis. Toutefois, on ne saurait déduire dans tous les cas, de ce que le défendeur n'est pas à même de prouver l'exécution d'une obligation procédurale, qu'il l'a méconnue : cela dépend beaucoup de la nature exacte de l'obligation en cause ; certaines supposent normalement l'établissement de documents écrits, d'autres non. L'ancienneté des faits doit également être prise en compte.

56. C'est à la Cour qu'il appartient d'apprécier la valeur de l'ensemble des éléments de preuve produits par les deux parties et dûment soumis au débat contradictoire, en vue de parvenir à ses conclusions. En somme, quand il s'agit d'établir des faits tels que ceux qui sont en cause dans la présente affaire, aucune des parties ne supporte à elle seule la charge de la preuve.

57. C'est en s'inspirant des considérations qui précèdent que la Cour va à présent se prononcer sur les faits qui restent controversés entre les Parties.

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58. La Cour n'est pas convaincue par l'allégation de la RDC selon laquelle M. Diallo aurait été libéré dès le 7 novembre 1995 pour n'être arrêté à nouveau qu'au début du mois de janvier 1996, avant d'être remis en liberté le 10 janvier. Cette appréciation s'appuie sur les raisons suivantes.

Deux documents figurent au dossier, qui prouvent l'incarcération de M. Diallo le 5 novembre 1995 et sa remise en liberté le 10 janvier 1996 : il s'agit du « billet d'écrou » portant la première de ces deux dates et du « billet de mise en liberté » portant la seconde. S'il était vrai, comme le prétend la RDC, qu'entre ces deux dates M. Diallo a été une première fois libéré puis de nouveau arrêté, on ne comprendrait guère que la défenderesse ait été incapable de produire des documents administratifs — ou quelque autre élément de preuve — de nature à établir la réalité de ces faits. Il est vrai que le 30 novembre 1995, soit à une date à laquelle selon la version des faits présentée par la RDC M. Diallo se trouvait en liberté, alors que selon les allégations de la Guinée il était incarcéré, l'intéressé a écrit une lettre au premier ministre et au ministre des finances zaïrois pour leur transmettre les dossiers des créances revendiquées par ses sociétés, dans laquelle il ne fait pas référence à sa détention. Mais l'existence de cette correspondance est loin de prouver, contrairement à ce que soutient la RDC, que M. Diallo se trouvait à cette date en liberté. Il est constant que M. Diallo a pu, au cours de ses périodes de privation de liberté, largement communiquer avec l'extérieur, et qu'il n'était pas em-

anded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.

56. It is for the Court to evaluate all the evidence produced by the two Parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.

57. It is on the basis of the considerations set out above that the Court will now pronounce on the facts which remain in dispute between the Parties.

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58. The Court is not convinced by the DRC's allegation that Mr. Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. The Court's assessment is based on the following reasons.

There are two documents in the case file which prove that Mr. Diallo was imprisoned on 5 November 1995 and freed again on 10 January 1996: these are the committal note *(billet d'écrou)* bearing the first of these two dates and the release document *(billet de mise en liberté)* which bears the second. If it were true, as the DRC claims, that between these two dates Mr. Diallo was released for the first time and then rearrested, it is hardly comprehensible that the Respondent has been unable to produce any administrative documents — or any other piece of evidence — to establish the reality of those events. It is true that on 30 November 1995 — a date when Mr. Diallo was at liberty according to the DRC's version of the facts, whereas according to Guinea's allegations, he was in prison — he wrote a letter to the Zairean Prime Minister and Minister of Finance transmitting to them the files concerning the debts claimed by his companies, in which he makes no reference to his detention. But the existence of this correspondence far from proves, contrary to the assertions of the DRC, that Mr. Diallo was at liberty on that date. It is a fact that, during the periods when he was deprived of his liberty, Mr. Diallo was largely able to communicate with the outside world, and

pêché de correspondre par courrier. La lettre du 30 novembre 1995 n'est donc aucunement décisive.

59. En conséquence, la Cour conclut que M. Diallo est resté détenu du 5 novembre 1995 au 10 janvier 1996, soit soixante-six jours sans interruption.

60. En revanche, la Cour ne retient pas l'affirmation de la demanderesse selon laquelle M. Diallo aurait été à nouveau arrêté le 14 janvier 1996 et serait demeuré détenu jusqu'à son expulsion le 31 janvier suivant. Cette allégation, contestée par la défenderesse, n'est étayée par aucun commencement de preuve; la Cour observe d'ailleurs que dans la procédure écrite la Guinée avait situé la date de cette prétendue arrestation au 17 et non au 14 janvier. La Cour ne saurait donc tenir pour établie la seconde période de détention d'une durée de dix-sept jours invoquée par la demanderesse. Toutefois, la RDC ayant admis que M. Diallo se trouvait détenu, au plus tard, le 25 janvier 1996, la Cour tiendra pour établi que l'intéressé a été détenu entre le 25 et le 31 janvier 1996.

61. Pas davantage la Cour ne peut-elle retenir les allégations de menaces de mort qui auraient été proférées à l'encontre de M. Diallo par ses gardiens, faute pour ces allégations d'être étayées par un quelconque commencement de preuve.

62. En ce qui concerne la question du respect par les autorités de la RDC de leurs obligations au titre de l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires, les faits pertinents seront examinés plus loin, lorsque la Cour abordera cette question (voir paragraphes 90-97 ci-après).

2. L'examen des faits au regard du droit international applicable

63. La Guinée soutient que les conditions dans lesquelles M. Diallo a été arrêté, détenu et expulsé en 1995-1996 constituent une méconnaissance par la RDC de ses obligations internationales à plusieurs titres.

En premier lieu, l'expulsion de M. Diallo aurait méconnu l'article 13 du Pacte international relatif aux droits civils et politiques (ci-après le «Pacte») du 16 décembre 1966, auquel la Guinée et la RDC sont devenues parties respectivement le 24 avril 1978 et le 1er février 1977, ainsi que l'article 12, paragraphe 4, de la Charte africaine des droits de l'homme et des peuples (ci-après la «Charte africaine») du 27 juin 1981, entrée en vigueur pour la Guinée le 21 octobre 1986, et pour la RDC le 28 octobre 1987.

En deuxième lieu, l'arrestation et la détention de M. Diallo auraient violé l'article 9, paragraphes 1 et 2, du Pacte, ainsi que l'article 6 de la Charte africaine.

En troisième lieu, M. Diallo aurait subi des conditions de détention assimilables à des traitements inhumains ou dégradants prohibés par le droit international.

En quatrième lieu et enfin, M. Diallo n'aurait pas été informé, lors de

that he was not prevented from engaging in written correspondence. The letter of 30 November 1995 is therefore in no way conclusive.

59. Accordingly, the Court concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996.

60. On the other hand, the Court does not accept the Applicant's assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all; the Court also observes that, in the written proceedings, Guinea stated the date of this alleged arrest to be 17 and not 14 January. The Court therefore cannot regard the second period of detention claimed by the Applicant, lasting 17 days, as having been established. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996.

61. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

62. As regards the question of compliance of the authorities of the DRC with their obligations under Article 36 (1) *(b)* of the Vienna Convention on Consular Relations, the relevant facts will be examined at a later stage, when the Court deals with that question (see paragraphs 90-97 below).

2. Consideration of the facts in the light of the applicable international law

63. Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") of 27 June 1981, which entered into force for Guinea on 21 October 1986, and for the DRC on 28 October 1987.

Second, Mr. Diallo's arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he

son arrestation, de son droit à solliciter l'assistance consulaire de son pays, en violation de l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires du 24 avril 1963, entrée en vigueur à l'égard de la Guinée le 30 juillet 1988 et à l'égard de la RDC le 14 août 1976.

La Cour examinera successivement le bien-fondé de chacune de ces assertions.

a) *La violation alléguée de l'article 13 du Pacte et de l'article 12, paragraphe 4, de la Charte africaine*

64. L'article 13 du Pacte est ainsi rédigé:

> «Un étranger qui se trouve légalement sur le territoire d'un Etat partie au présent Pacte ne peut en être expulsé qu'en exécution d'une décision prise conformément à la loi et, à moins que des raisons impérieuses de sécurité nationale ne s'y opposent, il doit avoir la possibilité de faire valoir les raisons qui militent contre son expulsion et de faire examiner son cas par l'autorité compétente, ou par une ou plusieurs personnes spécialement désignées par ladite autorité, en se faisant représenter à cette fin.»

En termes voisins, l'article 12, paragraphe 4, de la Charte africaine dispose que:

> «L'étranger légalement admis sur le territoire d'un Etat partie à la présente Charte ne pourra en être expulsé qu'en vertu d'une décision conforme à la loi.»

65. Il résulte des termes mêmes des deux dispositions précitées que l'expulsion d'un étranger qui se trouve légalement sur le territoire d'un Etat partie à ces instruments ne peut être compatible avec les obligations internationales de cet Etat qu'à la condition qu'elle soit prononcée conformément à «la loi», c'est-à-dire au droit national applicable en la matière. Le respect du droit interne conditionne ici, dans une certaine mesure, celui du droit international. Mais il est clair que, si la «conformité à la loi» ainsi définie est une condition nécessaire du respect des dispositions précitées, elle n'en est pas la condition suffisante. D'une part, il faut que la loi nationale applicable soit elle-même compatible avec les autres exigences du Pacte et de la Charte africaine; d'autre part, une expulsion ne doit pas revêtir un caractère arbitraire, la protection contre l'arbitraire étant au cœur des droits garantis par les normes internationales de protection des droits de l'homme, notamment celles contenues dans les deux traités applicables en l'espèce.

66. L'interprétation qui précède est pleinement corroborée par la jurisprudence du Comité des droits de l'homme institué par le Pacte en vue de veiller au respect de cet instrument par les Etats parties (voir, par exemple, en ce sens: *Maroufidou c. Suède*, n° 58/1979, par. 9.3; *Comité des*

was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) *(b)* of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court will examine in turn whether each of these assertions is well-founded.

(a) *The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter*

64. Article 13 of the Covenant reads as follows:

> "An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Likewise, Article 12, paragraph 4, of the African Charter provides that:

> "A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

66. The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou* v. *Sweden*, No. 58/1979, para. 9.3; *Human Rights*

droits de l'homme, observation générale nº 15: situation des étrangers au regard du Pacte).

Le Comité des droits de l'homme a, depuis sa création, développé une jurisprudence interprétative considérable, notamment à l'occasion des constatations auxquelles il procède en réponse aux communications individuelles qui peuvent lui être adressées à l'égard des Etats parties au premier Protocole facultatif, ainsi que dans le cadre de ses «Observations générales».

Bien que la Cour ne soit aucunement tenue, dans l'exercice de ses fonctions judiciaires, de conformer sa propre interprétation du Pacte à celle du Comité, elle estime devoir accorder une grande considération à l'interprétation adoptée par cet organe indépendant, spécialement établi en vue de superviser l'application de ce traité. Il en va de la nécessaire clarté et de l'indispensable cohérence du droit international; il en va aussi de la sécurité juridique, qui est un droit pour les personnes privées bénéficiaires des droits garantis comme pour les Etats tenus au respect des obligations conventionnelles.

67. De même, lorsque la Cour est appelée, comme en l'espèce, à faire application d'un instrument régional de protection des droits de l'homme, elle doit tenir dûment compte de l'interprétation dudit instrument adopté par les organes indépendants qui ont été spécialement créés, si tel a été le cas, en vue de contrôler la bonne application du traité en cause. En l'espèce, l'interprétation de l'article 12, paragraphe 4, de la Charte africaine qui est retenue ci-dessus est conforme à la jurisprudence de la commission africaine des droits de l'homme et des peuples, instituée par l'article 30 de ladite Charte (voir, par exemple: *Kenneth Good c. République du Botswana*, nº 313/05, par. 204; *Organisation mondiale contre la torture et Association internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'homme c. Rwanda,* nos 27/89, 46/91, 49/91, 99/93).

68. La Cour note en outre que l'interprétation, par la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme, de l'article premier du protocole nº 7 et de l'article 22, paragraphe 6, respectivement, à la convention (européenne) de sauvegarde des droits de l'homme et des libertés fondamentales et de la convention américaine relative aux droits de l'homme — dont les dispositions sont proches, en substance, de celles du Pacte et de la Charte africaine que la Cour applique en la présente espèce — est en cohérence avec ce qui a été dit, au paragraphe 65 ci-dessus, à propos de ces dernières dispositions.

69. Selon la Guinée, la décision d'expulsion prise à l'encontre de M. Diallo a d'abord méconnu l'article 13 du Pacte et l'article 12, paragraphe 4, de la Charte africaine parce qu'elle n'a pas été prise en conformité avec le droit interne congolais pour trois raisons: elle aurait dû être signée par le président de la République et non par le premier ministre; elle aurait dû être précédée de la consultation de la commission nationale d'immigration; elle aurait dû exprimer les motifs de l'expulsion, ce qu'elle n'a pas fait.

Committee, General Comment No. 15: The Position of Aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

67. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by Article 30 of the said Charter (see, for example, *Kenneth Good* v. *Republic of Botswana*, No. 313/05, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights* v. *Rwanda*, No. 27/89, 46/91, 49/91, 99/93).

68. The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above.

69. According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons: it should have been signed by the President of the Republic and not by the Prime Minister; it should have been preceded by consultation of the National Immigration Board; and it should have indicated the grounds for the expulsion, which it failed to do.

70. La Cour n'est pas convaincue par le premier argument. Il est vrai que l'article 15 de l'ordonnance-loi zaïroise du 12 septembre 1983 relative à la police des étrangers, dans sa rédaction alors en vigueur, confiait au président de la République, et non au premier ministre, le pouvoir d'expulser un étranger. Mais la RDC expose que, depuis l'entrée en vigueur de l'acte constitutionnel du 9 avril 1994, les pouvoirs conférés par des dispositions législatives particulières au président de la République ont été considérés comme transférés au premier ministre — alors même que ces dispositions n'auraient pas été formellement modifiées — en vertu de l'article 80, deuxième alinéa, de la nouvelle Constitution, qui prévoit que «le premier ministre exerce le pouvoir réglementaire par voie de décrets délibérés en Conseil des ministres».

La Cour rappelle qu'il appartient à chaque Etat, au premier chef, d'interpréter son droit interne. La Cour n'a pas, en principe, le pouvoir de substituer sa propre interprétation à celle des autorités nationales, notamment lorsque cette interprétation émane des plus hautes juridictions internes (voir, pour ce dernier cas, *Emprunts serbes, arrêt n° 14, 1929, C.P.J.I. série A n° 20*, p. 46, et *Emprunts brésiliens, arrêt n° 15, 1929, C.P.J.I. série A n° 21*, p. 124). Exceptionnellement, si un Etat propose de son droit interne une interprétation manifestement erronée, notamment afin d'en tirer avantage dans une affaire pendante, il appartient à la Cour de retenir l'interprétation qui lui paraît correcte.

71. Tel n'est pas le cas en l'espèce. L'interprétation de sa Constitution présentée par la RDC, d'où il résulte que l'article 80, deuxième alinéa, produit certains effets sur les lois déjà en vigueur à la date d'adoption de ladite Constitution, ne paraît pas manifestement erronée. Il n'a pas été contesté que ladite interprétation a bien correspondu, à l'époque considérée, à la pratique générale des pouvoirs publics constitutionnels. La RDC a versé au dossier, à cet égard, plusieurs autres décrets d'expulsion pris à la même époque et tous signés par le premier ministre. Dès lors, même s'il serait théoriquement possible de discuter le bien-fondé de cette interprétation, il n'appartient certainement pas à la Cour d'adopter, pour les besoins du jugement de la présente affaire, une interprétation différente du droit interne congolais. On ne saurait donc conclure que le décret d'expulsion de M. Diallo n'a pas été pris «conformément à la loi» pour la raison qu'il a été signé par le premier ministre.

72. En revanche, la Cour est d'avis que ce décret n'a pas respecté les prescriptions de la législation congolaise pour deux autres raisons.

En premier lieu, il n'a pas été précédé de la consultation de la commission nationale d'immigration, dont l'avis est requis par l'article 16 de l'ordonnance-loi susmentionnée sur la police des étrangers avant toute mesure d'expulsion prise à l'encontre d'un étranger titulaire d'une carte de résidence. La RDC n'a contesté ni que la situation de M. Diallo le faisait entrer dans le champ d'application de cette disposition, ni que la consultation de la commission a été omise. Cette omission est corroborée par l'absence de visa de l'avis de la commission dans le décret, alors que tous les autres décrets d'expulsion versés au dossier visent expressément

70. The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister — even though such provisions have not been formally amended — under Article 80 (2) of the new Constitution, which provides that "the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers".

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

71. That is not the situation here. The DRC's interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the decree expelling Mr. Diallo was not issued "in accordance with law" by virtue of the fact that it was signed by the Prime Minister.

72. However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo's situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board's opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance

un tel avis, conformément d'ailleurs au même article 16 de l'ordonnance-loi, qui dispose *in fine* que la décision «fait mention de la consultation de la commission».

En deuxième lieu, le décret d'expulsion aurait dû être «motivé» en vertu de l'article 15 de l'ordonnance-loi de 1983, c'est-à-dire indiquer les motifs de la décision prise. Or, force est de constater que la motivation générale et stéréotypée figurant dans le décret ne saurait être d'aucune manière regardée comme satisfaisant aux exigences de la législation. Le décret se borne à indiquer que «la présence et la conduite [de M. Diallo] ont compromis et continuent à compromettre l'ordre public zaïrois, spécialement en matière économique, financière et monétaire». La première partie de cette phrase ne fait que paraphraser la condition légale de toute mesure d'expulsion selon le droit congolais, puisque l'article 15 de l'ordonnance-loi de 1983 permet l'expulsion d'un étranger «qui, par sa présence ou par sa conduite, compromet ou menace de compromettre la tranquillité ou l'ordre public». Quant à la seconde partie, elle apporte certes un complément, mais d'une nature tellement vague qu'il ne permet pas du tout de savoir en raison de quelles activités la présence de M. Diallo a été estimée propre à menacer l'ordre public (dans le même sens, *mutatis mutandis*, voir *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 231, par. 152).

La formule employée par l'auteur du décret équivaut donc à une absence de motivation de la mesure d'expulsion.

73. La Cour conclut donc que sur deux points importants, relatifs à des garanties procédurales conférées aux étrangers par le droit congolais, et qui visent à protéger les personnes concernées contre le risque d'arbitraire, l'expulsion de M. Diallo n'a pas été prononcée «conformément à la loi».

En conséquence, indépendamment de la question de savoir si cette expulsion était justifiée sur le fond, question sur laquelle la Cour reviendra dans la suite du présent arrêt, la mesure litigieuse a violé l'article 13 du Pacte et l'article 12, paragraphe 4, de la Charte africaine.

74. En outre, la Cour estime que la Guinée est fondée à soutenir que le droit reconnu par l'article 13 à l'étranger qui est sous le coup d'une mesure d'expulsion de «faire valoir les raisons qui militent contre son expulsion et de faire examiner son cas par l'autorité compétente» n'a pas été respecté dans le cas de M. Diallo.

Il est constant, en effet, que ni avant la signature du décret d'expulsion du 31 octobre 1995, ni postérieurement à cette signature mais avant la mise à exécution dudit décret le 31 janvier 1996, M. Diallo n'a été mis en mesure de faire valoir sa défense devant une autorité publique compétente pour prendre en considération ses arguments et décider de la suite appropriée qu'il convenait de leur donner.

Certes, comme la RDC l'a relevé, l'article 13 du Pacte fait une exception au droit pour l'étranger de faire valoir ses raisons dans le cas où «des raisons impérieuses de sécurité nationale» s'y opposent. La défenderesse soutient que tel était précisément le cas en l'espèce. Mais elle n'a fourni à

with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision "shall mention the fact that the Board was consulted".

Second, the expulsion decree should have been "reasoned" pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the "presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so". The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien "who, by his presence or conduct, breaches or threatens to breach the peace or public order". As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 231, para. 152).

The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

73. The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided "in accordance with law".

Consequently, regardless of whether that expulsion was justified on the merits, a question to which the Court will return later in this Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

74. Furthermore, the Court considers that Guinea is justified in contending that the right afforded by Article 13 to an alien who is subject to an expulsion measure to "submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority" was not respected in the case of Mr. Diallo.

It is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where "compelling reasons of national security" require otherwise. The Respondent maintains that this was precisely the case here. However, it

la Cour aucun élément tangible de nature à établir l'existence de ces «raisons impérieuses». Sans doute est-ce en principe aux autorités nationales qu'il appartient d'apprécier les motifs d'ordre public qui peuvent justifier l'adoption de telle ou telle mesure de police. Mais, lorsqu'il s'agit d'écarter une importante garantie procédurale prévue par un traité international, on ne saurait s'en remettre purement et simplement à l'Etat en cause quant à l'appréciation des conditions qui permettent d'écarter, de manière exceptionnelle, ladite garantie. Il appartient à l'Etat de démontrer que les «raisons impérieuses» exigées par le Pacte existaient, ou à tout le moins que l'on pouvait conclure raisonnablement qu'elles existaient compte tenu des circonstances qui entouraient la mesure d'expulsion.

En l'espèce, une telle démonstration n'a pas été faite par la défenderesse.

Pour ce motif également, la Cour conclut que l'article 13 du Pacte a été violé eu égard aux conditions dans lesquelles M. Diallo a été expulsé.

b) *La violation alléguée de l'article 9, paragraphes 1 et 2, du Pacte et de l'article 6 de la Charte africaine*

75. Aux termes de l'article 9, paragraphes 1 et 2, du Pacte:

> «1. Tout individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut faire l'objet d'une arrestation ou d'une détention arbitraire. Nul ne peut être privé de sa liberté, si ce n'est pour des motifs et conformément à la procédure prévus par la loi.
>
> 2. Tout individu arrêté sera informé, au moment de son arrestation, des raisons de cette arrestation et recevra notification, dans le plus court délai, de toute accusation portée contre lui.»

Aux termes de l'article 6 de la Charte africaine:

> «Tout individu a droit à la liberté et à la sécurité de sa personne. Nul ne peut être privé de sa liberté sauf pour des motifs et dans des conditions préalablement déterminés par la loi; en particulier nul ne peut être arrêté ou détenu arbitrairement.»

76. Selon la Guinée, les dispositions précitées ont été violées à l'occasion des arrestations et de la détention de M. Diallo en 1995-1996 aux fins de l'exécution du décret d'expulsion, pour plusieurs raisons.

En premier lieu, les privations de liberté qu'il a subies n'ont pas eu lieu «conformément à la procédure prévu[e] par la loi» au sens de l'article 9, paragraphe 1, du Pacte, ni «dans [les] conditions préalablement déterminé[e]s par la loi» au sens de l'article 6 de la Charte africaine.

En deuxième lieu, ces privations de liberté étaient «arbitraires» au sens de ces dispositions.

En troisième lieu, M. Diallo n'a pas été, au moment de ses arrestations,

has not provided the Court with any tangible information that might establish the existence of such "compelling reasons". In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the "compelling reasons" required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, no such demonstration has been provided by the Respondent.

On these grounds too, the Court concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) *The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter*

75. Article 9, paragraphs 1 and 2, of the Covenant provides that:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

Article 6 of the African Charter provides that:

> "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

76. According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons.

First, the deprivations of liberty which he suffered did not take place "in accordance with such procedure as [is] established by law" within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of "conditions previously laid down by law" within the meaning of Article 6 of the African Charter.

Second, they were "arbitrary" within the meaning of these provisions.

Third, Mr. Diallo was not informed, at the time of his arrests, of the

informé des raisons de celles-ci, ni n'a reçu notification des accusations portées contre lui, ce qui a constitué une violation de l'article 9, paragraphe 2, du Pacte.

La Cour examinera successivement le bien-fondé de chacune de ces assertions.

77. Au préalable, il y a lieu de faire une remarque d'ordre général. Les dispositions de l'article 9, paragraphes 1 et 2, du Pacte, ainsi que celles de l'article 6 de la Charte africaine, s'appliquent en principe à toute forme d'arrestation et de détention décidée et exécutée par une autorité publique, quelles que soient sa base juridique et la finalité qu'elle poursuit (voir en ce sens, en ce qui concerne le Pacte, l'observation générale du Comité des droits de l'homme n° 8, du 30 juin 1982, relative au droit à la liberté et à la sécurité de la personne *(Comité des droits de l'homme, Pacte, observation générale n° 8: article 9 (droit à la liberté et à la sécurité de la personne))*). Ces dispositions n'ont donc pas un champ d'application limité aux procédures pénales; elles s'appliquent aussi, en principe, aux mesures privatives de liberté prises dans le cadre d'une procédure administrative, telles que celles qui peuvent être nécessaires dans le but de mettre à exécution une mesure d'éloignement forcé d'un étranger du territoire national. Dans cette dernière hypothèse, il importe peu que la mesure en cause soit qualifiée par le droit interne d'«expulsion» ou de «refoulement». Il n'en va autrement qu'en ce qui concerne l'exigence, qui figure au paragraphe 2 de l'article 9 du Pacte, que la personne arrêtée soit «informée de toute accusation» portée contre elle, exigence qui ne se comprend que dans le cadre d'une procédure de nature pénale.

78. La Cour en vient maintenant au premier des trois griefs de la Guinée, celui tiré de ce que l'arrestation et la détention de M. Diallo n'étaient pas conformes aux prescriptions de la loi de la RDC. Il y a lieu d'observer d'abord que l'arrestation de M. Diallo le 5 novembre 1995 et sa détention jusqu'au 10 janvier 1996 (voir paragraphe 58 ci-dessus) étaient destinées à permettre la mise à exécution du décret d'expulsion pris à son encontre le 31 octobre 1995. La seconde arrestation, intervenue au plus tard le 25 janvier 1996, visait aussi à l'exécution du même décret: la mention, figurant sur le procès-verbal notifié à l'intéressé le 31 janvier 1996, jour de son expulsion effective, d'un «refoulement» pour «séjour irrégulier» était manifestement erronée, comme la RDC, d'ailleurs, en convient.

79. L'article 15 de l'ordonnance-loi du 12 septembre 1983 relative à la police des étrangers, dans sa rédaction en vigueur à l'époque de l'arrestation et de la détention de M. Diallo, prévoyait que l'étranger «qui est susceptible de se soustraire à l'exécution» d'une mesure d'expulsion peut être incarcéré pour une durée initiale de quarante-huit heures, pouvant être «prorogée de quarante-huit heures en quarante-huit heures, sans que la détention puisse dépasser huit jours». La Cour constate que l'arrestation et la détention de M. Diallo n'ont pas été conformes à ces dispositions. Rien n'indique que les autorités de la RDC ont cherché à déterminer si M. Diallo était «susceptible de se soustraire à l'exécution» du décret d'expulsion et, en conséquence, s'il était nécessaire de le placer en

reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court will examine in turn whether each of these assertions is well-founded.

77. First of all, it is necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person *(Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person))*). The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an "expulsion" or a *"refoulement"*. The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be "informed of any charges" against him, a requirement which is only meaningful in the context of criminal proceedings.

78. The Court now turns to the first of Guinea's three allegations, namely, that Mr. Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It should first be noted that Mr. Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 above) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a *"refoulement"* on account of "illegal residence" in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

79. Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo's arrest and detention, provided that an alien "who is likely to evade implementation" of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be "extended by 48 hours at a time, but shall not exceed eight days". The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr. Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 sug-

détention. Le fait qu'il n'ait pas cherché à se soustraire à l'expulsion après sa remise en liberté le 10 janvier 1996 laisse présumer qu'il n'y avait pas de nécessité réelle à sa détention. La longueur totale de la période au cours de laquelle il a été détenu — soixante-six jours à partir de sa première arrestation et au moins six jours supplémentaires à partir de la seconde arrestation — excède de beaucoup la durée maximale autorisée par l'article 15. En outre, la RDC n'a produit aucune preuve tendant à établir que sa détention a fait l'objet d'un réexamen toutes les quarante-huit heures, comme il est exigé par cette disposition.

80. La Cour estime également, en réponse au deuxième grief susmentionné (voir paragraphe 76 ci-dessus), que l'arrestation et la détention de M. Diallo ont été arbitraires au sens de l'article 9, paragraphe 1, du Pacte et de l'article 6 de la Charte africaine.

81. Certes, en principe, une arrestation et une détention visant à exécuter une décision d'expulsion prise par l'autorité compétente ne sauraient passer pour «arbitraires» au sens des textes précités, quand bien même la légalité de la décision d'expulsion pourrait prêter à contestation. Dès lors, le seul fait que le décret du 31 octobre 1995 n'a pas été pris, à certains égards, «conformément à la loi», comme la Cour l'a constaté plus haut à propos de l'article 13 du Pacte et de l'article 12, paragraphe 4, de la Charte africaine, ne suffit pas à rendre l'arrestation et la détention destinées à mettre à exécution ledit décret «arbitraires» au sens de l'article 9, paragraphe 1, du Pacte et de l'article 6 de la Charte africaine.

82. Toutefois, il y a lieu, en l'espèce, de tenir compte du nombre et de la gravité des irrégularités ayant entaché les détentions subies par M. Diallo. Comme il a été dit, il a été détenu pendant une durée particulièrement longue, sans qu'il apparaisse que les autorités aient même cherché à établir si sa détention était nécessaire.

En outre, la Cour ne peut que constater que non seulement le décret d'expulsion lui-même n'était pas motivé de façon suffisamment précise, ainsi qu'il a été relevé plus haut (voir paragraphe 72), mais que la RDC n'a jamais été à même, tout au long de la procédure, de fournir des motifs qui puissent être de nature à donner un fondement convaincant à l'expulsion de M. Diallo. Des allégations de «corruption» et d'autres infractions ont été formulées à son encontre, mais aucun élément concret n'a été présenté à la Cour de nature à étayer ces allégations. Ces accusations n'ont donné lieu à aucune poursuite devant les tribunaux, ni, *a fortiori*, à aucune condamnation. En outre, il est difficile de ne pas percevoir un lien entre l'expulsion de M. Diallo et le fait qu'il ait tenté d'obtenir le recouvrement des créances qu'il estimait être dues à ses sociétés par, notamment, l'Etat zaïrois ou des entreprises dans lesquelles ce dernier détient une part importante du capital, en saisissant à cette fin les juridictions civiles. Dans ces conditions, l'arrestation et la détention visant à permettre l'exécution d'une telle mesure d'expulsion, qui ne repose sur aucun fondement défendable, ne peuvent qu'être qualifiées d'arbitraires au sens de l'article 9, paragraphe 1, du Pacte et de l'article 6 de la Charte africaine.

gests that there was no need for his detention. The overall length of time for which he was detained — 66 days following his initial arrest and at least six more days following the second arrest — greatly exceeded the maximum period permitted by Article 15. In addition, the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

80. The Court further finds, in response to the second allegation set out above (see paragraph 76 above), that Mr. Diallo's arrest and detention were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

81. Admittedly, in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as "arbitrary" within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, "in accordance with law", as the Court has noted above in relation to Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree "arbitrary" within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

82. However, account should be taken here of the number and seriousness of the irregularities tainting Mr. Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 72), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. These accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

83. Enfin, la Cour en vient à l'examen du grief relatif à l'article 9, paragraphe 2, du Pacte précité.

Pour les raisons exposées plus haut (voir paragraphe 77), la Guinée ne saurait utilement soutenir qu'au moment de chacune de ses arrestations (en novembre 1995 et janvier 1996) M. Diallo n'aurait pas été informé des «accusation[s] portée[s] contre lui» comme l'aurait exigé, selon la demanderesse, l'article 9, paragraphe 2. Cette disposition particulière de l'article 9 ne s'applique que dans le cas où une personne est arrêtée dans le cadre d'une procédure pénale; tel n'était pas le cas de M. Diallo.

84. En revanche, la Guinée est fondée à soutenir que le droit de M. Diallo d'être «informé, au moment de son arrestation, des raisons de cette arrestation» — droit qui est garanti en toute matière, quel que soit le motif de l'arrestation — a été méconnu.

La RDC n'a produit aucun document ni aucun autre élément de preuve de nature à établir que le décret d'expulsion aurait été notifié à M. Diallo au moment de son arrestation le 5 novembre 1995, ni qu'il aurait été informé de quelque manière, à ce moment, de la raison pour laquelle il était arrêté. Bien que le décret d'expulsion manquât lui-même d'une motivation précise comme il a été dit (voir paragraphe 72), la notification de ce décret au moment de l'arrestation de M. Diallo aurait constitué une information suffisante, aux fins de l'article 9, paragraphe 2, précité, des raisons de cette arrestation, puisqu'elle aurait indiqué à l'intéressé qu'il était arrêté pour les besoins d'une procédure d'expulsion et lui aurait permis, le cas échéant, d'engager les procédures appropriées en vue de contester la légalité du décret. Mais aucune information de ce genre ne lui a été fournie; la RDC, qui devrait être à même de prouver la date de la notification du décret à M. Diallo, n'a présenté aucune preuve à cet effet.

85. Il en va de même de l'arrestation de M. Diallo en janvier 1996. A cette date, il n'a pas été davantage établi que l'intéressé ait été informé de ce qu'il était éloigné par la contrainte du territoire congolais en exécution d'un décret d'expulsion. De plus, le jour de son renvoi effectif, il lui a été fourni l'information erronée qu'il était «refoulé» en raison de sa «situation irrégulière» (voir paragraphe 50 ci-dessus). Dans ces conditions, l'exigence d'information prévue à l'article 9, paragraphe 2, du Pacte n'a pas non plus été respectée à cette occasion.

c) *La violation alléguée de l'interdiction de soumettre une personne détenue à des mauvais traitements*

86. La Guinée soutient que M. Diallo a été soumis à des mauvais traitements durant sa détention, dus aux conditions particulièrement pénibles de celle-ci, au fait qu'il aurait été privé de son droit de communiquer avec ses avocats et avec l'ambassade de Guinée, et au fait qu'il aurait reçu des menaces de mort de la part de ses gardiens.

83. Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant.

For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the "charges against him", as the Applicant contends is required by Article 9, paragraph 2, of the Covenant. This particular provision of Article 9 is applicable only when a person is arrested in the context of criminal proceedings; that was not the case for Mr. Diallo.

84. On the other hand, Guinea is justified in arguing that Mr. Diallo's right to be "informed, at the time of arrest, of the reasons for his arrest" — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached.

The DRC has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo's arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.

85. The same applies to Mr. Diallo's arrest in January 1996. On that date, it has also not been established that Mr. Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a *"refoulement"* on account of his "illegal residence" (see paragraph 50 above). This being so, the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion either.

(c) *The alleged violation of the prohibition on subjecting a detainee to mistreatment*

86. Guinea maintains that Mr. Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards.

87. La demanderesse invoque à cet égard l'article 10, paragraphe 1, du Pacte, aux termes duquel: «Toute personne privée de sa liberté est traitée avec humanité et avec le respect de la dignité inhérente à la personne humaine.»

Sont également pertinentes, en la matière, les dispositions de l'article 7 du Pacte, selon lesquelles «[n]ul ne sera soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants», et celles de l'article 5 de la Charte africaine, aux termes desquelles «[t]out individu a droit au respect de la dignité inhérente à la personne humaine».

Il est certain, en outre, que la prohibition des traitements inhumains ou dégradants fait partie des règles du droit international général que les Etats sont tenus de respecter en toute circonstance, et en dehors même de tout engagement conventionnel.

88. La Cour constate, toutefois, que la Guinée n'a pas démontré de façon suffisamment convaincante que M. Diallo aurait été soumis lors de sa détention à de tels traitements. L'allégation selon laquelle il aurait reçu des menaces de mort n'est étayée par aucune preuve. Il semble bien que M. Diallo ait pu communiquer avec ses proches et ses avocats sans rencontrer de grandes difficultés, et, même si cela n'avait pas été le cas, de telles entraves n'auraient pas constitué par elles-mêmes des traitements prohibés par l'article 10, paragraphe 1, du Pacte et par le droit international général. La question des communications de M. Diallo avec les autorités guinéennes est distincte de celle du respect des dispositions présentement examinées et sera abordée au point suivant, en relation avec l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires. Enfin, la circonstance que M. Diallo était nourri grâce aux vivres que ses proches lui apportaient sur son lieu de détention — ce que la RDC ne conteste pas — ne suffit pas à établir en elle-même l'existence de mauvais traitements, dès lors que l'accès des proches à la personne privée de liberté n'était pas entravé.

89. En conclusion, la Cour estime qu'il n'a pas été démontré que M. Diallo ait été soumis à des traitements prohibés par l'article 10, paragraphe 1, du Pacte.

d) *La violation alléguée des dispositions de l'article 36, paragraphe 1, alinéa* b)*, de la convention de Vienne sur les relations consulaires*

90. Aux termes de l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires:

> «Si l'intéressé en fait la demande, les autorités compétentes de l'Etat de résidence doivent avertir sans retard le poste consulaire de l'Etat d'envoi lorsque, dans sa circonscription consulaire, un ressortissant de cet Etat est arrêté, incarcéré ou mis en état de détention préventive ou toute autre forme de détention. Toute communication adressée au poste consulaire par la personne arrêtée, incarcérée ou mise en état de détention préventive ou toute autre forme de déten-

87. The Applicant invokes in this connection Article 10, paragraph 1, of the Covenant, according to which: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Article 7 of the Covenant, providing that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment", and Article 5 of the African Charter, stating that "[e]very individual shall have the right to the respect of the dignity inherent in a human being", are also pertinent in this area.

There is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments.

88. The Court notes, however, that Guinea has failed to demonstrate convincingly that Mr. Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr. Diallo was able to communicate with his relatives and his lawyers without any great difficulty and, even if this had not been the case, such constraints would not per se have constituted treatment prohibited by Article 10, paragraph 1, of the Covenant and by general international law. The question of Mr. Diallo's communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations. Finally, that Mr. Diallo was fed thanks to the provisions his relatives brought to his place of detention — which the DRC does not contest — is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

89. In conclusion, the Court finds that it has not been demonstrated that Mr. Diallo was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant.

(d) *The alleged violation of the provisions of Article 36, paragraph 1* (b)*, of the Vienna Convention on Consular Relations*

90. Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations provides that:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said

tion doit également être transmise sans retard par lesdites autorités. Celles-ci doivent sans retard informer l'intéressé de ses droits aux termes du présent alinéa.»

91. Ces dispositions sont applicables, comme cela ressort de leurs termes mêmes, à toute privation de liberté quelle qu'en soit la nature, même en dehors de tout contexte de recherche des auteurs d'une infraction pénale. Elles sont donc applicables en l'espèce, ce que la RDC ne conteste pas.

92. Selon la Guinée, les dispositions précitées auraient été méconnues à l'occasion des arrestations de M. Diallo en novembre 1995 et janvier 1996, parce qu'il n'aurait pas alors été informé «sans retard» de son droit de solliciter l'assistance des autorités consulaires de son pays.

93. Tout au long de la procédure écrite et lors du premier tour des plaidoiries, la RDC n'a pas contesté l'exactitude, sur ce point, des allégations de la Guinée; elle n'a pas cherché à établir, ni même prétendu, que l'information requise par la dernière phrase de la disposition précitée avait été fournie à M. Diallo, et qu'elle l'avait été «sans retard» comme il est exigé par le texte.

La défenderesse a répondu au grief de la demanderesse en mettant en avant deux arguments: d'une part, la Guinée n'a pas apporté la preuve que M. Diallo avait demandé aux autorités congolaises d'avertir sans retard le poste consulaire de Guinée de sa situation; d'autre part, l'ambassadeur de Guinée à Kinshasa était au courant de l'arrestation et de la détention de M. Diallo, comme le prouvent les démarches qu'il a accomplies en sa faveur.

94. C'est seulement en réponse à la question posée par un juge lors de l'audience du 26 avril 2010 que la RDC a affirmé pour la première fois qu'elle avait «informé oralement M. Diallo aussitôt après sa détention de la possibilité de solliciter l'assistance consulaire de son Etat» (réponse écrite de la RDC remise au Greffe le 27 avril 2010, confirmée oralement à l'audience du 29 avril, lors du second tour de plaidoiries).

95. La Cour constate que les deux arguments mis en avant par la RDC jusqu'au second tour de plaidoiries sont dépourvus de pertinence. C'est aux autorités de l'Etat qui procède à l'arrestation qu'il appartient d'informer spontanément la personne arrêtée de son droit à demander que son consulat soit averti; le fait que cette personne n'ait rien demandé de tel non seulement ne justifie pas le non-respect de l'obligation d'informer qui est à la charge de l'Etat qui procède à l'arrestation, mais pourrait bien s'expliquer justement, dans certains cas, par le fait que cette personne n'a pas été informée de ses droits à cet égard (*Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 46, par. 76). Par ailleurs, le fait que les autorités consulaires de l'Etat de nationalité de la personne arrêtée aient été informées par d'autres voies de l'arrestation de cette personne ne fait pas disparaître la violation de l'obligation d'informer celle-ci «sans retard» de ses droits, lorsque cette violation a été commise.

authorities shall inform the person concerned without delay of his rights under this subparagraph."

91. These provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

92. According to Guinea, these provisions were violated when Mr. Diallo was arrested in November 1995 and January 1996, because he was not informed "without delay" at those times of his right to seek assistance from the consular authorities of his country.

93. At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea's allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr. Diallo, or that it was supplied "without delay", as the text requires.

The Respondent replied to the Applicant's allegation with two arguments: that Guinea had failed to prove that Mr. Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean Ambassador in Kinshasa was aware of Mr. Diallo's arrest and detention, as evidenced by the steps he took on his behalf.

94. It was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had "orally informed Mr. Diallo immediately after his detention of the possibility of seeking consular assistance from his State" (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

95. The Court notes that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 46, para. 76). Moreover, the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights "without delay".

96. Quant à l'affirmation de la RDC, présentée dans les conditions ci-dessus décrites, selon laquelle M. Diallo avait été «informé oralement» de ses droits dès le moment où il a été arrêté, la Cour ne peut manquer de relever qu'elle est arrivée très tard dans la procédure, alors que ce point était en cause depuis le début, et qu'elle n'est pas assortie du moindre élément de nature à la corroborer. La Cour ne saurait donc lui prêter crédit.

97. En conséquence, la Cour conclut qu'il y a eu violation, de la part de la RDC, de l'article 36, paragraphe 1, alinéa *b)*, de la convention de Vienne sur les relations consulaires.

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98. La Guinée a soutenu par ailleurs que l'expulsion de M. Diallo, étant donné les conditions dans lesquelles elle avait été mise à exécution, a violé son droit de propriété, garanti par l'article 14 de la Charte africaine, parce que l'intéressé a été contraint de quitter le territoire congolais en y laissant la plus grande partie de ses biens.

De l'avis de la Cour, cet aspect du différend se rapporte moins à la question de la licéité de l'expulsion de M. Diallo au regard des obligations internationales de la RDC qu'à celle du dommage que M. Diallo a subi du fait des actes internationalement illicites dont il a été victime. La Cour l'examinera donc plus loin dans le présent arrêt, dans le cadre de la question de la réparation due par la défenderesse (voir paragraphes 160-164 ci-après).

III. La protection des droits propres de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre

99. Africom-Zaïre et Africontainers-Zaïre sont deux personnes morales de droit zaïrois constituées en sociétés privées à responsabilité limitée (SPRL) et inscrites au registre du commerce de la ville de Kinshasa. La SPRL étant une forme de société commerciale propre aux systèmes de droit civil et n'ayant pas d'équivalent précis dans les systèmes de *common law*, la Cour reprendra, dans la version anglaise du présent arrêt, certaines expressions françaises utilisées en droit congolais, à savoir «parts sociales», «associé», «gérant», «gérance» et «gérant associé». Le capital d'une SPRL est divisé en «parts sociales» égales entre elles. Aux termes de l'article 36 du décret de l'Etat indépendant du Congo du 27 février 1887 sur les sociétés commerciales, tel qu'amendé par le décret du 23 juin 1960 (ci-après «le décret de 1887»), ces parts sont nominatives et non librement transmissibles. Elles sont en outre «uniformes», c'est-à-dire qu'elles confèrent à leurs détenteurs (dénommés «associés»: voir, par exemple, les articles 43, 44, 45 et 51 du décret de 1887) des droits égaux. La gestion (ou «gérance») d'une SPRL est confiée à un mandataire dénommé «gérant», lequel peut, le cas échéant, être un associé (on parle en ce cas de «gérant associé»).

96. As for the DRC's assertion, made in the conditions described above, that Mr. Diallo was "orally informed" of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

97. Consequently, the Court finds that there was a violation by the DRC of Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations.

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98. Guinea has further contended that Mr. Diallo's expulsion, given the circumstances in which it was carried out, violated his right to property, guaranteed by Article 14 of the African Charter, because he had to leave behind most of his assets when he was forced to leave the Congo.

In the Court's view, this aspect of the dispute has less to do with the lawfulness of Mr. Diallo's expulsion in the light of the DRC's international obligations and more to do with the damage Mr. Diallo suffered as a result of the internationally wrongful acts of which he was a victim. The Court will therefore examine it later in this Judgment, within the context of the question of reparation owed by the Respondent (see paragraphs 160-164 below).

III. Protection of Mr. Diallo's Direct Rights as *Associé* in Africom-Zaire and Africontainers-Zaire

99. Africom-Zaire and Africontainers-Zaire are two corporate entities incorporated under Zairean law in the form of *sociétés privées à responsabilité limitée* (SPRLs) and entered in the Trade Register of the city of Kinshasa. Because the SPRL, as a form of commercial company, is specific to civil-law systems and has no precise equivalent in common-law systems, the Court will use certain French terms of DRC law in the English version of the present Judgment, namely, *parts sociales*, *associé*, *gérant*, *gérance* and *gérant associé*. The capital of an SPRL is divided into equal *parts sociales*. Under Article 36 of the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations, as amended by the Decree of 23 June 1960 (hereinafter: "the 1887 Decree"), the *parts* are nominative and not freely transferable. They are also "uniform", i.e., they confer identical rights upon their holders (called *associés*: see, e.g., Articles 43, 44, 45 and 51 of the 1887 Decree). Management (the *gérance*) of an SPRL is entrusted to an agent, called the *gérant*, who may also be an *associé* (in which case there is a *gérant associé*).

100. Dans son arrêt du 24 mai 2007, la Cour a indiqué qu'elle n'avait pas «à déterminer, [au] stade [des exceptions préliminaires], quels [étaient] les droits spécifiques qui s'attach[ai]ent au statut d'associé et quels [étaient] ceux qui s'attach[ai]ent aux fonctions de gérant d'une SPRL, en droit congolais», mais que ce serait,

> «le cas échéant, au stade du fond qu'elle aura[it] à définir la nature et le contenu précis de ces droits, ainsi que leurs limites. C[e serait] à ce stade de la procédure encore qu'il reviendra[it], le cas échéant, à la Cour d'apprécier les effets sur ces divers droits des mesures prises à l'encontre de M. Diallo.» (*C.I.J. Recueil 2007 (II)*, p. 606, par. 66.)

101. Dans ses conclusions finales, la Guinée a prié la Cour de dire que, s'agissant des droits propres de M. Diallo en tant qu'associé, la RDC était l'auteur de plusieurs faits internationalement illicites qui engageaient sa responsabilité envers elle. En particulier, elle a prétendu que la RDC avait manqué à ses obligations internationales en

> «privant [M. Diallo] de l'exercice de ses droits de propriété, de contrôle et de direction des sociétés qu'il a[vait] fondées en RDC et dont il était l'unique associé, en l'empêchant de poursuivre à ce titre le recouvrement des nombreuses créances dues auxdites sociétés, tant par la RDC elle-même que par d'autres co-contractants, [et] en procédant à l'expropriation de fait des propriétés de M. Diallo».

102. Dans ses conclusions finales, la RDC a, au contraire, réaffirmé qu'elle n'était l'auteur d'aucun fait internationalement illicite envers la Guinée en ce qui a trait aux droits propres de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre.

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103. Avant d'examiner les diverses allégations formulées à cet égard par les Parties, la Cour doit éclaircir certaines questions relatives à l'existence juridique des deux sociétés, d'une part, et au rôle et à la participation de M. Diallo dans celles-ci, d'autre part. En effet, comme la Cour l'a établi dans son arrêt du 24 mai 2007, les droits des associés sont «des droits propres de [ceux]-ci *dans [leur] relation avec la personne morale*» (*C.I.J. Recueil 2007 (II)*, p. 606, par. 64; les italiques sont de la Cour). En d'autres termes, les droits propres des associés existent parce que les sociétés constituent des «individualités juridiques distinctes de celles des associés» (ainsi qu'indiqué à l'article premier du décret congolais du 27 février 1887 sur les sociétés commerciales), et ces droits sont ceux des associés dans leur relation avec la société dont ils détiennent des parts. En l'espèce, il importe tout particulièrement de clarifier les questions de l'existence juridique des sociétés et de la participation et du rôle de M. Diallo dans celles-ci, puisque, selon la Guinée, M. Diallo en était l'unique gérant

100. In its Judgment of 24 May 2007, the Court stated that it did not have "to determine, at [the preliminary objections] stage . . ., which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law", but that it was

> "at the merits stage, as appropriate, that [it] will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo." (*I.C.J. Reports 2007 (II)*, p. 606, para. 66.)

101. In its final submissions, Guinea asked the Court to find that, on the issue of Mr. Diallo's direct rights as *associé*, the DRC had committed several internationally wrongful acts which engage its responsibility towards Guinea. Specifically, Guinea contended that the DRC had breached its international obligations by:

> "depriving [Mr. Diallo] of the exercise of his rights of ownership, oversight and management in respect of the companies which he founded in the DRC and in which he was the sole *associé*; [by] preventing him in that capacity from pursuing recovery of the numerous debts owed to the said companies both by the DRC itself and by other contractual partners; and [by] expropriating *de facto* Mr. Diallo's property".

102. In contrast, the DRC reiterated in its final submissions that it had committed no internationally wrongful acts towards Guinea in respect of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

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103. Before addressing the various claims made by the Parties in this regard, it is necessary for the Court to clarify matters relating to the legal existence of the two companies and to Mr. Diallo's role and participation in them. Indeed, as the Court found in its Judgment of 24 May 2007, the rights of *associés* are "their direct rights *in relation to a legal person*" (*I.C.J. Reports 2007 (II)*, p. 606, para. 64; emphasis added). In other words, direct rights as *associé* exist because companies have "juridical personalities distinct from those of the *associés*" (as stated in Article 1 of the Congolese Decree of 27 February 1887 on commercial corporations), and they are rights of the *associés* in their relationship with the company whose *parts* they hold. In the present case, it is especially important to clarify the issues of the legal existence of the companies and of Mr. Diallo's participation and role in them, since Guinea claims that he was the sole *gérant* and also, directly or indirectly, the sole *associé* of the two companies. As mentioned by the Court in its Judgment of 24 May 2007,

aussi bien que, directement ou indirectement, l'unique associé. Comme la Cour l'a relevé dans son arrêt du 24 mai 2007, la Guinée soutient que, «en fait comme en droit, il était à peu près impossible de distinguer M. Diallo de ses sociétés» (*C.I.J. Recueil 2007 (II)*, p. 604, par. 56). La RDC considère, quant à elle, que le nombre de parts détenues par M. Diallo dans la société Africom-Zaïre n'a jamais été établi de manière incontestable; elle ajoute que les deux sociétés continuent officiellement d'exister et qu'elles doivent donc être distinguées de M. Diallo en tant qu'associé. En outre, la RDC affirme que les deux sociétés, faute d'activité économique, se trouvaient, avant l'expulsion de M. Diallo, en situation de «faillite non déclarée» depuis de nombreuses années.

104. Pour déterminer quels étaient les droits de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre, et s'il a été contrevenu à ces droits, la Cour devra en premier lieu examiner la question de l'existence et de la structure de ces sociétés en droit congolais. Ainsi qu'elle l'a déclaré dans l'affaire de la *Barcelona Traction*:

> «Dans ce domaine, le droit international est appelé à reconnaître des institutions de droit interne qui jouent un rôle important et sont très répandues sur le plan international ... Cela veut ... dire que le droit international a dû reconnaître dans la société anonyme une institution créée par les Etats en un domaine qui relève essentiellement de leur compétence nationale. Cette reconnaissance nécessite que le droit international se réfère aux règles pertinentes du droit interne, chaque fois que se posent des questions juridiques relatives aux droits des Etats qui concernent le traitement des sociétés et des actionnaires et à propos desquels le droit international n'a pas fixé ses propres règles.» (*Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 33-34, par. 38.)

Dans son arrêt du 24 mai 2007, la Cour a déjà conclu que les droits propres de M. Diallo en tant qu'associé «[étaient] définis par le droit interne» de la RDC en tant qu'Etat où les sociétés avaient été constituées (*C.I.J. Recueil 2007 (II)*, p. 606, par. 64), et qu'il convenait de se référer en particulier au décret congolais du 27 février 1887 sur les sociétés commerciales «afin de préciser la nature juridique des sociétés Africom-Zaïre et Africontainers-Zaïre» (*ibid.*, p. 605, par. 62).

105. Dans son arrêt du 24 mai 2007, la Cour a relevé que, en vertu du décret du 27 février 1887, les SPRL sont des sociétés «que forment des personnes, n'engageant que leur apport, qui ne [font] pas publiquement appel à l'épargne et dont les parts [sociales] obligatoirement uniformes et nominatives ne sont pas librement transmissibles» (article 36 du décret du 27 février 1887 sur les sociétés commerciales; *C.I.J. Recueil 2007 (II)*, p. 594, par. 25; voir paragraphe 99 ci-dessus). La Cour a également indiqué ce qui suit:

> «[l]e droit congolais attribue à la SPRL une personnalité juridique

Guinea maintains that "in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies" (*I.C.J. Reports 2007 (II)*, p. 604, para. 56). The DRC, for its part, considers that the number of *parts* held by Mr. Diallo in Africom-Zaire has never been indisputably established; it adds that the two companies are still formally in existence and are therefore to be distinguished from Mr. Diallo as *associé*. Moreover, the DRC contends that, for lack of any commercial activity, the two SPRLs were in a state of "undeclared bankruptcy" for many years before Mr. Diallo's expulsion.

104. In order to determine Mr. Diallo's legal rights as *associé* in Africom-Zaire and Africontainers-Zaire, and whether those rights have been infringed, the Court will have to examine in the first instance the existence and structure of those companies under DRC law. As the Court stated in the *Barcelona Traction* case:

> "In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field . . . All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, pp. 33-34, para. 38.)

In the Judgment of 24 May 2007, the Court has already found that Mr. Diallo's direct rights as *associé* "are defined by the domestic law" of the DRC, being the State of incorporation of the companies (*I.C.J. Reports 2007 (II)*, p. 606, para. 64), and that the Congolese Decree of 27 February 1887 on commercial corporations must in particular be referred to "in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire" (*ibid.*, p. 605, para. 62).

105. In its Judgment of 24 May 2007, the Court observed that, under the Decree of 27 February 1887, SPRLs are companies "which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales*, required to be uniform and nominative, are not freely transferable" (Article 36 of the Decree of 27 February 1887 on commercial corporations; *I.C.J. Reports 2007 (II)*, p. 594, para. 25; see paragraph 99 above). The Court also stated that

> "Congolese law accords an SPRL independent legal personality

> indépendante et distincte de celle des associés, notamment en ce que le patrimoine des associés est complètement séparé de celui de la société, et que ceux-ci ne sont responsables des dettes de la société qu'à hauteur de leur apport à celle-ci. Il en découle que les créances et les dettes de la société à l'égard des tiers relèvent respectivement des droits et des obligations de celle-ci. Ainsi que l'a souligné la Cour dans l'affaire de la *Barcelona Traction*: «Tant que la société subsiste, l'actionnaire n'a aucun droit à l'actif social.» (*C.I.J. Recueil 1970*, p. 34, par. 41.) Cela demeure la règle fondamentale en la matière, qu'il s'agisse d'une SPRL ou d'une société anonyme.» (*C.I.J. Recueil 2007 (II)*, p. 606, par. 63.)

106. Il n'est pas contesté qu'Africom-Zaïre, société d'import/export, a été fondée en 1974 par M. Diallo, qui en a été le gérant pendant de nombreuses années. Comme cela est indiqué ci-après (voir paragraphe 110), c'est en cette qualité que M. Diallo a pris part à la création de la société Africontainers-Zaïre. La Guinée affirme qu'il était en outre le seul associé d'Africom-Zaïre, ce que la RDC a toutefois mis en doute au cours de la procédure. En particulier, la RDC soutient que le nombre de parts détenues par M. Diallo dans la société Africom-Zaïre n'a jamais été dûment établi et que la Guinée n'a pas prouvé que l'intéressé était toujours associé de cette société au moment de son expulsion.

107. Les statuts de la société Africom-Zaïre ne figurant pas dans le dossier soumis à la Cour, celle-ci ne peut déterminer avec précision la nature et le niveau de la participation de M. Diallo dans ladite société au moment de sa création. Néanmoins, le droit congolais exigeant qu'une SPRL soit constituée de plus d'un associé — ainsi qu'il ressort des articles pertinents du décret de 1887, notamment l'article 36 précité («[l]a société privée à responsabilité limitée est celle que forment *des personnes*» (les italiques sont de la Cour)) et l'article 78, qui fait référence à l'assemblée générale «des associés» —, et aucune des Parties n'ayant contesté le fait que la société Africom-Zaïre avait été dûment constituée en tant que SPRL en vertu du décret de 1887, force est de conclure que, au tout début de son existence, cette société devait compter, en sus de M. Diallo, au moins un autre associé.

108. Les procès-verbaux des assemblées générales de la société Africom-Zaïre n'ayant pas été produits, la Cour est dans l'impossibilité de déterminer si — et, le cas échéant, quand — M. Diallo est devenu l'unique associé de cette SPRL. Elle estime toutefois que cette question factuelle est dépourvue d'incidence juridique quant à la question qui occupe ici la Cour, puisqu'il n'a pas été établi que, en droit congolais, une SPRL cessait automatiquement d'exister en tant que personne morale lorsqu'une seule personne devenait propriétaire de l'ensemble de ses parts sociales. De surcroît, il est manifeste que les activités commerciales d'Africom-Zaïre en RDC n'ont en pratique aucunement souffert du fait qu'elle ait pu devenir une SPRL unipersonnelle. Cela est attesté par la relation commerciale établie entre Africom-Zaïre et les autorités du Zaïre (puis de la

> distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company's debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the *Barcelona Traction* case: 'So long as the company is in existence the shareholder has no right to the corporate assets.' (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for an SPRL or for a public limited company." (*I.C.J. Reports 2007 (II)*, p. 606, para. 63.)

106. It is not disputed that Africom-Zaire, an import-export company, was founded in 1974 by Mr. Diallo, and that he has been the *gérant* of that company for many years. As mentioned below (see paragraph 110), it was in that capacity that Mr. Diallo took part in the creation of Africontainers-Zaire. Guinea contends that he was also the sole *associé* of Africom-Zaire. This has however been questioned by the DRC in the course of the proceedings. In particular, the DRC contends that the number of *parts* held by Mr. Diallo in Africom-Zaire has never been duly documented and that Guinea has not established that he was still an *associé* of that company at the time of his expulsion.

107. Because the record before the Court does not include Africom-Zaire's Articles of Incorporation, the Court is unable to determine precisely the nature and extent of Mr. Diallo's holding in that company at the time it was formed. Nevertheless, as DRC law requires that an SPRL be formed by more than one *associé* — as seen in the relevant Articles of the 1887 Decree, including Article 36, cited above ("[a]n [SPRL] is a company formed by *persons*" (emphasis added)) and Article 78, which refers to the general meeting "of the *associés*" — and since neither of the Parties has contested the fact that Africom-Zaire was duly formed as an SPRL under the 1887 Decree, the conclusion is inescapable that, at the very first stage of its existence, Africom-Zaire must have had, besides Mr. Diallo, at least one other *associé*.

108. As the Court has not been provided with minutes of general meetings of Africom-Zaire, it is unable to conclude whether Mr. Diallo has become the sole *associé* of that SPRL and, if so, when this occurred. In the opinion of the Court, that factual issue is however of no legal consequence to the issue under consideration here, since it has not been established that, under DRC law, an SPRL automatically ceases to exist as a legal person when all its *parts sociales* come to be owned by a single person. Moreover, it is clear that in practice, the business activities of Africom-Zaire in the DRC were not in any way impaired by the fact that it may have become a unipersonal SPRL. This is shown by the commercial relationship established by Africom-Zaire with the authorities of Zaire (and later the DRC), in which no questions or objections were

RDC), dans le cadre de laquelle aucune question ou objection n'a été soulevée quant à la nature juridique d'Africom-Zaïre et au fait que celle-ci ait pu en venir à ne compter qu'un seul associé. La RDC a affirmé que, au milieu des années 1980, Africom-Zaïre avait cessé toute activité commerciale et qu'elle avait, pour cette raison, été radiée du registre du commerce. Toutefois, elle n'a pas avancé que cette mesure administrative revenait à mettre fin à la personnalité juridique distincte de la SPRL. En conséquence, la Cour conclut que, quand bien même M. Diallo en serait devenu l'unique associé, la société Africom-Zaïre a conservé sa personnalité juridique distincte. Cette SPRL demeure donc régie par le décret de 1887, en l'absence de législation congolaise spécifique aux sociétés dont les parts sociales ne seraient plus détenues que par un seul associé ou qui seraient, en fait, entièrement contrôlées par le gérant associé.

109. S'agissant de la question du nombre de parts détenues par M. Diallo dans la société Africom-Zaïre, la Cour relève que la RDC n'a pas contesté que l'intéressé était bien un associé de cette société puisqu'elle a admis qu'il était le gérant associé, au sens de l'article 67 du décret du 27 février 1887 (voir paragraphe 138 ci-après), des sociétés Africontainers-Zaïre et Africom-Zaïre. Par ailleurs, et même s'il est impossible d'apprécier avec précision le niveau de participation de M. Diallo dans la société Africom-Zaïre, la Cour estime qu'il découle de l'ensemble des éléments qui lui ont été soumis que celui-ci détenait une partie à ce point importante des parts sociales de cette société qu'il la contrôlait et pouvait empêcher que d'éventuels autres associés, réunis en assemblée générale (voir paragraphe 120 ci-après sur le droit congolais relatif au droit des associés de demander la convocation d'une assemblée générale), ne mettent en cause sa gérance, notamment sa décision de passer contrat avec les pouvoirs publics, puis d'engager et de poursuivre des actions à l'encontre de l'Etat zaïrois devant les juridictions internes (voir paragraphe 114 ci-après). Ayant ainsi conclu que M. Diallo était un associé important de la société Africom-Zaïre, la Cour estime qu'il revient à la RDC de prouver que M. Diallo avait cessé d'être associé de ladite société au moment de son expulsion, comme elle le donne à entendre (voir paragraphe 106 ci-dessus). Or, de l'avis de la Cour, cela n'a pas été établi. La Cour considère dès lors que, tout au long de la période couverte par le présent différend, M. Diallo détenait une très grande partie, sinon la totalité, des parts sociales de la société Africom-Zaïre, ce qui lui a permis de diriger et de contrôler pleinement cette société, à la fois comme gérant et comme associé. C'est uniquement en cas de mise en liquidation de la société qu'il conviendrait d'établir le montant exact de la participation de M. Diallo en tant qu'associé, afin de lui transférer, à hauteur de la part du capital qui lui appartient, la valeur nette de l'actif de la société.

110. Le 18 septembre 1979, M. Diallo a pris part, en tant que gérant d'Africom-Zaïre, à la création d'une autre SPRL, Africontainers-Zaïre, spécialisée dans le transport de marchandises par conteneurs. La Guinée a présenté, dans les annexes à son mémoire, l'acte notarié des statuts de la société, en date du 18 septembre 1979. Le capital de cette nouvelle société

advanced as to the legal nature of Africom-Zaire and the fact that it may have become a company with a sole *associé*. The DRC has stated that by the mid-1980s, Africom-Zaire had ceased all commercial activity and for that reason had been struck off the Trade Register. However, the DRC did not argue that that administrative measure amounted to the ending of the distinct legal personality of the SPRL. The Court thus concludes that, notwithstanding the fact that Mr. Diallo may have become its sole *associé*, Africom-Zaire kept its distinct legal personality. This SPRL thus remains governed by the 1887 Decree, in the absence of Congolese legislation specifically regulating companies whose *parts sociales* are owned by a single *associé*, or which, *de facto*, are fully controlled by the *gérant associé*.

109. On the question of the number of shares held by Mr. Diallo in Africom-Zaire, the Court notes that the DRC has not contested that he was an *associé* in the company, as it has conceded that he was the *gérant associé*, within the meaning of Article 67 of the Decree of 27 February 1887 (see paragraph 138 below), of Africontainers-Zaire and of Africom-Zaire. Moreover, and even if it is impossible to quantify precisely the extent of his holding in Africom-Zaire, the Court considers that all the evidence submitted to it suggests that Mr. Diallo held such a significant part of the *parts sociales* in the company that he controlled it and could have prevented any other *associés* acting in a general meeting (see paragraph 120 below on the DRC law relating to the right of the *associés* to request that a general meeting be convened) from challenging his management, including in particular his decision to contract with the public authorities and to initiate and pursue proceedings against the State of Zaire in domestic courts (see paragraph 114 below). Having thus concluded that Mr. Diallo was a major *associé* in Africom-Zaire, the Court considers that it is for the DRC to prove that Mr. Diallo might have ceased to be an *associé* in Africom-Zaire at the time of his expulsion, as it suggests (see paragraph 106 above). In the opinion of the Court, this has not however been established. The Court considers therefore that a very large part of the *parts sociales* of Africom-Zaire, if not all of them, were owned by Mr. Diallo throughout the years over which the current dispute extends, allowing him to be fully in charge and in control of that company, both as *gérant* and as *associé*. Establishing the precise holding of Mr. Diallo in Africom-Zaire as *associé* would only be necessary if the company were liquidated, so as to transfer to Mr. Diallo, in due proportion to his capital ownership, the net value of the company's assets.

110. On 18 September 1979, as *gérant* of Africom-Zaire, Mr. Diallo took part in the creation of another SPRL, Africontainers-Zaire, which specialized in transporting goods in containers. The notarial act of 18 September 1979 constituting Africontainers-Zaire's Articles of Incorporation was submitted by Guinea as part of the documents included with its

était détenu à hauteur de 40 % par M. Kibeti Zala, de nationalité zaïroise, à hauteur de 30 % par M^me^ Colette Dewast, de nationalité française, et à hauteur de 30 % par la société Africom-Zaïre. En 1980, M. Zala et M^me^ Dewast se retirèrent de la société Africontainers-Zaïre. A partir de cette époque, le capital de cette dernière fut réparti comme suit : 60 % à la société Africom-Zaïre et 40 % à M. Diallo. M. Diallo devint à la même époque le gérant de la société Africontainers-Zaïre pour une durée indéterminée, remplaçant ainsi M. Alain David, désigné pour occuper en premier cette fonction dans les statuts de la société. La Cour conclut que, puisque, comme cela a été établi précédemment (voir paragraphe 109), M. Diallo dirigeait et contrôlait pleinement la société Africom-Zaïre, il dirigeait et contrôlait aussi pleinement, de manière directe ou indirecte, la société Africontainers-Zaïre.

111. Sur la base des documents versés au dossier, la RDC soutient que, à la suite de son expulsion, M. Diallo a nommé un nouveau gérant d'Africontainers-Zaïre, M. N'Kanza. A cet égard, la RDC relève que celui-ci a procédé à l'inventaire des biens de la société et représenté cette dernière aux négociations avec la société Gécamines en 1997, soit plus d'une année après l'expulsion de M. Diallo. La Guinée fait valoir que, contrairement à ce que soutient la RDC, M. Diallo n'a pas nommé M. N'Kanza en qualité de nouveau gérant d'Africontainers-Zaïre. Premièrement, elle souligne l'absence d'éléments de preuve attestant que se soit jamais tenue une assemblée générale extraordinaire au cours de laquelle M. N'Kanza aurait pu être nommé gérant de cette société. Deuxièmement, elle se réfère à la décision de la cour d'appel de Kinshasa/Gombe du 20 juin 2002, dans laquelle M. Diallo est présenté comme le gérant associé d'Africontainers-Zaïre. Enfin, elle fait observer que, dans certains documents relatifs à cette société qui ont été soumis à la Cour, M. N'Kanza est présenté non pas comme gérant, mais comme « directeur d'exploitation », et que M. Diallo a signé les lettres qu'il a adressées à la RDC en tant que « gérant d'Africontainers-Zaïre ».

112. La Cour relève que la RDC n'a pas établi, sur la base des actes pertinents de la société, que M. N'Kanza eût été nommé gérant d'Africontainers-Zaïre. En particulier, aucune assemblée générale n'a été tenue au cours de laquelle M. N'Kanza aurait été nommé gérant (voir paragraphes 129 et 133 ci-après, relatifs à la nomination d'un gérant en application de l'article 65 du décret de 1887). La Cour conclut donc que le seul gérant agissant pour le compte de l'une ou l'autre des sociétés, tant au moment des détentions de M. Diallo qu'après son expulsion, était M. Diallo lui-même.

113. La Cour estime par ailleurs qu'Africom-Zaïre et Africontainers-Zaïre n'ont pas cessé d'exister. En l'absence d'une liquidation judiciaire, la dissolution d'une société ne peut, aux termes du décret de 1887, « être décidée que par l'assemblée générale » (art. 99). Une fois la dissolution décidée, la procédure de liquidation commence. Or, la Cour observe qu'aucun élément de preuve n'établit qu'une liquidation judiciaire aurait eu lieu ou qu'une assemblée générale aurait été tenue aux fins de

Memorial. The capital in the new company was held as follows: 40 per cent by Mr. Kibeti Zala, a Zairean national; 30 per cent by Ms Colette Dewast, a French national, and 30 per cent by Africom-Zaire. Mr. Zala and Ms Dewast withdrew from Africontainers-Zaire in 1980. From that time onwards, the capital in Africontainers-Zaire was held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became *gérant* of Africontainers-Zaire for an indefinite period, thus replacing Mr. Alain David, who had been appointed the first *gérant* in the Articles of Incorporation. The Court concludes that since Mr. Diallo was, as established above (see paragraph 109), fully in charge and in control of Africom-Zaire, he was also, directly or indirectly, fully in charge and in control of Africontainers-Zaire.

111. Relying on documents submitted to the Court, the DRC alleges that, following his expulsion, Mr. Diallo appointed a new *gérant* for Africontainers-Zaire, Mr. N'Kanza. The DRC notes in this regard that it was Mr. N'Kanza who made the inventory of Africontainers' property and represented the company in the negotiations with Gécamines in 1997, over one year after Mr. Diallo's expulsion. Guinea argues that, contrary to the assertion by the DRC, Mr. Diallo did not appoint Mr. N'Kanza as a new *gérant* for Africontainers-Zaire. First, it draws attention to the lack of evidence establishing that an extraordinary general meeting was ever held at which Mr. N'Kanza might have been appointed *gérant* of Africontainers-Zaire. Secondly, Guinea cites the decision of the *Cour d'Appel* of Kinshasa/Gombe of 20 June 2002, in which Mr. Diallo is referred to as the *gérant associé* of Africontainers-Zaire. Finally, Guinea observes that in documents relating to Africontainers-Zaire submitted to the Court, Mr. N'Kanza is not referred to as *gérant*, but rather as *"Directeur d'exploitation"*, and that Mr. Diallo signed his letters to the DRC as "*gérant* of Africontainers-Zaire".

112. The Court observes that the DRC has failed to establish, by means of relevant corporate documents, that Mr. N'Kanza was appointed *gérant* of Africontainers-Zaire. In particular, no general meeting appointing Mr. N'Kanza as *gérant* took place (see paragraphs 129 and 133 below on the appointment of the *gérant* under Article 65 of the 1887 Decree). The Court therefore concludes that the only *gérant* acting for either of the companies, both at the time of Mr. Diallo's detentions and after his expulsion, was Mr. Diallo himself.

113. The Court is moreover of the view that Africom-Zaire and Africontainers-Zaire have not ceased to exist. In the absence of a judicial liquidation, the dissolution of a company, according to the 1887 Decree, "can only be decided by a general meeting" (Art. 99). Once the dissolution has been decided upon, the company goes into a process of liquidation. The Court notes that there is however no evidence before it indicating that a judicial liquidation took place or that a general meeting

décider de la dissolution ou de la liquidation de l'une ou de l'autre de ces sociétés.

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114. Etant parvenue à la conclusion que M. Diallo, en tant que gérant comme en tant qu'associé des deux sociétés, dirigeait et contrôlait celles-ci pleinement, mais que ces dernières demeuraient néanmoins des entités juridiques distinctes de sa personne, la Cour va maintenant aborder les différentes demandes de la Guinée relatives aux droits propres de M. Diallo en tant qu'associé. Ce faisant, elle devra déterminer si, en droit congolais, les droits revendiqués constituent effectivement des droits propres de l'associé, ou s'ils constituent plutôt des droits ou obligations des sociétés. Comme la Cour l'a déjà rappelé, les demandes portant sur des droits autres que des droits propres de M. Diallo en tant qu'associé ont été déclarées irrecevables dans son arrêt du 24 mai 2007; elle ne peut donc plus les examiner. Tel est en particulier le cas des demandes concernant les droits contractuels d'Africom-Zaïre contre l'Etat zaïrois (RDC), d'une part, et d'Africontainers-Zaïre contre les sociétés Gécamines, Onatra, Fina et Shell, d'autre part.

115. Dans les motifs qui vont suivre, la Cour veillera à maintenir strictement la distinction entre les atteintes alléguées aux droits des deux SPRL en cause et les atteintes alléguées aux droits propres de M. Diallo en tant qu'associé de celles-ci (voir *C.I.J. Recueil 2007 (II)*, p. 605-606, par. 62-63). Qu'une telle distinction puisse paraître artificielle dans le cas d'une SPRL dont les parts sociales sont détenues en fait par un seul associé, la Cour le conçoit. Elle n'en reste pas moins juridiquement fondée, et il est indispensable de l'observer rigoureusement dans la présente affaire. La Guinée elle-même accepte, dans la phase actuelle de la procédure, cette distinction, et la plupart de ses arguments sont précisément fondés sur elle. La Cour doit se prononcer sur les prétentions du demandeur telles que celui-ci les a présentées.

116. Les demandes relatives aux droits propres de M. Diallo en tant qu'associé formulées par la Guinée concernent le droit de prendre part aux assemblées générales des deux SPRL et d'y voter, le droit de nommer un gérant et le droit de surveiller et de contrôler la gérance des sociétés. La Guinée présente également une demande relative au droit de propriété de M. Diallo sur ses parts sociales dans les sociétés Africom-Zaïre et Africontainers-Zaïre. La Cour va à présent examiner ces différentes demandes.

A. Le droit de prendre part aux assemblées générales et d'y voter

117. La Guinée soutient que, en expulsant M. Diallo, la RDC l'a privé de son droit de prendre part aux assemblées générales et d'y voter, droit garanti par l'article 79 du décret congolais du 27 février 1887 sur les sociétés commerciales. Elle affirme que, en vertu du droit congolais, les

of either of the two companies was held for the purposes of their dissolution or liquidation.

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114. Having reached the conclusion that Mr. Diallo was, both as *gérant* and *associé* of the two companies, fully in charge and in control of them, but that they nevertheless remained legal entities distinct from him, the Court will now address the various claims of Guinea pertaining to the direct rights of Mr. Diallo as *associé*. In doing so, the Court will have to assess whether, under DRC law, the claimed rights are indeed direct rights of the *associé*, or whether they are rather rights or obligations of the companies. As the Court has already pointed out, claims relating to rights which are not direct rights held by Mr. Diallo as *associé* have been declared inadmissible by the Judgment of 24 May 2007; they can therefore no longer be entertained. In particular, this is the case of the claims relating to the contractual rights of Africom-Zaire against the State of Zaire (DRC), and of Africontainers-Zaire against the Gécamines, Onatra, Fina and Shell companies.

115. In the following paragraphs, the Court is careful to maintain the strict distinction between the alleged infringements of the rights of the two SPRLs at issue and the alleged infringements of Mr. Diallo's direct rights as *associé* of these latter (see *I.C.J. Reports 2007 (II)*, pp. 605-606, paras. 62-63). The Court understands that such a distinction could appear artificial in the case of an SPRL in which the *parts sociales* are held in practice by a single *associé*. It is nonetheless well-founded juridically, and it is essential to rigorously observe it in the present case. Guinea itself accepts this distinction in the present stage of the proceedings, and most of its arguments are indeed based on it. The Court has to deal with the claims as they were presented by the Applicant.

116. Guinea's claims relating to Mr. Diallo's direct rights as *associé* pertain to the right to participate and vote in general meetings of the two SPRLs, the right to appoint a *gérant*, and the right to oversee and monitor the management of the companies. Guinea also presents a claim in relation to the right to property concerning Mr. Diallo's *parts sociales* in Africom-Zaire and Africontainers-Zaire. The Court will now address those different claims.

A. The Right to Take Part and Vote in General Meetings

117. Guinea maintains that the DRC, in expelling Mr. Diallo, deprived him of his right, guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations, to take part in general meetings and to vote. It claims that under DRC law general meetings of

assemblées générales d'Africom-Zaïre et d'Africontainers-Zaïre ne pouvaient se tenir en dehors du territoire de la RDC. La Guinée admet que M. Diallo aurait certes pu exercer ses droits d'associé à partir d'un territoire étranger en se faisant représenter par un mandataire de son choix, en application de l'article 81 du décret de 1887, mais elle fait valoir que la désignation d'un mandataire est uniquement une possibilité offerte à l'associé, dont le droit reconnu est clairement d'avoir le choix de désigner une personne pour le représenter ou de siéger en personne. La Guinée ajoute que, dans le cas d'Africontainers-Zaïre, il aurait été impossible à M. Diallo de se faire représenter par un mandataire puisque l'article 22 des statuts de la société stipule qu'un associé ne peut être représenté que par un autre associé et que M. Diallo était devenu le seul associé de cette SPRL au moment de son expulsion.

118. La RDC soutient qu'il ne peut y avoir eu violation du droit de M. Diallo de prendre part aux assemblées générales, dans la mesure où rien ne prouve qu'une assemblée générale ait été convoquée et que M. Diallo n'ait pu s'y rendre en raison de son éloignement du territoire de la RDC. Elle affirme que, en tout état de cause, le droit commercial congolais n'impose aucune obligation aux sociétés commerciales quant au lieu où une assemblée générale doit se tenir.

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119. Aux termes de l'article 79 du décret congolais du 27 février 1887 sur les sociétés commerciales, «[n]onobstant toute disposition contraire, tous les associés ont le droit de prendre part aux assemblées générales et jouissent d'une voix par part sociale». La Cour observe qu'il découle de cette disposition que le droit de prendre part aux assemblées générales et d'y voter appartient aux associés et non à la société. Cela est conforme à la conclusion à laquelle elle est parvenue en l'affaire de la *Barcelona Traction*, selon laquelle «il est bien connu» que le droit de prendre part aux assemblées générales et d'y voter est un droit «que le droit interne confère [aux associés]» et qui est «distinc[t] de ceux de la société» (*Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 36, par. 47).

120. La Cour abordera maintenant la question de savoir si la RDC, en expulsant M. Diallo, a privé celui-ci de son droit de prendre part aux assemblées générales et d'y voter, tel que garanti par l'article 79 du décret congolais du 27 février 1887 sur les sociétés commerciales.

121. Conformément à l'article 83 du même décret, la décision de convoquer une assemblée générale revient à la gérance ou aux commissaires (par. 1), mais les associés ont eux aussi le droit de demander la convocation d'une assemblée générale s'ils réunissent un cinquième du nombre total des parts sociales (par. 2). A la lumière des éléments de preuve que les Parties lui ont présentés, la Cour conclut que rien ne prouve que M. Diallo, agissant en qualité de gérant ou d'associé détenteur d'au moins un cinquième du nombre total des parts sociales, ait pris

Africom-Zaire and Africontainers-Zaire could not be held outside the territory of the DRC. Guinea admits that Mr. Diallo could of course have exercised his rights as *associé* from another country by appointing a proxy of his choice, in accordance with Article 81 of the 1887 Decree, but argues that appointing a proxy is merely an option available to the *associé*, whose recognized right is clearly to have a choice whether to appoint a representative or to attend in person. Guinea adds that, in the case of Africontainers-Zaire, it would have been impossible for Mr. Diallo to be represented by a proxy, since Article 22 of the Articles of Incorporation of the SPRL stipulates that only an *associé* may be appointed proxy of another, whereas he had become its sole *associé* at the time of his expulsion.

118. The DRC maintains that there cannot have been any violation of Mr. Diallo's right to take part in general meetings, as there has been no evidence that any general meetings were convened and that Mr. Diallo was unable to attend owing to his removal from DRC territory. The DRC asserts that in any case Congolese commercial law places no obligation on commercial companies in respect of where general meetings are to be held.

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119. Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations stipulates that: "[n]otwithstanding any provision to the contrary, all *associés* shall have the right to take part in general meetings and shall be entitled to one vote per share". The Court observes that it follows from the terms of this provision that the right to participate and vote in general meetings belongs to the *associés* and not to the company. This is consistent with the Court's conclusion in the *Barcelona Traction* case, where it pointed out that "[i]t is well known" that the right to participate and vote in general meetings is a right "which municipal law confers upon the [shareholders] distinct from those of the company" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 36, para. 47).

120. The Court now turns to the question of whether the DRC, in expelling Mr. Diallo, deprived him of his right to take part in general meetings and to vote, as guaranteed by Article 79 of the Congolese Decree of 27 February 1887 on commercial corporations.

121. According to Article 83 of the Congolese Decree of 27 February 1887, while the decision to convene a general meeting is incumbent upon the *gérant* or the auditors (para. 1), *associés* also have the right to request that a general meeting be convened if they hold a fifth of the total number of shares (para. 2). In view of the evidence submitted to it by the Parties, the Court finds that there is no proof that Mr. Diallo, acting either as *gérant* or as *associé* holding at least one-fifth of the total number of shares, has taken any action to convene a general meeting, either after

la moindre mesure pour convoquer une assemblée générale, soit après son expulsion de la RDC, soit à un quelconque moment après 1980, alors qu'il résidait en RDC, ne fût-ce qu'afin de «délib[é]re[r] et [de] statue[r] sur le bilan et le compte de profits et pertes et sur l'affectation des bénéfices», comme cela aurait dû être le cas chaque année en vertu du décret de 1887 (voir article 96). Or, selon la Cour, le droit de M. Diallo de prendre part aux assemblées générales et d'y voter n'aurait pu être violé que si des assemblées générales avaient effectivement été convoquées après son expulsion. La Cour relève à cet égard que, quand bien même l'article premier de l'ordonnance-loi n° 66-341 du 7 juin 1966 obligerait les sociétés ayant leur siège administratif en RDC à tenir leurs assemblées générales sur le territoire congolais, il n'a pas été prouvé que M. Diallo aurait été empêché d'agir pour convoquer des assemblées générales depuis l'étranger, en qualité de gérant ou d'associé.

122. La Cour examinera à présent la question de savoir si M. Diallo a été privé de son droit de prendre part à d'éventuelles assemblées générales et d'y voter au motif que, comme le soutient la Guinée, il n'aurait pu, après son expulsion, exercer ce droit que par l'intermédiaire d'un mandataire, alors que la législation congolaise lui reconnaîtrait le droit de choisir soit de désigner un tiers pour le représenter, soit de siéger en personne.

123. Conformément à l'article 81 du décret congolais du 27 février 1887, «[l]es associés peuvent toujours se faire représenter par un mandataire de leur choix, mais en observant les conditions exprimées dans les statuts». Quant à l'article 80 du même décret, il prévoit que, «[s]auf dispositions contraires des statuts, les associés peuvent émettre leur vote par écrit ou par tout autre moyen qui garantisse l'authenticité de la volonté exprimée». La Cour a noté que les Parties lui avaient fourni les statuts d'Africontainers-Zaïre, mais ne lui avaient pas communiqué ceux d'Africom-Zaïre (voir paragraphes 107 et 110 ci-dessus). Le paragraphe 2 de l'article 22 des statuts d'Africontainers-Zaïre se lit comme suit: «Les associés peuvent se faire représenter soit par un mandataire choisi parmi les associés, soit par un représentant ou un préposé des personnes juridiques associées, s'il s'agit d'elles.» Quant à l'article 21, il stipule que «[l]es décisions de l'assemblée générale sont prises à la majorité des trois quarts des voix quel que soit le nombre de parts sociales possédées par les associés présents ou *représentés*» (les italiques sont de la Cour).

124. Il résulte de ces dispositions que le droit de l'associé de prendre part et de voter aux assemblées générales peut être exercé par lui-même en personne ou par l'intermédiaire d'un mandataire de son choix. Il ne fait pas de doute à cet égard que le vote exprimé par un mandataire à une assemblée générale a le même effet juridique que celui exprimé par l'associé lui-même. En revanche, il est plus difficile de déduire avec certitude des dispositions précitées qu'elles consacreraient, ainsi que le soutient la Guinée, le droit pour l'associé d'assister en personne aux assemblées générales. De l'avis de la Cour, ces dispositions ont pour finalité première

having been expelled from the DRC, or at any time when he was a resident in the DRC after 1980, not even for the purposes of annually "consider[ing] and decid[ing] on the balance sheet and profit and loss account and on the allocation of profits", as required by the 1887 Decree (see Article 96). In the opinion of the Court, the right of Mr. Diallo to take part in general meetings and to vote could only have been breached if general meetings had actually been convened after his expulsion from the DRC. The Court notes in this respect that, even assuming that Article 1 of Legislative Order No. 66-341 of 7 June 1966 were to oblige corporations having their administrative seat in the DRC to hold their general meetings on Congolese territory, no evidence has been provided that Mr. Diallo would have been precluded from taking any action to convene general meetings from abroad, either as *gérant* or as *associé*.

122. The Court will now turn to the question of whether Mr. Diallo has been deprived of his right to take part and vote in any general meetings because, as Guinea argues, after his expulsion he could only have exercised that right through a proxy, whereas Congolese law afforded him the right to choose between appointing a representative or attending in person.

123. According to Article 81 of the Congolese Decree of 27 February 1887, "*[a]ssociés* may always be represented by a proxy of their choice, subject to compliance with the conditions set forth in the statutes". According to Article 80 of the Congolese Decree, "[u]nless the statutes provide otherwise, *associés* may express their votes in writing or by any other means that guarantees the authenticity of the will expressed". The Court has noted that the Parties have provided it with the Articles of Incorporation of Africontainers-Zaire, but have not communicated to it those of Africom-Zaire (see paragraphs 107 and 110 above). Article 22, paragraph 2, of the Articles of Incorporation of Africontainers-Zaire reads as follows: "*Associés* may arrange to be represented either by a proxy chosen from amongst the *associés*, or by a representative or agent of any *associé* that is a legal person, if such is the case." Article 21 of the Articles of Incorporation of Africontainers-Zaire states that "[r]esolutions of the general meeting shall be passed by a majority of three quarters of the votes irrespective of the number of shares owned by the members present or *represented at the meeting*" (emphasis added).

124. It follows from these provisions that an *associé*'s right to take part and vote in general meetings may be exercised by the *associé* in person or through a proxy of his choosing. There is no doubt in this connection that a vote expressed through a proxy at a general meeting has the same legal effect as a vote expressed by the *associé* himself. On the other hand, it is more difficult to infer with certainty from the above-mentioned provisions that they establish the right, as Guinea maintains, for the *associé* to attend general meetings in person. In the opinion of the Court, the primary purpose of these provisions is to ensure that the general meetings

d'assurer que les assemblées générales des sociétés puissent utilement se tenir. L'interprétation du droit congolais retenue par la Guinée pourrait contrecarrer cet objectif, en permettant à un associé de bloquer le fonctionnement normal des organes sociétaires. Il est douteux que le législateur congolais ait pu vouloir un tel résultat, fort éloigné de l'*affectio societatis*. Par ailleurs, en ce qui concerne Africom-Zaïre et Africontainers-Zaïre, la Cour ne perçoit pas en quoi la désignation par M. Diallo d'un représentant aurait pu, d'une quelconque manière, porter concrètement atteinte à son droit de prendre part et de voter aux assemblées générales des deux SPRL, puisqu'il les contrôlait complètement.

125. Par ailleurs, en ce qui concerne Africontainers-Zaïre, la Cour ne peut faire droit à l'argument de la Guinée selon lequel il aurait été impossible à M. Diallo de se faire représenter à une assemblée générale par un mandataire autre que lui-même au motif qu'il était le seul associé de cette SPRL et que l'article 22 des statuts d'Africontainers-Zaïre stipule qu'un associé ne peut désigner qu'un autre associé pour le représenter. Ainsi que la Cour l'a fait observer ci-dessus (voir paragraphe 110), cette société compte deux associés: M. Diallo et Africom-Zaïre. Dès lors, en application de l'article 22 précité, M. Diallo pouvait, en sa qualité d'associé d'Africontainers-Zaïre, désigner le «représentant ou ... préposé» d'Africom-Zaïre pour le représenter à une assemblée générale d'Africontainers-Zaïre. Au préalable, il aurait pu, en sa qualité de gérant d'Africom-Zaïre et en vertu de l'article 69 du décret de 1887 (voir paragraphe 135 ci-après), désigner un tel «représentant ou ... préposé» de cette société.

126. En conséquence, la Cour ne peut accueillir l'allégation de la Guinée selon laquelle la RDC a violé le droit de M. Diallo de prendre part aux assemblées générales et d'y voter. En expulsant M. Diallo, la RDC l'a probablement empêché de prendre part en personne à une éventuelle assemblée générale, mais, de l'avis de la Cour, une telle entrave n'équivaut pas à une privation de son droit de prendre part aux assemblées générales et d'y voter.

B. Les droits relatifs à la gérance

127. La Cour note que la Guinée a avancé, à divers stades de la procédure, quatre affirmations légèrement différentes, qu'elle a regroupées sous un seul et même chef, selon lequel il y aurait eu violation du droit de M. Diallo de «nommer un gérant». Elle a ainsi soutenu que, en expulsant M. Diallo de manière illicite, la RDC a commis: une violation du droit que l'intéressé aurait de nommer un gérant, une violation du droit qu'il aurait d'être nommé gérant, une violation du droit qu'il aurait d'exercer les fonctions de gérant et une violation du droit qu'il aurait de ne pas être révoqué en tant que gérant.

128. La RDC affirme que le droit de nommer le gérant d'une SPRL est un droit de la société, et non de l'associé, puisqu'il s'agit d'un droit de l'assemblée générale, qui est un organe de la société. Par ailleurs, selon la

of companies can take place effectively. Guinea's interpretation of Congolese law might frustrate that objective, by allowing an *associé* to prevent the organs of the company from operating normally. It is questionable whether the Congolese legislators could have desired such an outcome, which is far removed from the *affectio societatis*. Moreover, in respect of Africom-Zaire and Africontainers-Zaire, the Court does not see how the appointment of a representative by Mr. Diallo could in any way have breached in practical terms his right to take part and vote in general meetings of the two SPRLs, since he had complete control over them.

125. Furthermore, with regard to Africontainers-Zaire, the Court cannot accept Guinea's argument that it would have been impossible for Mr. Diallo to be represented at a general meeting by a proxy other than himself because he was the sole *associé* of that SPRL and Article 22 of Africontainers-Zaire's Articles of Incorporation stipulates that an *associé* may only appoint another *associé* as proxy. As the Court has observed above (see paragraph 110), that company has two *associés*, namely, Mr. Diallo and Africom-Zaire. Therefore, pursuant to the above-mentioned Article 22, Mr. Diallo, acting as *associé* of Africontainers-Zaire, could appoint the "representative or agent" of Africom-Zaire as his proxy for a general meeting of Africontainers-Zaire. Prior to the appointment of that proxy, and acting as *gérant* of Africom-Zaire pursuant to Article 69 of the 1887 Decree (see paragraph 135 below), Mr. Diallo could have appointed such a "representative or agent" of the latter company.

126. Therefore, the Court cannot sustain Guinea's claim that the DRC has violated Mr. Diallo's right to take part and vote in general meetings. The DRC, in expelling Mr. Diallo, has probably impeded him from taking part in person in any general meeting, but, in the opinion of the Court, such hindrance does not amount to a deprivation of his right to take part and vote in general meetings.

B. The Rights relating to the Gérance

127. The Court observes that, at various points in the proceedings, Guinea has made four slightly different assertions which it has grouped under the general claim of a violation of Mr. Diallo's right to "appoint a *gérant*". It has contended that, by unlawfully expelling Mr. Diallo, the DRC has committed: a violation of his alleged right to appoint a *gérant*, a violation of his alleged right to be appointed as *gérant*, a violation of his alleged right to exercise the functions of a *gérant*, and a violation of his alleged right not to be removed as *gérant*.

128. The DRC contends that the right to appoint the *gérant* of an SPRL is a right of the company, not of the *associé*, as it lies with the general meeting, which is an organ of the company. Furthermore, the

RDC, dès lors que, en vertu du décret de 1887, un gérant qui n'a pas été désigné dans les statuts est nommé par l'assemblée générale, le droit invoqué par la Guinée de nommer un gérant ne se distingue pas du droit de l'associé de prendre part aux assemblées générales. La RDC fait valoir que la Guinée n'a pas démontré qu'une assemblée générale aurait été convoquée et que la défenderesse serait intervenue auprès des autres associés pour empêcher M. Diallo de participer à la nomination d'un nouveau gérant ou de se faire représenter par une personne de son choix. Elle affirme que, à la suite de son expulsion, M. Diallo a bien nommé M. N'Kanza gérant d'Africontainers-Zaïre.

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129. La Cour relève que la nomination et les fonctions des gérants sont régies, en droit congolais, par le décret de 1887 sur les sociétés commerciales et par les statuts de la société concernée.

130. Aux termes de l'article 64 du décret de 1887,

> «[l]a société privée à responsabilité limitée est gérée par un ou plusieurs mandataires, associés ou non associés, appelés gérants».

Quant à la nomination des gérants, elle est régie par l'article 65 de ce même décret, qui se lit comme suit:

> «[l]es gérants sont nommés soit dans l'acte constitutif, soit par l'assemblée générale, pour un temps limité ou sans durée déterminée».

En outre, l'article 69 du décret de 1887 prévoit que

> «[l]es statuts, l'assemblée générale ou la gérance peuvent confier la gestion journalière de la société et des pouvoirs spéciaux à des agents ou autres mandataires, associés ou non associés».

131. Par ailleurs, l'article 14 des statuts d'Africontainers-Zaïre stipule, notamment, ce qui suit:

> «La société est administrée par un ou plusieurs gérants[,] associés ou non[,] nommés par l'assemblée générale.
>
> S'il est désigné plusieurs gérants, l'assemblée décide s'ils ont pouvoir séparément ou conjointement.»

L'article 17 est, pour sa part, ainsi conçu:

> «La gérance peut déléguer à l'un des associés ou à des tiers[,] ou attribuer à l'un de ses membres, tous pouvoirs nécessaires à la gestion journalière. Elle déterminera les attributions et[,] le cas échéant, la rétribution de ces mandataires; les pouvoirs délégués sont révocables en tout temps.»

132. La Cour commencera par écarter l'argument de la RDC selon

DRC affirms that because, under the 1887 Decree, a *gérant* who has not been appointed in the Articles of Incorporation is appointed by the general meeting, the right invoked by Guinea to appoint a *gérant* is indistinguishable from the right of the *associé* to take part in the general meetings. According to the DRC, Guinea has failed to show that a general meeting was convened and that the DRC intervened with the other *associés* to prevent Mr. Diallo from participating in the appointment of a new *gérant*, or from being represented by another person of his choice. The DRC submits that Mr. Diallo did appoint Mr. N'Kanza as *gérant* of Africontainers-Zaire following his expulsion.

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129. The Court observes that the appointment and functions of *gérants* are governed, in Congolese law, by the 1887 Decree on commercial corporations, and by the Articles of Incorporation of the company in question.

130. Under Article 64 of the 1887 Decree:

> "A private limited company shall be managed by one or more persons, who may or may not be *associés*, called *gérants*."

The appointment of *gérants* is governed by Article 65 of the 1887 Decree, which provides:

> "*Gérants* shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate."

In addition, Article 69 of the 1887 Decree provides that:

> "The statutes, the general meeting or the *gérance* may entrust the day-to-day management of the company and special powers to agents or other proxies, whether *associés* or not."

131. Furthermore, Article 14 of Africontainers-Zaire's Articles of Incorporation provides, *inter alia*, that:

> "The company shall be managed by one or more *gérants*, who may or may not be *associés*, appointed by the general meeting.
>
> Where more than one *gérant* is appointed, the general meeting shall decide whether they shall exercise their powers separately or jointly."

Article 17, for its part, is couched in the following terms:

> "The *gérance* may delegate to one of the *associés* or to third parties or confer on one of its managers any powers necessary for the performance of daily managerial duties. It shall determine the powers to be conferred and, where necessary, the remuneration of such agents; delegated powers may be revoked at any time."

132. The Court will begin by dismissing the DRC's argument that

lequel le droit de M. Diallo de nommer un gérant n'a pas pu être violé puisque l'intéressé a en réalité nommé un gérant d'Africontainers-Zaïre en la personne de M. N'Kanza. Elle a en effet déjà conclu que ce fait n'avait pas été établi (voir paragraphes 111 et 112 ci-dessus).

133. S'agissant de la première allégation formulée par la Guinée, selon laquelle la RDC a violé le droit de M. Diallo de nommer un gérant, la Cour rappelle que, aux termes de l'article 65 du décret de 1887, «[l]es gérants sont nommés soit dans l'acte constitutif, soit par l'assemblée générale». La Cour fait observer que, en vertu de cette disposition, toute SPRL doit être gérée par un gérant au moins. La nomination du gérant a en principe lieu au moment même de la constitution de la SPRL. Elle peut aussi avoir lieu à un stade ultérieur, par décision de l'assemblée générale. Dans ce cas, un organe de la société (l'assemblée générale) exerce son pouvoir envers un autre organe (la gérance). La nomination du gérant relève donc de la responsabilité de la société elle-même, sans constituer un droit de l'associé. En conséquence, la Cour conclut que l'argument de la Guinée selon lequel la RDC a violé le droit de M. Diallo de nommer un gérant doit être rejeté.

134. S'agissant de la deuxième allégation avancée par la Guinée, selon laquelle la RDC a violé le droit de M. Diallo d'être nommé gérant, la Cour observe que, dans l'arrêt qu'elle a rendu en 2007 sur les exceptions préliminaires, elle a relevé ce qui suit :

> «[l]a RDC s'accorde ... avec la Guinée sur le fait que, s'agissant du droit congolais, les droits propres de l'associé sont déterminés par le décret de l'Etat indépendant du Congo, en date du 27 février 1887, sur les sociétés commerciales. Les droits de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre seraient donc théoriquement les suivants : «le droit aux dividendes et aux produits de la liquidation», «le droit d'être nommé gérant», «le droit de l'associé gérant à ne pas être révoqué sans motif», «le droit du gérant à représenter la société», «le droit de surveillance [de la gérance]» et «le droit de participer aux assemblées générales».» (*C.I.J. Recueil 2007 (II)*, p. 603, par. 53.)

Il ne fait aucun doute qu'un associé a le droit d'être nommé gérant. Néanmoins, ce droit ne peut avoir été violé en l'espèce, puisque, de fait, M. Diallo a bien été nommé gérant, et demeure le gérant des deux sociétés en question. A cet égard, la Cour rappelle la conclusion qu'elle a formulée dans son arrêt de 2007 selon laquelle «M. Diallo, qui avait la qualité d'associé des deux sociétés Africom-Zaïre et Africontainers-Zaïre, exerçait également les fonctions de gérant pour chacune d'entre elles» (*ibid.*, p. 606, par. 66). Cette conclusion est confirmée par certains éléments de preuve que les Parties ont présentés à la Cour au stade actuel de la procédure, et notamment par des éléments de preuve soumis par la Guinée elle-même. En conséquence, la Cour conclut qu'il n'y a pas eu violation du droit de M. Diallo d'être nommé gérant.

Mr. Diallo's right to appoint a *gérant* could not have been violated because he in fact appointed a *gérant* for Africontainers-Zaire in the person of Mr. N'Kanza. It has already concluded that this allegation has not been proved (see paragraphs 111 and 112 above).

133. As regards the first assertion put forth by Guinea that the DRC has violated Mr. Diallo's right to appoint a *gérant*, the Court recalls Article 65 of the 1887 Decree, which provides that "*[g]érants* shall be appointed either in the instrument of incorporation or by the general meeting". The Court observes that, under this provision, every SPRL is required to be managed by at least one *gérant*. In principle, the appointment of the *gérant* takes place at the point when the SPRL is founded. It can also take place at a later stage, by decision of the general meeting. In that case, one organ of the company (the general meeting) exercises its power in respect of another (the *gérance*). The appointment of the *gérant* therefore falls under the responsibility of the company itself, without constituting a right of the *associé*. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to appoint a *gérant* must fail.

134. As regards the second assertion put forward by Guinea that the DRC has violated Mr. Diallo's right to be appointed *gérant*, the Court notes that, in its 2007 Judgment on preliminary objections, it observed that:

> "The DRC . . . agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: 'the right to dividends and to the proceeds of liquidation', 'the right to be appointed manager *(gérant)*', 'the right of the *associé* manager *(gérant)* not to be removed without cause', 'the right of the manager to represent the company', 'the right of oversight [of the management]' and 'the right to participate in general meetings'." (*I.C.J. Reports 2007 (II)*, p. 603, para. 53.)

It is clear that an *associé* has a right to be appointed *gérant*. However, this right cannot have been violated in this instance because Mr. Diallo has in fact been appointed as *gérant*, and still is the *gérant* of both companies in question. In this regard, the Court recalls its finding in its 2007 Judgment "that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them" (*ibid.*, p. 606, para. 66). This finding is confirmed in evidence put before the Court by the Parties in the present stage of the proceedings, in particular by evidence submitted by Guinea itself. Accordingly, the Court concludes that there is no violation of Mr. Diallo's right to be appointed *gérant*.

135. La Cour note que la Guinée a soutenu, en troisième lieu, que le droit de M. Diallo d'exercer ses fonctions de gérant avait été violé. Sur ce point, la Guinée a affirmé dans sa réplique que,

> «à la suite de sa détention et de son expulsion par les autorités zaïroises, [M. Diallo] a été mis dans l'impossibilité, d'un point de vue pratique, de remplir le rôle de «gérant» depuis la Guinée, puisqu'il se trouvait hors du territoire».

La Cour ne saurait souscrire à ce raisonnement et, à cet égard, se réfère à l'article 69 du décret de 1887, qui prévoit que «la gérance peu[t] confier la gestion journalière de la société et des pouvoirs spéciaux à des agents ou autres mandataires associés ou non associés». En ce qui concerne Africontainers-Zaïre, la Cour renvoie en outre à l'article 16 des statuts de cette société, aux termes duquel «[l]a gérance pourra établir des sièges administratifs en République du Zaïre et des succursales, bureaux, agences, dépôts ou comptoirs en n'importe quel lieu, tant dans la République du Zaïre qu'à l'étranger». S'il est vrai qu'il a pu être plus difficile pour M. Diallo d'exercer ses fonctions de gérant du fait qu'il se trouvait hors du territoire de la RDC, la Guinée n'a pas démontré que cela lui avait été impossible. De surcroît, elle n'a pas démontré que M. Diallo avait tenté de désigner un mandataire, qui aurait pu agir en RDC sur ses instructions.

136. En fait, il ressort clairement de différents documents soumis à la Cour que, même après l'expulsion de M. Diallo, des représentants d'Africontainers-Zaïre ont continué à agir au nom de cette société en RDC et de négocier avec la société Gécamines au sujet de réclamations contractuelles.

137. En conséquence, la Cour conclut que l'argument de la Guinée selon lequel la RDC a violé le droit de M. Diallo d'exercer ses fonctions de gérant doit être rejeté.

138. La Cour relève enfin que la Guinée a avancé, en quatrième lieu, que la RDC avait violé le droit de M. Diallo de ne pas être révoqué en tant que gérant, invoquant l'article 67 du décret de 1887, qui se lit comme suit:

> «Sauf disposition contraire des statuts, les gérants associés, nommés pour la durée de la société, ne sont révocables que pour de justes motifs par l'assemblée générale délibérant dans les conditions requises pour les modifications aux statuts.
>
> Les autres gérants sont révocables en tout temps.»

Se référant à cette disposition, la Guinée affirme que M. Diallo a été privé de son droit de ne pas être révoqué en tant que gérant aussi longtemps que la société existait. La Cour fait cependant observer qu'aucun élément de preuve ne lui a été présenté attestant que M. Diallo avait été privé de son droit de demeurer gérant, aucune assemblée générale n'ayant été convoquée pour le révoquer, ou à toute autre fin. Aussi n'a-t-il pas pu être révoqué «pour de justes motifs». S'il est vrai que, comme indiqué

135. The Court notes that, thirdly, Guinea has claimed that a right of Mr. Diallo to exercise his functions as *gérant* was violated. In this regard, Guinea has argued in its Reply that:

> "following [Mr. Diallo's] detention and expulsion by the Zairean authorities, it became impossible for him, in practical terms, to perform the role of 'gérant' from Guinea, because he was outside the country".

The Court cannot accept this line of reasoning, and refers in this regard to Article 69 of the 1887 Decree, which provides that "the *gérance* may entrust the day-to-day management of the company and special powers to agents or other proxies, whether *associés* or not". Moreover, with respect to Africontainers-Zaire, the Court also refers to Article 16 of its Articles of Incorporation, which provides that the "*gérance* is entitled to establish administrative bases in the Republic of Zaire and branches, offices, agencies, depots or trading outlets in any location whatsoever, whether in the Republic of Zaire or abroad". While the performance of Mr. Diallo's duties as *gérant* may have been rendered more difficult by his presence outside the country, Guinea has failed to demonstrate that it was impossible to carry out those duties. In addition, Guinea has not shown that Mr. Diallo attempted to appoint a proxy, who could have acted within the DRC on his instructions.

136. In fact, it is clear from various documents submitted to the Court that, even after Mr. Diallo's expulsion, representatives of Africontainers-Zaire have continued to act on behalf of the company in the DRC and to negotiate contractual claims with the Gécamines company.

137. The Court accordingly concludes that Guinea's claim that the DRC has violated a right of Mr. Diallo to exercise his functions as *gérant* must fail.

138. Finally, the Court observes that, fourthly, Guinea has claimed that the DRC has violated Mr. Diallo's right not to be removed as *gérant*, referring to Article 67 of the 1887 Decree, which provides that:

> "Unless the statutes provide otherwise, *gérants associés* appointed for the life of the company can be removed only for good cause, by a general meeting deliberating under the conditions required for amendments to the statutes.
>
> Other *gérants* can be removed at any time."

With reference to this provision, Guinea argues that Mr. Diallo was deprived of his right not to be removed as a *gérant* as long as the company was in existence. The Court observes, however, that no evidence has been provided to it that Mr. Diallo was deprived of his right to remain *gérant*, since no general meeting was ever convened for the purpose of removing him, or for any other purpose. There was therefore no possibility of having him removed "for good cause". Although it may have

ci-dessus, il a pu être plus difficile pour l'intéressé d'exercer ses fonctions depuis l'étranger à la suite de son expulsion, M. Diallo est néanmoins demeuré, d'un point de vue juridique, le gérant d'Africom-Zaïre et d'Africontainers-Zaïre. En conséquence, la Cour conclut que l'argument de la Guinée selon lequel la RDC a violé le droit de M. Diallo de ne pas être révoqué en tant que gérant doit être rejeté.

139. La Cour ajoutera que, quand bien même il serait établi que M. Diallo aurait été nommé gérant associé pour toute la durée de vie de la société et qu'il aurait été révoqué en tant que tel sans justes motifs, l'argument de la Guinée continuerait de reposer sur des bases très fragiles. Le droit énoncé à l'article 67 du décret de 1887 est un droit du gérant associé et non du simple associé. Dans la mesure où il s'agit d'un droit du gérant, qui est un organe de la société, cet argument ne saurait être retenu en vertu de l'alinéa *c)* du point 3 du paragraphe 98 de l'arrêt que la Cour a rendu en 2007.

140. Au vu de tout ce qui précède, la Cour conclut que les diverses allégations de la Guinée regroupées sous le chef de la violation des droits de M. Diallo relatifs à la gérance doivent être rejetées.

C. Le droit de surveiller et de contrôler les actes accomplis par la gérance

141. La Guinée affirme que, en arrêtant et en expulsant M. Diallo, la RDC a privé celui-ci de son droit de surveiller et de contrôler les actes accomplis par la gérance et les opérations d'Africom-Zaïre et d'Africontainers-Zaïre, en violation des articles 71 et 75 du décret de 1887. Se référant à ces dispositions, elle avance que le droit de surveiller et de contrôler les actes accomplis par la gérance est un droit qui s'attache au statut d'associé, et non un droit de la société, en particulier lorsque celle-ci ne compte pas plus de cinq associés. La Guinée soutient que, dans la mesure où M. Diallo était le seul associé des deux sociétés, il jouissait de tous les droits et pouvoirs du commissaire énoncés à l'article 75 du décret de 1887. Elle ajoute que ces droits sont également reconnus par l'article 19 des statuts de la société Africontainers-Zaïre.

142. La RDC fait valoir que, en vertu des articles 71 et 75 du décret de 1887, ainsi que des articles 19 et 25, paragraphe 3, des statuts d'Africontainers-Zaïre, le soin de surveiller et de contrôler la gérance d'une SPRL est confié non à un associé individuellement, mais à des experts financiers appelés «commissaires aux comptes». De l'avis de la RDC, l'associé a pour seul droit en la matière celui de prendre part à la nomination d'un ou de plusieurs commissaires aux comptes lors de l'assemblée générale. Bien qu'elle admette que, dans certaines circonstances, la loi congolaise donne aux associés le droit de surveiller et de contrôler la gérance de la société, la RDC fait néanmoins valoir que la Guinée n'a pas

become more difficult for Mr. Diallo to carry out his duties as *gérant* from outside the DRC following his expulsion, as discussed above, he remained, from a legal standpoint, the *gérant* of both Africom-Zaire and Africontainers-Zaire. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right not to be removed as *gérant* must fail.

139. The Court may add that, even if it were established that Mr. Diallo had been appointed *gérant associé* as long as the company was in existence and that he had been removed as *gérant* without good cause, the claim of Guinea would still stand on very weak ground. The right established by Article 67 of the 1887 Decree is a right of a combined *gérant associé*, not a simple right of an *associé*. To the extent that it is a right of the *gérant*, who is an organ of the company, the claim would be precluded by paragraph 98 (3) *(c)* of the Court's 2007 Judgment.

140. In light of all the above, the Court concludes that the various assertions put forward by Guinea, grouped under the general claim of a violation of Mr. Diallo's rights relating to the *gérance*, must be rejected.

C. The Right to Oversee and Monitor the Management

141. Guinea submits that, in detaining and expelling Mr. Diallo, the DRC deprived him of his right to oversee and monitor the actions of management and the operations of Africom-Zaire and Africontainers-Zaire, in violation of Articles 71 and 75 of the 1887 Decree. Referring to those provisions, Guinea contends that the right to oversee and monitor the actions of management is a right attaching to the status of *associé*, not a right of the company, especially where there are five or fewer *associés*. It argues that because Mr. Diallo was the sole *associé* of both companies, he enjoyed all the rights and powers of the *commissaire* or auditor under Article 75 of the 1887 Decree. It adds that those rights are also recognized by Article 19 of Africontainers-Zaire's Articles of Incorporation.

142. The DRC submits that under Articles 71 and 75 of the 1887 Decree, as well as Article 19 and Article 25, paragraph 3, of Africontainers-Zaire's Articles of Incorporation, the task of overseeing and monitoring the *gérance* of an SPRL is entrusted not to an *associé* individually, but to financial experts known as "statutory auditors" *[commissaires aux comptes]*. In the view of the DRC, the right of the *associé* is limited to participating in the appointment of one or more such auditors at the general meeting. The DRC acknowledges that, under certain conditions, Congolese law accords *associés* the right to oversee and monitor the management of the company, but it argues that Guinea has failed to

démontré que les autorités congolaises avaient ordonné à Africontainers-Zaïre d'empêcher M. Diallo de contrôler ses opérations.

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143. L'article 71 du décret de 1887 se lit comme suit :

« *Article 71*

La surveillance de la gérance est confiée à un ou plusieurs mandataires, associés ou non associés, appelés commissaires.

S'il y en a plusieurs, les statuts ou l'assemblée générale peuvent les faire agir en collège.

Si le nombre des associés ne dépasse pas cinq, la nomination de commissaires n'est pas obligatoire et chaque associé a les pouvoirs des commissaires. »

144. L'article 75 du même décret est ainsi conçu :

« *Article 75*

Le mandat des commissaires consiste à surveiller et contrôler, sans aucune restriction, tous les actes accomplis par la gérance, toutes les opérations de la société et le registre des associés. »

145. Aux termes de l'article 19 des statuts d'Africontainers-Zaïre,

« [l]a surveillance de la société est exercée par chacun des associés. Si la société vient à comporter plus de cinq associés, la surveillance sera exercée par un commissaire au moins nommé par l'assemblée générale, qui fixera l'époque à laquelle il sera soumis à réélection et le montant de ses rémunérations. »

146. La Cour déduit du libellé du paragraphe 3 de l'article 71 précité que, dès lors qu'Africom-Zaïre et Africontainers-Zaïre comptaient moins de cinq associés, M. Diallo était autorisé à agir en qualité de commissaire. Il s'agit toutefois de savoir si, en droit congolais, cette disposition s'applique dans le cas d'une société ne comptant qu'un associé qui la dirige et la contrôle pleinement.

147. La Cour estime que, quand bien même il existerait, dans les sociétés dont la direction et le contrôle sont pleinement assurés par un seul associé, un droit de surveiller et de contrôler la gérance, M. Diallo n'aurait pu être privé du droit de surveiller et de contrôler la gérance des deux sociétés. S'il est peut-être vrai que les détentions et l'expulsion de M. Diallo ont rendu plus difficile l'activité commerciale des sociétés, elles n'ont pu en aucun cas empêcher celui-ci de surveiller et de contrôler la gérance, quel que soit l'endroit où il se trouvait.

148. En conséquence, la Cour conclut que l'allégation de la Guinée selon laquelle la RDC a violé le droit de M. Diallo de surveiller et de contrôler la gérance ne saurait être accueillie.

demonstrate that the DRC had ordered Africontainers-Zaire not to permit Mr. Diallo to monitor its operations.

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143. Article 71 of the 1887 Decree provides as follows:

"*Article 71*

Oversight of the management shall be entrusted to one or more administrators, who need not be *associés*, called 'auditors'.

If there are more than one of these, the statutes or the general meeting may require them to act on a collegiate basis.

If the number of *associés* does not exceed five, the appointment of auditors is not compulsory, and each *associé* shall have the powers of an auditor."

144. Article 75 of that Decree is couched in the following terms:

"*Article 75*

The auditors' task shall be to oversee and monitor, without restriction, all the actions performed by the management, all the company's transactions and the register of *associés*."

145. Article 19 of Africontainers-Zaire's Articles of Incorporation provides:

"Each of the *associés* shall exercise supervision over the company. Should the company consist of more than five *associés*, supervision shall be exercised by at least one auditor appointed by the general meeting, which shall fix his/her term of office and remuneration."

146. The Court concludes from the wording of Article 71, third paragraph, as cited above, that since both Africom-Zaire and Africontainers-Zaire had fewer than five *associés*, Mr. Diallo was permitted to act as auditor. However, the question arises of whether, under Congolese law, this provision applies in the case of a company where there is only one *associé* who is fully in charge and in control of it.

147. The Court considers that, even if a right to oversee and monitor the management exists in companies where only one *associé* is fully in charge and in control, Mr. Diallo could not have been deprived of the right to oversee and monitor the *gérance* of the two companies. While it may have been the case that Mr. Diallo's detentions and expulsion from the DRC rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the *gérance*, wherever he may have been.

148. Accordingly, the Court concludes that Guinea's claim that the DRC has violated Mr. Diallo's right to oversee and monitor the management fails.

D. Le droit de propriété de M. Diallo sur ses parts sociales dans les sociétés Africom-Zaïre et Africontainers-Zaïre

149. La Guinée fait valoir que, privé du contrôle ou de l'usage effectif de ses droits en tant qu'associé, M. Diallo a été victime d'une expropriation indirecte de ses parts sociales dans les sociétés Africom-Zaïre et Africontainers-Zaïre, parce que ses droits de propriété ont fait l'objet d'une atteinte telle qu'il a été durablement privé de leur contrôle effectif, de leur usage ou de leur valeur.

150. La Guinée fait observer que les ingérences de la RDC dans le droit de propriété de M. Diallo sur ses parts sociales remontent à sa première mise en détention, en 1988. Elles auraient entraîné le non-recouvrement des créances des sociétés et, ainsi, la diminution de la valeur de l'investissement que M. Diallo détenait dans ces sociétés. Selon la Guinée, elles se seraient poursuivies lorsque les autorités congolaises ont décidé, en 1995, de suspendre l'exécution de l'arrêt rendu en l'affaire *Africontainers c. Zaïre Shell* en faveur de la société demanderesse, ce qui aurait eu pour effet de diminuer la valeur des parts sociales détenues par M. Diallo. La Guinée soutient que les ingérences de la RDC ont atteint leur point culminant avec la nouvelle arrestation et l'expulsion de M. Diallo, qui aurait de ce fait été dans l'impossibilité de gérer ses sociétés, de participer aux activités de leurs organes, ainsi que de contrôler ses parts sociales et d'en faire usage. La Guinée affirme que l'expropriation indirecte des droits de M. Diallo constitue un fait internationalement illicite qui engage la responsabilité internationale de la RDC.

151. L'argument de la Guinée est essentiellement fondé sur l'existence d'un élément de fait particulier à cette affaire, à savoir

> «le fait que M. Diallo soit le seul associé des deux sociétés, c'est-à-dire le seul propriétaire des parts sociales d'Africom et d'Africontainers. Par voie de conséquence, bien que leurs personnalités juridiques soient formellement distinctes, il résulte de la configuration très particulière des rapports entre M. Diallo et ses sociétés que, sur le *terrain factuel* qui est le terrain de l'expropriation (l'expropriation est un fait), le patrimoine des deux sociétés se confond avec le sien. Dès lors, en expropriant ses sociétés, la RDC a porté atteinte au droit de propriété de M. Diallo sur ses parts sociales.»

152. La RDC allègue, quant à elle, qu'il ne saurait y avoir eu violation d'un quelconque droit attaché au droit de propriété sur les parts sociales. Elle soutient plus particulièrement que, en ce qui concerne le droit de percevoir des dividendes — et à supposer que les sociétés en aient effectivement distribué —, la Guinée devrait encore démontrer que M. Diallo s'est trouvé dans l'impossibilité de les percevoir en raison de la décision d'éloignement du territoire congolais dont il a été l'objet ou de tout autre fait illicite attribuable à la RDC. La RDC estime à cet égard que la Gui-

D. The Right to Property of Mr. Diallo over his Parts Sociales *in Africom-Zaire and Africontainers-Zaire*

149. Guinea claims that Mr. Diallo, no longer enjoying control over, or effective use of, his rights as *associé*, has suffered the indirect expropriation of his *parts sociales* in Africom-Zaire and Africontainers-Zaire because his property rights have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights.

150. Guinea states that the acts of interference by the DRC with Mr. Diallo's property rights in the *parts sociales* date back to 1988, when he was first placed in detention. Those acts allegedly resulted in the debts owed to the companies not being recovered and, by way of consequence, Mr. Diallo's investment in the companies falling in value. According to Guinea, the interference by the DRC continued consequent to the Congolese authorities' decision in 1995 to stay enforcement of the judgment for the plaintiff handed down in *Africontainers* v. *Zaire Shell,* which resulted in reducing the value of Mr. Diallo's *parts sociales* in the company. Guinea claims that the interference by the DRC culminated in the re-arrest and expulsion of Mr. Diallo who, as a result, was prevented from managing his companies and from participating in any way in the activities of their corporate organs and was deprived of any possibility of controlling and using his *parts sociales*. Guinea asserts that the indirect expropriation of Mr. Diallo's rights constitutes an internationally wrongful act giving rise to the DRC's international responsibility.

151. The essence of Guinea's argument is that there is a factual element specific to this case, namely:

> "that Mr. Diallo is the sole *associé* in the two companies, that is to say, the only owner of the *parts sociales* in Africom[-Zaire] and Africontainers[-Zaire]. As a consequence, even though officially they have separate legal personalities, the very special characteristics of the relationship between Mr. Diallo and his companies means that, from the *factual perspective*, which is the perspective of expropriation (expropriation is a question of fact), the property of the two companies merges with his. Thus, in expropriating his companies, the DRC infringed Mr. Diallo's ownership rights in his *parts sociales*."

152. For its part, the DRC claims that there cannot have been any violation of any rights attaching to ownership of the *parts sociales*. In particular, as regards the right to dividends, it alleges that, even on the assumption that any have actually been distributed by the companies, Guinea would still have to show that Mr. Diallo was unable to receive them on account of the decision to remove him from Congolese territory or of another wrongful act attributable to the DRC. The DRC argues in this respect that Guinea has not established that Mr. Diallo could not

née n'a pas établi que M. Diallo ne pouvait percevoir directement de dividendes depuis l'étranger, ou qu'il en aurait été empêché par un quelconque fait attribuable à la RDC.

153. La RDC soutient encore qu'il ne saurait lui être reproché d'avoir porté atteinte à l'exercice des droits de M. Diallo en tant que propriétaire de ses parts sociales. Elle n'aurait, en particulier, jamais donné l'ordre à la société Africontainers-Zaïre de ne pas rémunérer les parts sociales de M. Diallo lors du partage annuel des dividendes. En ce qui concerne Africom-Zaïre, la RDC note que la Guinée n'a pas produit d'élément prouvant que M. Diallo était toujours associé de cette société à la date de son expulsion du territoire congolais et établissant, s'il l'était encore, le nombre de ses parts sociales (voir paragraphe 106 ci-dessus).

154. Enfin, selon la RDC, il n'y a pas de corrélation entre la valeur des parts sociales de M. Diallo et le fait que l'intéressé soit présent sur son territoire. La RDC rejette les allégations de la Guinée selon lesquelles des actes qui lui sont attribuables ont été à l'origine d'une perte de cette valeur et, plus généralement, de la disparition économique des sociétés. Sur ce point, la RDC fait valoir que tant Africom-Zaïre qu'Africontainers-Zaïre étaient dans un état de «faillite non déclarée» plusieurs années avant que M. Diallo ne soit expulsé, puisque, depuis 1991, sinon avant, elles n'avaient eu aucune activité commerciale.

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155. La Cour fait observer que le droit international a maintes fois reconnu le principe de droit interne selon lequel une société possède une personnalité juridique distincte de celle de ses actionnaires. Cela demeure vrai s'agissant d'une SPRL qui serait devenue unipersonnelle dans le cas d'espèce. Dès lors, les droits et les biens de la société doivent être distingués de ceux de l'associé. A cet égard, l'idée avancée par la Guinée, selon laquelle le patrimoine de la société se confond avec celui de l'actionnaire, ne saurait se défendre en droit. En outre, il convient de noter que les responsabilités de la société ne sont pas celles de l'actionnaire. Dans le cas de la SPRL Africontainers-Zaïre, il est expressément indiqué dans ses statuts que «[c]haque associé n'est responsable des engagements de la société que jusqu'à concurrence du montant de sa participation» (article 7; voir aussi paragraphes 105 et 115 ci-dessus).

156. La Cour, dans l'affaire de la *Barcelona Traction*, a reconnu qu'«un dommage ... causé [à une société] attei[gnait] souvent ses actionnaires» (*Barcelona Traction, Light and Power Company, Limited (Belgique c. Espagne), deuxième phase, arrêt, C.I.J. Recueil 1970*, p. 35, par. 44). Mais, a-t-elle ajouté, le fait que la société et l'actionnaire subissent l'un et l'autre un dommage n'implique pas que tous deux aient le droit de demander réparation:

> «chaque fois que les intérêts d'un actionnaire sont lésés par un acte visant la société, c'est vers la société qu'il doit se tourner pour qu'elle

directly receive his dividends abroad or that he was prevented from doing so by an act attributable to the DRC.

153. The DRC contends as well that it cannot be accused of having impeded the exercise of rights held by Mr. Diallo as owner of his *parts sociales*. Specifically, the DRC at no time ordered Africontainers-Zaire not to make payments in respect of Mr. Diallo's *parts sociales* in the annual dividend allocation. With regard to Africom-Zaire, the DRC notes that Guinea has failed to provide evidence showing that Mr. Diallo was still an *associé* in this company at the time of his expulsion and, if so, how many *parts sociales* he held (see paragraph 106 above).

154. The DRC finally asserts that the value of Mr. Diallo's *parts sociales* is unrelated to his presence in its territory. It rejects Guinea's arguments that acts attributable to the DRC were at the origin of the loss of value of his *parts sociales* and, in general, the economic demise of his companies. On this subject, the DRC claims that both Africom-Zaire and Africontainers-Zaire had been in a state of "undeclared bankruptcy" for several years before Mr. Diallo's expulsion, not having engaged in any commercial activity since, at least, 1991.

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155. The Court observes that international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders. This remains true even in the case of an SPRL which may have become unipersonal in the present case. Therefore, the rights and assets of a company must be distinguished from the rights and assets of an *associé*. In this respect, it is legally untenable to consider, as Guinea argues, that the property of the corporation merges with the property of the shareholder. Furthermore, it must be recognized that the liabilities of the company are not the liabilities of the shareholder. In the case of Africontainers-Zaire, as an SPRL, it is specifically indicated in its Articles of Incorporation that the "liability of each *associé* in respect of corporate obligations shall be limited to the amount of his/her *parts sociales* in the company" (Article 7; see also paragraphs 105 and 115 above).

156. The Court, in the *Barcelona Traction* case, recognized that "a wrong done to the company frequently causes prejudice to its shareholders" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 35, para. 44). But, it added, damage affecting both company and shareholder will not mean that both are entitled to claim compensation:

> "whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate

> intente les recours voulus car, bien que deux entités distinctes puissent souffrir d'un même préjudice, il n'en est qu'une dont les droits soient violés» (*C.I.J. Recueil 1970*, p. 35, par. 44).

Ce principe a été réaffirmé lorsque, répondant à un argument avancé par la Belgique, la Cour a établi une

> «distinction entre la lésion d'un droit et la lésion d'un simple intérêt... [L]a responsabilité n'est pas engagée si un simple intérêt est touché; elle ne l'est que si un droit est violé, de sorte que des actes qui ne visent et n'atteignent que les droits de la société n'impliquent aucune responsabilité à l'égard des actionnaires, même si leurs intérêts en souffrent.» (*Ibid.*, p. 36, par. 46.)

157. La Cour a d'ores et déjà indiqué que la RDC n'avait pas violé le droit propre de M. Diallo en tant qu'associé de prendre part et de voter aux assemblées générales des sociétés, pas plus que son droit d'être nommé ou de demeurer gérant ou son droit de surveiller et de contrôler les actes accomplis par la gérance (voir paragraphes 117-148 ci-dessus). Ainsi que la Cour vient de le rappeler, les autres droits propres de M. Diallo se rapportant à ses parts sociales doivent être clairement distingués de ceux des SPRL, en particulier en ce qui concerne les droits de propriété des sociétés. La Cour rappelle à cet égard que, de même que ses autres avoirs, y compris ses créances à l'égard de tiers, le capital fait partie du patrimoine de la société, tandis que les associés sont propriétaires des parts sociales. Ces dernières représentent le capital sans se confondre avec lui, et confèrent à leurs détenteurs des droits dans le fonctionnement des sociétés, ainsi qu'un droit à percevoir un éventuel dividende ou tout autre montant en cas de liquidation des sociétés. Les seuls droits propres de M. Diallo que la Cour doit encore examiner ont trait à ces deux derniers aspects, à savoir la perception de dividendes ou de tout autre montant payable en cas de liquidation des sociétés. Il n'existe cependant aucune preuve de ce que des dividendes aient jamais été déclarés ou qu'une quelconque mesure ait été prise pour liquider les sociétés, et encore moins de ce que les droits de M. Diallo à cet égard aient été violés par un quelconque acte attribuable à la RDC.

158. Enfin, la Cour estime n'avoir nul besoin de déterminer l'étendue des activités commerciales des sociétés Africom-Zaïre et Africontainers-Zaïre à l'époque où M. Diallo a été expulsé ni de se prononcer sur leur éventuel état de «faillite non déclarée», tel qu'invoqué par la RDC. Ainsi que la Cour l'a déjà dit dans l'affaire de la *Barcelona Traction*:

> «une situation financière précaire ne peut être assimilée à la disparition de l'entité sociale ...: la situation juridique de la société est seule pertinente et sa situation économique ne l'est pas, non plus que le fait qu'elle puisse être «pratiquement détruite»» (*ibid.*, p. 41, par. 66).

159. La Cour conclut de ce qui précède que les allégations, formulées

> action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed" (*I.C.J. Reports 1970*, p. 35, para. 44).

This principle was reaffirmed when the Court, responding to a Belgian contention, established a

> "distinction between injury in respect of a right and injury to a simple interest . . . Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected." (*Ibid.*, p. 36, para. 46.)

157. The Court has already indicated that the DRC has not violated Mr. Diallo's direct right as *associé* to take part and vote in general meetings of the companies, nor his right to be appointed or to remain *gérant*, nor his right to oversee and monitor the management (see paragraphs 117-148 above). As the Court has just reaffirmed, Mr. Diallo's other direct rights, in respect of his *parts sociales*, must be clearly distinguished from the rights of the SPRLs, in particular in respect of the property rights belonging to the companies. The Court recalls in this connection that, together with its other assets, including debts receivable from third parties, the capital is part of the company's property, whereas the *parts sociales* are owned by the *associés*. The *parts sociales* represent the capital but are distinct from it, and confer on their holders rights in the operation of the company and also a right to receive any dividends or any monies payable in the event of the company being liquidated. The only direct rights of Mr. Diallo which remain to be considered are in respect of these last two matters, namely, the receipt of dividends or any monies payable on a winding-up of the companies. There is, however, no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, even less that any action attributable to the DRC has infringed Mr. Diallo's rights in respect of those matters.

158. Finally, the Court considers there to be no need to determine the extent of the business activities of Africom-Zaire and Africontainers-Zaire at the time Mr. Diallo was expelled, or to make any finding as to whether they were in a state of "undeclared bankruptcy", as alleged by the DRC. As the Court has already found in the *Barcelona Traction* case:

> "a precarious financial situation cannot be equated with the demise of the corporate entity . . .: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being 'practically defunct'" (*ibid.*, p. 41, para. 66).

159. The Court concludes from the above that Guinea's allegations of

par la Guinée, d'atteinte au droit de propriété de M. Diallo sur ses parts sociales dans les sociétés Africom-Zaïre et Africontainers-Zaïre ne sont pas établies.

IV. Réparations

160. La Cour ayant conclu que la République démocratique du Congo avait violé les obligations lui incombant en vertu des articles 9 et 13 du Pacte international relatif aux droits civils et politiques, des articles 6 et 12 de la Charte africaine des droits de l'homme et des peuples, ainsi que de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires (voir paragraphes 73, 74, 85 et 97 ci-dessus), il lui appartient maintenant de déterminer, à la lumière des conclusions finales de la Guinée, quelles sont les conséquences découlant de ces faits internationalement illicites qui engagent la responsabilité internationale de la RDC.

161. La Cour rappelle que «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis» (*Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 47). Lorsque cela n'est pas possible, la réparation peut prendre «la forme de l'indemnisation ou de la satisfaction, voire de l'indemnisation et de la satisfaction» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010 (I)*, p. 103, par. 273). Au vu des circonstances propres à l'espèce, en particulier du caractère fondamental des obligations relatives aux droits de l'homme qui ont été violées et de la demande de réparation sous forme d'indemnisation présentée par la Guinée, la Cour est d'avis que, outre la constatation judiciaire desdites violations, la réparation due à la Guinée à raison des dommages subis par M. Diallo doit prendre la forme d'une indemnisation.

162. A cet égard, dans ses conclusions finales, la Guinée a demandé à la Cour de surseoir à statuer sur le montant de l'indemnité, afin de permettre aux Parties de parvenir à un règlement concerté. Dans l'hypothèse où les Parties ne pourraient, «dans un délai de six mois suivant le prononcé d[u présent] arrêt», s'accorder à ce sujet, la Guinée l'a également priée de l'autoriser à présenter une évaluation du montant de l'indemnité qui lui est due afin que la Cour puisse en décider «dans une phase ultérieure de la procédure» (voir paragraphe 14 ci-dessus).

163. La Cour estime que les Parties doivent effectivement mener des négociations afin de s'entendre sur le montant de l'indemnité devant être payée par la RDC à la Guinée à raison du dommage résultant des détentions et de l'expulsion illicites de M. Diallo en 1995-1996, y compris la perte de ses effets personnels qui en a découlé.

164. La requête introductive d'instance ayant été déposée, en la présente affaire, au mois de décembre 1998, la Cour estime qu'une bonne administration de la justice commande de clore la procédure dans les

infringement of Mr. Diallo's right to property over his *parts sociales* in Africom-Zaire and Africontainers-Zaire have not been established.

IV. Reparation

160. Having concluded that the Democratic Republic of the Congo has breached its obligations under Articles 9 and 13 of the International Covenant on Civil and Political Rights, Articles 6 and 12 of the African Charter on Human and Peoples' Rights, and Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility.

161. The Court recalls that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). Where this is not possible, reparation may take "the form of compensation or satisfaction, or even both" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 103, para. 273). In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.

162. In this respect, Guinea requested in its final submissions that the Court defer its Judgment on the amount of compensation, in order for the Parties to reach an agreed settlement on that matter. Should the Parties be unable to do so "within a period of six months following [the] delivery of the [present] Judgment", Guinea also requested the Court to authorize it to submit an assessment of the amount of compensation due to it, in order for the Court to decide on this issue "in a subsequent phase of the proceedings" (see paragraph 14 above).

163. The Court is of the opinion that the Parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings.

164. In light of the fact that the Application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be

meilleurs délais; elle considère donc que la période consacrée à la négociation d'un accord sur le montant de l'indemnité doit être limitée. Par conséquent, dans l'hypothèse où les Parties ne parviendraient pas, dans un délai de six mois suivant le prononcé du présent arrêt, à s'entendre sur le montant de l'indemnité due par la RDC, la question devra être réglée par la Cour dans une phase ultérieure de la procédure. Etant suffisamment informée des faits de la présente espèce, la Cour juge que, dans ce cas, un seul échange de pièces de procédure écrite lui serait suffisant pour fixer ce montant.

* * *

165. Par ces motifs,

LA COUR,

1) Par huit voix contre six,

Dit que la demande de la République de Guinée relative à l'arrestation et à la détention de M. Diallo en 1988-1989 est irrecevable;

POUR: M. Owada, *président*; M. Tomka, *vice-président*; MM. Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood, *juges*; M. Mampuya, *juge* ad hoc;

CONTRE: MM. Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf, *juges*; M. Mahiou, *juge* ad hoc;

2) A l'unanimité,

Dit que, eu égard aux conditions dans lesquelles M. Diallo a été expulsé du territoire congolais le 31 janvier 1996, la République démocratique du Congo a violé l'article 13 du Pacte international relatif aux droits civils et politiques, ainsi que l'article 12, paragraphe 4, de la Charte africaine des droits de l'homme et des peuples;

3) A l'unanimité,

Dit que, eu égard aux conditions dans lesquelles M. Diallo a été arrêté et détenu en 1995-1996 en vue de son expulsion, la République démocratique du Congo a violé l'article 9, paragraphes 1 et 2, du Pacte international relatif aux droits civils et politiques, ainsi que l'article 6 de la Charte africaine des droits de l'homme et des peuples;

4) Par treize voix contre une,

Dit que, en n'informant pas sans retard M. Diallo, lors de sa détention en 1995-1996, de ses droits en vertu de l'alinéa *b)* du paragraphe 1 de l'article 36 de la convention de Vienne sur les relations consulaires, la République démocratique du Congo a violé les obligations lui incombant en vertu dudit alinéa;

POUR: M. Owada, *président*; M. Tomka, *vice-président*; MM. Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, *juges*; M. Mahiou, *juge* ad hoc;

brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, failing agreement between the Parties within six months following the delivery of the present Judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation.

* * *

165. For these reasons,

THE COURT,

(1) By eight votes to six,

Finds that the claim of the Republic of Guinea concerning the arrest and detention of Mr. Diallo in 1988-1989 is inadmissible;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judges* Al-Khasawneh, Simma, Bennouna, Cançado Trindade, Yusuf; *Judge* ad hoc Mahiou;

(2) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights;

(3) Unanimously,

Finds that, in respect of the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion, the Democratic Republic of the Congo violated Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights;

(4) By thirteen votes to one,

Finds that, by not informing Mr. Diallo without delay, upon his detention in 1995-1996, of his rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations, the Democratic Republic of the Congo violated the obligations incumbent upon it under that subparagraph;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Mahiou;

CONTRE : M. Mampuya, *juge* ad hoc;

5) Par douze voix contre deux,

Rejette le surplus des conclusions de la République de Guinée relatives aux conditions dans lesquelles M. Diallo a été arrêté et détenu en 1995-1996 en vue de son expulsion;

POUR : M. Owada, *président*; M. Tomka, *vice-président*; MM. Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, *juges*; M. Mampuya, *juge* ad hoc;

CONTRE : M. Cançado Trindade, *juge*; M. Mahiou, *juge* ad hoc;

6) Par neuf voix contre cinq,

Dit que la République démocratique du Congo n'a pas violé les droits propres de M. Diallo en tant qu'associé des sociétés Africom-Zaïre et Africontainers-Zaïre;

POUR : M. Owada, *président*; M. Tomka, *vice-président*; MM. Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood, *juges*; M. Mampuya, *juge* ad hoc;

CONTRE : MM. Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf, *juges*; M. Mahiou, *juge* ad hoc;

7) A l'unanimité,

Dit que la République démocratique du Congo a l'obligation de fournir une réparation appropriée, sous la forme d'une indemnisation, à la République de Guinée pour les conséquences préjudiciables résultant des violations d'obligations internationales visées aux points 2 et 3 ci-dessus;

8) A l'unanimité,

Décide que, au cas où les Parties ne pourraient se mettre d'accord à ce sujet dans les six mois à compter du présent arrêt, la question de l'indemnisation due à la République de Guinée sera réglée par la Cour, et réserve à cet effet la suite de la procédure.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le trente novembre deux mille dix, en trois exemplaires, dont l'un sera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République de Guinée et au Gouvernement de la République démocratique du Congo.

Le président,
(Signé) Hisashi OWADA.

Le greffier,
(Signé) Philippe COUVREUR.

AGAINST: *Judge* ad hoc Mampuya;

(5) By twelve votes to two,

Rejects all other submissions by the Republic of Guinea relating to the circumstances in which Mr. Diallo was arrested and detained in 1995-1996 with a view to his expulsion;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judge* Cançado Trindade; *Judge* ad hoc Mahiou;

(6) By nine votes to five,

Finds that the Democratic Republic of the Congo has not violated Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Simma, Abraham, Keith, Sepúlveda-Amor, Skotnikov, Greenwood; *Judge* ad hoc Mampuya;

AGAINST: *Judges* Al-Khasawneh, Bennouna, Cançado Trindade, Yusuf; *Judge* ad hoc Mahiou;

(7) Unanimously,

Finds that the Democratic Republic of the Congo is under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) above;

(8) Unanimously,

Decides that, failing agreement between the Parties on this matter within six months from the date of this Judgment, the question of compensation due to the Republic of Guinea shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this thirtieth day of November, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

MM. les juges AL-KHASAWNEH, SIMMA, BENNOUNA, CANÇADO TRINDADE et YUSUF joignent une déclaration commune à l'arrêt; MM. les juges AL-KHASAWNEH et YUSUF joignent à l'arrêt l'exposé de leur opinion dissidente commune; MM. les juges KEITH et GREENWOOD joignent une déclaration commune à l'arrêt; M. le juge BENNOUNA joint à l'arrêt l'exposé de son opinion dissidente; M. le juge CANÇADO TRINDADE joint à l'arrêt l'exposé de son opinion individuelle ; M. le juge *ad hoc* MAHIOU joint à l'arrêt l'exposé de son opinion dissidente; M. le juge *ad hoc* MAMPUYA joint à l'arrêt l'exposé de son opinion individuelle.

(Paraphé) H.O.
(Paraphé) Ph.C.

Judges AL-KHASAWNEH, SIMMA, BENNOUNA, CANÇADO TRINDADE and YUSUF append a joint declaration to the Judgment of the Court; Judges AL-KHASAWNEH and YUSUF append a joint dissenting opinion to the Judgment of the Court; Judges KEITH and GREENWOOD append a joint declaration to the Judgment of the Court; Judge BENNOUNA appends a dissenting opinion to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge *ad hoc* MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* MAMPUYA appends a separate opinion to the Judgment of the Court.

(Initialled) H.O.

(Initialled) Ph.C.

TAB 2

René Provost, “Judging in Splendid Isolation” (2008) 56 Am. J. Comp. L. 125

RENÉ PROVOST*

Judging in Splendid Isolation

This article, taking the reception of international law in Canadian law as a case study, argues that the paradigmatic picture of the judicial function has been evolving as a result of the increased reliance on international legal norms by domestic judges. The place given to customary international law and the constitutional process for consenting to the ratification of treaties signal a dual layer of perceived lack of legitimacy on the part of judges. The first relates to the issue of bindingness of international norms on the state and the concern of judges that they are not in a position to introduce into domestic law legal standards which have not received acceptance by a more representative branch of government. The second touches on bindingness of international norms in the state and the desire of judges to protect the integrity of the constitutional balance of power among the executive, legislative, and judiciary. Both perceived shortcomings of judicial legitimacy are evolving, however, as reflected in doctrinal and judicial discussions of a "constitutional dialogue" among the three branches of government (internal dialogue) as well as a "transjudicial dialogue" involving judges and other actors belonging to different states (external dialogue). A look at the presumption of conformity of domestic law with international law, the doctrine of legitimate expectations as flowing from treaty ratification, and the usefulness of declarations of incompatibility of national law with binding international obligations highlights a shifting paradigm: judges are moving from a self-conception grounded in splendid isolation to one which projects the judicial function as more proactive and necessarily collaborative.

Judges function in splendid isolation. In any case, that is the paradigmatic picture of the judge: impartial, independent, and removed from the operation of the political branches of government.

* Director, Centre for Human Rights and Legal Pluralism, and Associate Professor, Faculty of Law, McGill University (rene.provost@mcgill.ca). I would like to thank Noura Karazivan, Jeff King, and Emilia Ordolis for their excellent research in preparation for this text, and Mario Prost, Stephen Toope, and Shauna Van Praagh for their insightful comments. This is a further reflection of ideas explored in *Le juge mondialisé: légitimité judiciaire et droit international au Canada, in* CLAIRE L'HEUREUX-DUBÉ AT THE SUPREME COURT OF CANADA 1987-2002 569 (Marie-Claire Belleau & François Lacasse eds., 2004). Research was made possible thanks to a generous grant from the Dobson Fund of the Faculty of Law, McGill University.

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Examining the attitudes of domestic judges vis-à-vis international law raises a series of questions touching on the very nature of the judicial function as imagined by its central participants. Because of the particular process whereby international norms become binding on a State, and especially the unique apportionment of responsibilities as between the executive and legislative powers, judges are frequently called to revisit the nature of their relationship with the two other branches of government. At a different level, the exogenous character of international obligations places judges in the role of translators of international norms and, as a result, bridges between the domestic and international communities. These questions are far removed from those with which judges feel most comfortable, those which animate the traditional picture of the judicial role in national legal systems. The questioning is nevertheless relentless, fuelled by an ever-expanding body of international norms of relevance to a wide range of issues brought before domestic courts, forcing judges to constantly justify their place within domestic polity.

The apparent simplicity of applying in national law those international norms which bind a State is likely the root of the lively debate over this issue. At a certain level, it remains difficult to fully accept that, on the one hand, a state is subject to international obligations, yet on the other, it is free to violate these obligations with impunity in its internal legal order. This reflects a vision whereby domestic law and public international law are two distinct—albeit interdependent—systems, each with its own internal logic, regardless of whether this vision of their degree of relative autonomy is more monist or dualist. Any attempted interpenetration of these two systems clearly reveals the incompatibilities between their logics, a prime example of which is the principle of supremacy of each norm in its respective normative sphere. The point of contact (and often of friction) between international law and national law will frequently be the national judge, before whom parties will invoke international norms to challenge the validity of legislative or executive acts. From the outset, any exercise which aims to measure State conduct against legal standards falling outside the normal activities of the government raises the problem of the legitimacy of judicial intervention.

In the Canadian context, the proper province of judicial activity was questioned following the adoption of the constitutional *Charter of Rights and Freedoms* in 1982. At that time, some disputed the legitimacy of the powers given to judges to evaluate the conformity of laws and executive acts with the *Charter* and to invalidate them in the event of violations.[1] In the context of the *Charter*, however, judges were largely insulated from criticism since their constitutional re-

1. *See, e.g.*, JACQUES GOSSELIN, LA LÉGITIMITÉ DU CONTRÔLE JUDICIAIRE SOUS LE RÉGIME DE LA CHARTE (1991); JANET HIEBERT, LIMITING RIGHTS: THE DILEMMA OF JU-

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view powers were expressly conferred upon them by the constitution. The criticism was primarily focused on the political wisdom of giving such powers to judges. That decision, in fact, reflected an earlier paradigmatic shift in the judicial function as embodied in the United States Supreme Court decision in *Marbury v. Madison*, translating the principles of the supremacy of the Constitution and the balance of power among branches of government into the power to declare the constitutional invalidity of domestic laws.[2] In contrast, the danger which lies in wait for the Canadian judge making use of international norms in the context of national law is part of a different, and perhaps much more disconcerting, dynamic, one which operates at two separate levels. These include the very normativity of international law transposed into national law, as well as the legitimacy of the national judge as administrator of these norms, each of which is contested. This in turn raises two related but distinct questions: that of knowing whether the State is bound by international norms in its national law, and that of the constitutional authority of Canadian judges to refer to international law in the exercise of their functions. The formal recognition of the courts' power to invalidate unconstitutional laws and the unarticulated status of international norms within Canadian law, make that legal system an attractive vehicle for a discussion of the nature of the judicial function as revealed in the treatment of international obligations by domestic judges.

In this regard, one can perceive the domestic judge as an interlocutor engaged in a simultaneous double-dialogue. On the one hand, judges dialogue with other national actors to define their respective positions vis-à-vis international norms. On the other, judges converse with international actors in order to contribute to the application and development of international law.[3] Taken together, these activities raise considerable practical and conceptual difficulties. Following a brief survey of recent cases which trace the evolution of the status of international law in Canadian law (part I), we will turn to what has been described as an internal dialogue between the judiciary and other national actors (part II), leading to an overview of the normative character of international law in Canadian law (part III). Such an overview, which links national law and international law, and implies an external dialogue between Canadian judges and various international actors, will initiate the argument that the paradigm of the judicial function in Canada should be redefined to better reflect

DICIAL REVIEW (1996); MICHAEL MANDEL, THE CHARTER OF RIGHTS AND THE LEGALISATION OF POLITICS IN CANADA (1992).

2. Marbury v. Madison, 5 U.S. 137 (1803).

3. *See* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 37 (Thomas Franck & Gregory Fox eds., 1996).

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the place of international law in Canadian law (part IV). It should be noted that, primarily, this analysis aims to offer a commentary on the position and function of the domestic judiciary faced with the intersection of international law and national law. As will become apparent, a discussion of the justified place of international law in Canadian law will constitute only one facet of a broader picture.

I. Recent Jurisprudential Evolution in Canada

The debate on the place of international law in Canadian law was revived in recent years by a series of decisions of the Supreme Court of Canada, supplemented by some decisions rendered by the Courts of Appeal of Ontario and Québec. As the present analysis does not aim to offer a comprehensive account of the integration of international law in national law, it may be useful to briefly present the import of these decisions before passing to an analysis more directly centered on the judicial function.[4]

The decision of the Supreme Court in the 1999 case of *Baker v. Canada*[5] is considered by some to be the turning point in the way the Court utilizes international law. The case concerned an appeal against a deportation certificate issued against Mrs. Baker in 1992, following the finding that she was illegally residing in Canada. The plaintiff contested this decision on various grounds, most notably on the necessity of interpreting and applying the *Immigration Act*[6] in conformity with the international obligations arising from Canada's ratification of the *Convention on the Rights of the Child*.[7] With respect to this question, Justice Claire L'Heureux-Dubé wrote for the majority:

> 69. Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*. [. . .] International treaties and conventions are not part of Canadian law unless they have been implemented by statute. [. . .] I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

4. For more systematic reviews, see Jutta Brunnée & Stephen Toope, *Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 Can. Y.B. Int'l Law 3 (2002); William Schabas, *Twenty-Five Years of International Law at the Supreme Court of Canada*, 79 Can. Bar Rev. 174 (2000).

5. Baker v. Canada, [1999] 2 S.C.R. 817.

6. Immigration Act, R.S.C c. I-2 (1985).

7. Convention on the Rights of the Child, § 3, 9, 12, Nov. 20, 1989, Can. T.S. 1992 No. 3, 1577 U.N.T.S. 3 [*entered into force* Sept. 2, 1990].

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> 70. Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.

Dissenting Justices Frank Iacobucci and John Major rejected the views of the majority, specifically the suggestion to take the "values of international law" into account in the contextual approach to interpretation. They insisted that "an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation" (Para. 79).

The Supreme Court further developed its position in the 2001 case of *United States v. Rafay & Burns*.[8] In this unanimous decision on the constitutionality of extraditing an individual to a country where he may receive the death penalty, the Court invoked the movement in international law aimed at abolishing capital punishment in support of its interpretation of the *Canadian Charter of Rights and Freedoms* (Paras. 79-92). The Court stressed that this trend is useful in interpreting Canadian values in regards to capital punishment. In the same year, Justice L'Heureux-Dubé, writing for the majority, noted in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[9] that an interpretation of the Québec *Cities and Towns Act*,[10] permitting municipalities to prohibit the use of pesticides on their territory, conforms with the precautionary principle in customary international law (Para. 31). The references to international law in these two cases seem simultaneously both oblique and auxiliary.

The contribution of international law to the Court's judicial analysis was considerably more important in the 2002 case of *Suresh v. Canada*.[11] In this case, the appellant was once again contesting a deportation certificate issued on the basis of his presumed membership in a group committing terrorist activities in Sri Lanka. Suresh sought to have the deportation certificate revoked on the grounds that he would in all likelihood be subjected to torture if deported to Sri Lanka. The question then became one of evaluating the impact of the international norm prohibiting torture on the interpretation and application of the *Immigration Act*. In a unanimous judgment, the Supreme Court offered a detailed analysis of the *Convention against Torture*[12] which had been ratified by Canada. As for the intersection of international law and national law:

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8. United States v. Rafay & Burns, [2001] 1 S.C.R. 283.
9. 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241.
10. Cities and Towns, Act R.S.Q., c. C-19, § 410.
11. Suresh v. Canada, [2002] 1 S.C.R. 3.
12. Convention against Torture, Dec. 19, 1966, 999 U.N.T.S. 171 [*entered into force* Mar. 23, 1976].

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> 59. [. . .] A complete understanding of the *Act* and the *Charter* requires consideration of the international perspective.
> 60. International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

The Court continued by examining various international treaties to conclude, with doctrinal support, that the prohibition of torture constitutes a peremptory norm of international law (*jus cogens*), with the consequence that the expulsion of an individual to a country where he risks torture can not be permitted, save in exceptional circumstances. The Court stressed that this conclusion flows from the interpretation given to the principles of fundamental justice guaranteed in Section 7 of the *Charter*, and not from any application whatsoever of the international norm (Para. 78). Towards the end of this decision, however, the Court returned to international law by finding that Canada's ratification of the *Convention against Torture* accords the appellant certain procedural guarantees (Para.119).[13]

The Supreme Court returned to the possible impact of international law on Canadian law in its 2005 judgment in the case of *Mugesera v. Canada*.[14] The appellant challenged a decision to deport him to Rwanda following the discovery that he had failed to disclose his participation in a crime at the time of his application for refugee status in Canada. In part, the appellant attacked the finding that he had incited others to commit genocide and crimes against humanity in a series of speeches he had made before leaving Rwanda. The Court underscored the substantive links between Canadian and international law in regard to these two crimes, noting that "genocide is a crime originating in international law. International law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide" (Para. 82). Domestic legislation incorporated the obliga-

13. The Supreme Court discussed international law at length in *Schreiber v. Canada*, [2002] 3 S.C.R. 269. In this case however, the international norm in question bore on the immunity of foreign states and had been expressly incorporated into Canadian law by the State Immunity Act, R.S.C., c.S-18 (1985). Similarly, in the case of Pushpanathan v. Canada, [1998] 1 S.C.R. 982, the Court directly applied international law to define "acts contrary to the purposes and principles of the United Nations" since the Immigration Act referred to the text of Convention Relating to the Status of Refugees on this issue.

14. Mugesera v. Canada, [2005] 2 S.C.R. 100.

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tions binding on Canada under the *Convention on the Prevention and Punishment of the Crime of Genocide*, as well as customary obligations relating to genocide and crimes against humanity. The Court paid particular attention to a series of judgments of the International Criminal Tribunals for Former Yugoslavia and Rwanda, leading to the reversal in Canadian law of the earlier finding in *R v. Finta* that a discriminatory intent was a required element for all crimes against humanity, on the basis that international law had changed in the intervening years (Paras. 143-144).[15]

Finally, the Supreme Court extensively discussed customary international law in order to determine the proper extraterritorial reach of the *Canadian Charter of Rights and Freedoms* in the 2007 judgment of *Hape v. Canada*.[16] The decision is remarkable, not because it breaks new ground on the question of the relation between international and municipal law, but because it offers a number of statements of principle on the matter, which had not been clearly articulated by the Supreme Court until then. The appellant in that case challenged his conviction for money laundering on the basis that several searches carried out by the Royal Canadian Mounted Police in Turks and Caicos fell short of the constitutional guarantees entrenched in the *Charter*. Justice Louis LeBel for the majority articulated in the clearest terms the principle that customary law is automatically incorporated into Canadian law and applicable by courts, unless expressly derogated from by statute (Para. 39). Binding obligations under international law, as well as the concept of comity of nations, should guide the interpretation of Canadian law and the development of the common law by domestic courts (Para. 53). While four judges joined in concurring reasons, none questioned the principles as articulated by the majority.

This renewed reflection of the Supreme Court of Canada on the place of international law in national law was echoed in the jurisprudence of the country's lower courts. Three decisions—two from the Court of Appeal of Ontario and one from the Court of Appeal of Québec—add elements which are useful to our discussion, and merit a brief examination.

The first decision is *Ahani v. Canada*, issued by the Court of Appeal of Ontario in February 2002, less than one month after the Supreme Court's ruling in *Suresh*.[17] The appellant had been subject to a deportation certificate because of his membership in a terrorist group in Iran. After having exhausted all recourses to have the decision overturned, he petitioned the United Nations Human Rights Committee. This led to the Committee requesting that Canada postpone

15. R. v. Finta, [1994] 1 S.C.R. 701.
16. Hape v. Canada, [2007] S.C.C. 26.
17. Ahani v. Canada, (2002) 208 D.L.R. (4th) 66 (Ont. C.A.).

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deportation while waiting for the Committee's findings. Arguing that Canada would in any case not be bound by the rulings of the Human Rights Committee, the Minister of Citizenship and Immigration refused to comply with this request. Ahani then requested an injunction from the High Court of Ontario, which was not granted to him, leading to the appeal decision which is of interest here. The majority opinion of the Court of Appeal, per Justice John Laskin, concluded on the basis of a restrictive reading of *Suresh*, in a rather absolute manner, that international treaties not incorporated into Canadian law by statute "have no domestic legal consequences" (Para. 34). The majority thus refused to recognize that the provisional measures issued by the Committee have any effect whatsoever in national law. In dissent, although he agreed with the majority on the general proposition of direct application,[18] Justice Marc Rosenberg argued that Canada's decision to ratify the *International Covenant on Civil and Political Rights* and its enabling *Optional Protocol*[19] could guide the interpretation of Section 7 of the *Charter*, and support a procedural right of reasonable access to the Human Rights Committee (Paras. 91-93).

The second decision worth noting is that of the Court of Appeal of Québec in March 2003, in *Reference re Bill C-7 on the Criminal Justice System for Young Persons*.[20] In this case, the government of Québec submitted a reference to the Court of Appeal in which it asked the Court to evaluate the constitutionality of the federal bill on young offenders with respect to the division of legislative powers and the *Canadian Charter of Rights and Freedoms*. Additionally, the Court was asked to evaluate the compatibility of this bill with international law, in particular the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*. Having recalled the guiding principle according to which international conventions are not binding in Canada unless they have been incorporated into Canadian law, the Court of Appeal added that "even though the international treaties were not incorporated into domestic law, that does not necessarily mean that they are of no utility in that area" (Para. 92). This reaffirms the utility of international law in the interpretation of laws in Canada on the basis of the presumption of the legislature's intention to legislate in conformity with its international obligations. Simultaneously, it recognizes the possibility of choosing to legislate in a way not in conformity with international law (Para. 93). The Court also considered the legal effects of a simple judicial

18. *Id.* at § 73 (Rosenberg, J., dissenting: "The Covenant, while ratified, has never been incorporated into Canadian domestic law and therefore does not create legal obligations enforceable in Canada.").

19. Optional Protocol, Dec. 16, 1966, Can. T.S. 1976 no. 47, 999 U.N.T.S. 171 [*entered into force* Mar. 23, 1976].

20. Reference *re* Bill C-7 on the Criminal Justice System for Young Persons, (2003) 10 C.R. (6th) 281 (C.A. Qué.).

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declaration of incompatibility, and concluded that the non-compulsory nature of such a declaration means that the question assumes a primarily political, and therefore non-justiciable, character (Paras. 112-113). Thus, the limited utility of a judicial declaration of incompatibility lies in the impact it might have on the application of Section 1 of the *Charter* (Para. 115).

The third lower court decision of significance in this context is the 2004 judgment of the Ontario Court of Appeal in *Bouzari v. Iran*.[21] The main issue raised by this case was whether Canada's *State Immunity Act* barred the filing of a civil suit alleging torture against a foreign country. One of the arguments made by the appellant in this regard was that Canada's international obligations, both conventional and customary, provide an exception to state immunity for a civil claim for torture. In a unanimous decision written by Justice Stephen Goudge, the Ontario Court Appeal rejected this line of reasoning. The Court began its examination of this issue by calling attention to the presumption of conformity, as well as Canada's right to legislate contrary to its conventional or customary obligations in international law (Paras. 64-67). The Court concluded that "[e]ven if Canada's international law obligations required that Canada permit a civil remedy for torture abroad by a foreign state, Canada has legislated in a way that does not do so. [. . .] Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not" (Para. 67). That said, the Court then proceeded to examine what it termed the "more fundamental question" regarding Canada's international obligations in this matter. It first examined the provisions of the *Convention against Torture*, as well as state practice regarding its application and interpretation, and found that "the Convention creates no obligation on Canada to provide access to the courts so that a litigant can pursue an action for damages against a foreign state for torture committed outside Canada" (Para. 74). It reached the same conclusion with regard to the International Covenant on Civil and Political Rights (ICCPR) (Para. 83). The Court also rejected the appellant's arguments with respect to customary international law, finding that there was no state practice in support of the establishment of a duty to provide a civil remedy for acts of torture carried out abroad by a foreign state (Paras. 93-94).

This series of decisions, especially those of the Supreme Court, breathed new life into the debate over the place of international law in Canadian law. Several recent doctrinal contributions have highlighted the inaccuracies and, sometimes, the contradictions of this jurisprudence, and have sought to paint an updated picture of the

21. Bouzari v. Iran, (2004) 243 D.L.R. (4th) 406 (Ont. C.A.).

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impact of international law on national law.[22] The discussion which follows will touch on this aspect of the question, but in a relatively tangential way. It will be done within the framework of an analysis centered more on the characterization of judicial attitudes in what can be described as an internal dialogue on international law between the executive, legislative, and judicial branches.

II. Internal Dialogue

Several years ago, the metaphor of "constitutional dialogue" between the Supreme Court and the legislative branch was introduced in order to describe the intersection of the contributions of both branches to constitutional interpretation.[23] The Supreme Court echoed this idea in *Vriend*, in which Justice Iacobucci wrote:[24]

> 138. As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> 139. To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

22. *See, e.g.*, Gibran Van Ert, Using International Law in Canadian Courts (2002); Stéphane Beaulac, *The Suresh Case and Unimplemented Treaty Norms*, 15:1 Revue québécoise de droit international 221 (2002); Brunnée & Toope, *supra* note 4.

23. Peter Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter Isn't Such a Bad Thing After All)*, 35 Osgoode Hall L.J. 75 (1997); Christopher Manfredi & James Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37 Osgoode Hall L.J. 513 (1999); Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 Can. Bar Rev. 481 (2001).

24. Vriend v. Alberta, [1998] 1 S.C.R. 493, §§ 138-39 (Justice Iacobucci). Hogg & Bushell, *supra* note 23.

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Whether or not such a metaphor is fully justified in light of the attributes of each branch of government and the precise nature of their interaction, the idea of dialogue is appealing in that it deftly describes the relational aspects of the judicial function. Judicial reflection is not insular; it is alert to the position of other actors in society, foremost amongst which is the legislative branch. The adoption of the *Charter* recalibrated the relationship between courts and legislatures by expressly recognizing the former's powers to judicially review the constitutionality of laws beyond issues of separation of powers between provincial and federal legislatures. This resulted in the emergence of a new kind of dialogue, about which much has been written.[25] Judges invoking international law will, in the same way, signal a new dynamic in the relationship between the executive, legislative, and judicial branches, also creating a distinctive dialogue. Much of the counter-majoritarian objection to judicial review of the constitutionality of legislation does not transfer easily to the possibility of increased reliance by judges on international law.[26] The most fundamental reason for this lies in the fact that, unlike constitutional review, reliance on international law does not imply judicial reliance on hierarchically superior norms in the domestic legal sphere. As such, the international review of domestic law by judges amounts to a contribution to the production of legal norms, which seems comparatively much more dialogic than constitutional review.

As we will see in this section, this dialogue is characterized by two particular elements present in judicial discourse: the importance of Canada's assent to international norms and the role of the executive in treaty ratification. This dialogue will be labelled "internal"—in that it takes place between national actors—as opposed to an "external" dialogue between Canadians and foreign actors, which will be addressed in the latter part of this article.

A. The Importance of Consent

One of the peculiarities of legal recourse to international norms is that the question first addressed often concerns the very existence of the norm. While the issue of the binding nature of domestic norms rarely arises, it will often constitute an unavoidable first step to any application of international norms. Returning to the metaphor of dialogue, this dynamic can be described as a series of exchanges between the judiciary and the executive as to the degree of Canadian consent

25. *See* Peter Hogg, *Discovering Dialogue*, 23 SUP. CT LAW REV. (2nd) 3 (2004); Christopher Manfredi, *The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003*, 23 SUP. CT LAW REV. (2nd) 105 (2004); Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 SUP. CT LAW REV. (2nd) 49 (2004).

26. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

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to a given international norm. The first consequence of paying such attention to consent is the marked rarity with which Canadian courts consider customary international law. In the case of international treaties, judges will first examine the executive's declared acceptance of the norm, which makes the treaty binding for Canada at the international level. The question that then arises is the degree of penetration of these internationally binding norms in the sphere of national law. The answer to this question involves a complex dialogue between the judiciary and the legislature.

From the brief overview of recent cases above, we notice that the most significant decisions on the place of international law in national law relate to the application of conventional and non-customary norms. This is the case, in particular, in the Supreme Court judgements in *Baker* and *Suresh*. In *Spraytech*, Justice L'Heureux-Dubé for the majority invoked the precautionary principle in customary international law, an elliptic analysis which played a purely auxiliary, if not cosmetic, role in the judgement.[27] One case which stands out in this respect is the 2005 decision of the Supreme Court in *Mugesera*, in which the Court explicitly engaged in a detailed analysis of the elements of the crimes of genocide and crimes against humanity under customary international law. However, it may be difficult to extrapolate too broadly from this decision for two reasons. The first is that Canadian legislation expressly incorporated customary international law by defining crimes against humanity under Section 7(3.76) of the *Criminal Code* as "a contravention of customary international law." This type of express incorporation by reference of elements of customary law is extremely rare in Canadian law. In this case, the legislative mandate given by Parliament to courts is clear, and there is no option but to directly turn to custom. The second reason that makes *Mugesera* an atypical decision in this respect is that the customary international norms in question had been extensively analyzed as well as updated by the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).[28] It is highly unusual for domestic judges to have at their disposal a detailed and authoritative international judicial analysis of the customary norms of relevance to the application of

27. Even in *Spraytech*, Justice L'Heureux-Dubé bases her conclusion that there is a customary international norm on a number of references to the precautionary principle in various international treaties, a rather conventional version of custom.

28. *Mugesera*, *supra* note 14, § 126 ("These tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law. Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the Criminal Code, which expressly incorporate customary international law.").

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Canadian law. Likewise, *Hape* can be seen as quite peculiar in that it concerns a norm—the sovereign equality of States—which constitutes "an axiom of the modern international legal system" (Para. 44). As a "cornerstone of the international legal system" (Para. 46), it stands unchallenged and thus not subject to any uncertainty or controversy regarding its existence. Indeed, sovereign equality of States is most commonly not characterized as a customary norm but rather as a general principle of international law.[29]

As such, *Baker* and *Suresh* offer a more standard scenario of the application of customary law by Canadian courts. In these two decisions, the international norms which the plaintiffs sought to introduce into Canadian law touched respectively on the principle of considering the best interests of children in decisions affecting them in the former, and on the prohibition of torture in the latter. It is difficult to imagine better candidates for customary status. And yet, in both cases, the Supreme Court focused exclusively on treaty law. More generally, this attitude reflects the place Canadian courts will normally reserve for the application of international law.[30] It is all the more surprising given the hybrid nature of the reception of international law in Canada, according to which customary international norms are automatically incorporated into national law without the intervention of the legislature.[31] Logic dictates that courts should turn to customary international law if it contains relevant norms rather than seeking to broaden the effects of norms deriving from treaties which have been ratified but remain unincorporated.

There are various explanations as to the greater reticence of Canadian courts to invoke customary international law norms rather than conventional ones, in spite of the former's theoretically greater normative penetration as compared to the latter's. Judges' lack of familiarity with such unwritten international law norms leave them poorly equipped to mount a convincing argument.[32] This is another facet of the dialogic aspect of the judicial function: the acknowledge-

29. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 18-19 (6th ed. 2003); ANTONIO CASSESE, INTERNATIONAL LAW 48-53 & 188-89 (2nd ed. 2005); PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 316-21 (5th ed. 2000). This is meant to escape the chicken-and-egg problem of sovereignty as a customary norm, given that custom is derived from state practice and statehood is defined by sovereignty.

30. Even Justice La Forest, in his overview of the place of international law in the jurisprudence of the Supreme Court of Canada, omits any mention of customary law: Gérald La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN Y.B. INT'L LAW 89 (1996).

31. *See, e.g.*, JOHN CURRIE, PUBLIC INTERNATIONAL LAW 201-04 (2001); HUGH M. KINDRED ET AL., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 183-95 (7th ed. 2006). The Supreme Court of Canada in 2007 finally gave a clear jurisprudential confirmation of the principle of automatic incorporation of customary law into Canadian law in *Hape* at § 39.

32. *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 161 (1993).

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ment that the ruling is only one element of the judgement, which fundamentally seeks to offer a convincing justification for its conclusions. And yet, one often reads acerbic criticisms of national jurisprudence in international law doctrine on the basis that it does not meet the standards of international juridical argumentation.[33] Indeed, we often find elementary errors of international law in Canadian jurisprudence, even that of the Supreme Court.[34] This weakness of the judiciary reflects that of most lawyers who, due to a lack of knowledge, frequently abstain from presenting relevant arguments on the basis of customary international law, preferring instead to remain on the more familiar ground of conventional international law. This line of argument is only convincing to a certain extent, however. We may note, after all, that in certain cases—especially those brought to appeal—the parties, *amicus curiae* and other interveners, present sophisticated arguments founded on international law, including customary international law. Moreover, we cannot cast doubt on the expertise of at least a portion of the Canadian judiciary in international law without also noting the growing willingness of these judges to be open to customary international law. Therefore, the explanation—if there is one—lies elsewhere.

An examination of the rare cases in which Canadian courts have dealt with customary international norms suggests another line of reasoning. In the Supreme Court decisions in *Rafay & Burns* and *Spraytech*, we may note that the Court attaches a particular importance to Canada's declared position vis-à-vis norms said to be customary. In *Rafay & Burns*, the Court finds comfort in the fact that for many years Canada has consistently supported the movement to abolish the death penalty in international law.[35] Similarly, within the brief discussion in *Spraytech* on the customary character of the precautionary principle, there is mention that Canada had recommended its insertion in the *Bergen Ministerial Declaration on Sustainable Development*.[36] From the point of view of international law doctrine, this translates into a radically consensual approach to custom, a vision which does not correspond to the position of international courts and tribunals. As an example, one need only look to the decision of the International Court of Justice in the *North Sea Conti-*

33. *See, e.g.*, Stephen Toope, *Case Comment on the Québec Secession Reference*, 93 AM. J. INT'L L. 519 (1999); Irit Weiser, *Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonwealth System*, 37 U. BRIT. COLUM. L. REV. 113 (2003).

34. For example, it is mentioned in Winnipeg Child and Family Services v. G (D.F.), [1997] 3 S.C.R. 925, that Canada has signed the Declaration on the Rights of the Child, whereas states do not sign resolutions of the United Nations General Assembly.

35. *Rafay & Burns, supra* note 8, at §§ 84-85.

36. *Spraytech, supra* note 9, at § 31.

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nental Shelf case, the leading case on custom in international law.[37] In this case, the International Court described the constitutive elements of custom—State practice and *opinio juris*—without dwelling in any particular way on the position of the State against which the customary rule was being invoked.[38] One can speculate as to the reasons possessing Canadian courts to adopt a contrary position.

The search for indications that Canada supports a customary international norm tends to bring the method of recognizing custom closer to the mode of interpreting conventional international law. Without explicitly using the language of consent as a precondition for the binding effects of customary norms in the national sphere, invoking a State's support for a norm obscures the central role played by judges in the emergence of custom. A judge examining obligations arising from a treaty ratified by Canada takes action pursuant to the decision of the executive power to be bound; and a judge who notes the existence of a customary norm often contributes in a much more direct manner to the identification of the obligations binding upon Canada. The relatively rare exception concerns the few customary norms which have been extensively analyzed by international tribunals, as was the case for genocide and crimes against humanity in *Mugesera*, or those which stand virtually unchallenged, such as State sovereignty in *Hape*. In the ordinary course of events the judge is, at the very least, the midwife of customary norms, assisting in the process of its emergence as a binding standard; and at most, in line with the development of the common law, the judge plays a truly creative role. As noted in the context of administrative and constitutional law, however, any attempt on the part of courts to impose norms derived from non-written sources immediately raises the question of the legitimacy of such an intervention.[39] Unwritten norms are nearly always subject to dispute, and customary international law norms are no exception. Even for norms such as the best interests of the child or the prohibition of torture, disagreement is not impossible, and domestic courts do not perceive themselves as being required—or even being able—to arbitrate this kind of international legal debate.[40] It is,

37. *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), 1969 I.C.J. Rep. 3.

38. The possible exception is the principle of the persistent objector, according to which a State can prevent a customary rule from being applied to it if it has clearly and consistently objected to it. The principle remains disputed, and the International Court of Justice has never recognized the principle's cogency in its application to a rule of customary international law. What's more, even this principle implies a presumption of consent of States to customary rules which appears difficult to reconcile with the approach of Canadian courts illustrated in *Rafay & Burns* and *Spraytech*.

39. *See* David Dyzenhaus, Murray Hunt & Michael Taggart, *The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation*, 1 Ox. U. Common. L.J. 5 (2001).

40. Louis LeBel & Gloria Chao, *The Rise of Canadian International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges*

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therefore, in the bond between the uncertain and unwritten character of customary norms and the limits of judicial legitimacy that we find the explanation of the otherwise unjustifiable preference of courts for treaties over custom. This gap in the judiciary's self-image of legitimacy proves particularly acute when the unwritten customary norm in question emanates from a foreign normative system, as the actor's lack of institutional legitimacy combines with the norm's lack of political legitimacy.

To invoke again the metaphor of dialogue, the hesitancy of courts to turn to customary international norms illustrates a dialogue between the judicial branch and the executive branch, by which judges try to identify executive support for the binding character of the international norm. As will be seen, however, the association of the executive with the international norm's binding force will paradoxically serve to limit its normative value.

B. The Role of the Executive in the Ratification of Treaties

The executive's absolute freedom to act in ratifying international conventions in Canada has traditionally been presented as the factor explaining the lack of normative effects of treaties in national law. The reticence to recognize such an effect of treaties in Canadian law seems quasi-absolute, in spite of developments in other countries that share the British legal tradition in which the executive enjoys such freedom of action.[41]

The *Baker* and *Suresh* cases are two good illustrations of how the debate on the normative effectiveness of treaties in Canadian law is confined to very narrow parameters. In *Baker*, even the majority opinion of the Court does not venture to suggest that a treaty ratified by the executive that remains unincorporated can have a direct effect in national law. Instead, the majority reaffirms the classic rule according to which the absence of Parliamentary intervention prevents direct application of the conventional norm in Canadian law, and then vaguely suggests that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review" (Para. 70). We will further analyze this proposition below and simply note, at this point, that the majority decision recognizes that the absence of legislative implementation obviates any direct effects of a treaty. The dissent of Justice Iacobucci also supports the existence of this formal requirement, and paints a more detailed picture of the logic behind it. Justice

in Internalising International Law, 16 SUP. CT L. REV. 23, at 46 (2002). Some have further suggested that the impressions national judges have that their contemporaries in other countries do not apply custom cause them to hesitate in imposing heavier obligations on their own government: Slaughter, *supra* note 3, at 51.

41. *See* Joanna Harrington, *Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament*, 50 MCGILL L.J. 465 (2005).

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Iacobucci explains the need to maintain this principle by alluding to the danger of "adversely affect[ing] the balance maintained by our Parliamentary tradition, or inadvertently grant[ing] the executive the power to bind citizens without the necessity of involving the legislative branch" (Para. 80). To this argument, the majority of the Ontario Court of Appeal in *Ahani* added the idea that balancing Canada's various international obligations is the executive's role, and that an overly activist judiciary risks dissuading future ratifications (Para. 48).

The dialogue here, if there is one, links the judiciary and the legislature, and aims to exclude the executive from the dialogic creation of norms in Canadian law. It should be noted that the jurisprudence is consistent in finding no direct effect of ratified but unincorporated treaties, and that the line which separates the majority and dissent in *Baker* seems quite thin, such that the dissenting judges were able to join in the Court's unanimous decision in *Suresh*. The Supreme Court's position is constant in both its majority and dissenting opinions: a ratified treaty norm cannot become part of the law of the land other than through its incorporation in domestic law *by way of statute*.[42] This stance embodies a very narrow conception of legislative involvement. Furthermore, the majority in *Baker* and the Court in *Suresh* both refer to international law as being capable of aiding in the interpretation of Canadian law, without distinguishing between the international norms which bind Canada and those which do not. On the contrary, the majority in *Baker* vaguely refers to the "values reflected in international human rights law" (Para. 70) and in *Suresh* it is affirmed even more clearly that an appeal to international law does not conceive of Canada's international obligations as obligations, but rather as principles of fundamental justice (Para. 60). The Court even specifies that it looks to international law "as evidence of these principles and not as controlling in itself" (Para. 60), a logical consequence of its conclusion that, under domestic law, Canada is not bound by ratified but unincorporated treaties.

There is a certain tension between, on the one hand, the tendency of courts to refer to conventional international norms rather than customary ones on the basis of clearer state assent to be bound by the former norms and, on the other hand, its tendency to sharply limit the effect of conventional norms in national law, due to the fact that the executive's assent to them has not received legislative confirmation. It is also necessary to consider the Supreme Court's rigid position, expressed on several occasions, that Parliament or a provincial

42. See the majority (§ 69) and the dissent (§ 79) in *Baker*, as well as the decision of the Court in *Suresh* (§ 60). See also the decision of the Court of Appeal of Québec in the Reference *re* Bill C-7 on the Criminal Justice System for Young Persons, *supra* note 20, at § 89.

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legislature must give its approval to an international norm *by way of statute*. Legislatures sometimes intervene in the process of creating conventional obligations without passing laws. British parliamentary tradition directs that Parliament approve the ratification of the most important treaties.[43] In Canada, the last treaty to receive formal parliamentary approbation was the *Auto Pact*[44] between Canada and the United States in 1966. Even at the level of informal consultation, the federal Parliament has seen its role eroded to the point of being only sporadically consulted, as it was for the ratification of the *North American Free Trade Agreement (NAFTA)*[45] in 1987 and the *Kyoto Protocol*[46] in 2002.[47] The Province of Québec recently innovated in this field by passing a statute enshrining the process, whereby the executive consults the National Assembly in order to adopt a resolution approving Québec's decision to declare itself bound by a treaty.[48] Such interventions, of varying degrees of formality, illustrate that the contribution of the legislature to the process of creating international obligations should not be reduced exclusively to passing a statute of incorporation, but rather that it can take a variety of forms. The courts should pay greater attention to the diverse forms of legislative participation and develop positions which reflect this diversity. As will be noted below, this enrichment of the now-impoverished dialogue between courts and legislatures should underlie a more complex and complete vision of the normative penetration of international law in Canadian law.[49]

Even in the case of unilateral ratification by the executive, without any intervention by the legislature, it seems difficult to approve of the Supreme Court's conclusions in its recent case-law. This is par-

43. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 640 (1997); Lord Templeman, *Treaty-making and the British Parliament*, *in* PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 158 (Stefan Riesenfeld & Frederick M. Abbott eds., 1994); Harrington, *supra* note 41.

44. Agreement Concerning Automotive Products, United States and Canada, Jan. 16, 1965, Can. T.S. 1966 No. 14.

45. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Dec. 17, 1992, Can. T.S. 1994 No. 2.

46. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol U.N. Doc. No. FCCC/CP/1997/L.7/Add.1 (Dec. 10, 1997), 1998 37 I.L.M. 32.

47. *See* Daniel Turp, *Un nouveau défi démocratique : l'accentuation du rôle du Parlement dans la conclusion et la mise en œuvre des traités internationaux*, *in* CANADIAN COUNCIL ON INTERNATIONAL LAW, THE INFLUENCE OF INTERNATIONAL LAW ON THE PRACTICE OF LAW IN CANADA – REPORTS OF THE 27TH ANNUAL CONGRESS, at 115-31 (1999). *See also* ALAN GOTLIEB, CANADIAN TREATY MAKING (1968); ANNE-MARIE JACOMY-MILLETTE, L'INTRODUCTION ET L'APPLICATION DES TRAITÉS INTERNATIONAUX AU CANADA (1971).

48. *An Act Respecting the Ministère des relations internationales*, R.S.Q. c. M-25.1.1.

49. See the description of the impact of various kinds of international norms in national law, *infra*, at notes 55*ff* and accompanying text.

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ticularly so in regard to the reticence of Canadian courts to adopt the doctrine of legitimate expectations. According to this doctrine, which arose from a High Court of Australia ruling in the *Teoh* case, the ratification of a treaty by the executive creates a legitimate expectation for citizens that executive agencies will act in conformity with the international obligations so created.[50] Without discussing the possibility of the reception of this doctrine in Canadian law—to which we will return later—it is appropriate to stress the frailty of the justifications put forward by Canadian courts which refuse to adopt it.

The jurisprudence, initially, emphasizes the division of powers between the executive and the legislature, as well as the need to prevent the former from assuming the role of the latter in ratifying international treaties. Clearly, courts would be ill-equipped to recognize that the executive has the competence to "legislate" in Canadian law via the consecration of the direct effect of conventional international obligations. Even if this conclusion were mandated by Canada's constitutional context, it would still be going too far to affirm that this step must be taken to prevent "inadvertently grant[ing] the executive the power to bind citizens."[51] The fact is that the executive branch now unquestionably holds the power to bind citizens through the exercise of its regulatory power. We may criticize the democratic deficit that grows from the progressive widening of this regulatory power, but this does not justify the refusal of courts to acknowledge the existence of such a development.[52] It is true that the adoption of regulations remains subject—at least in theory—to what the law authorizes, which leads to the conclusion that conventional norms ratified by the executive should not have the force of law. In accordance with their longstanding preferences,[53] courts have adopted a policy of "all or nothing," distinguishing in dichotomous fashion between ratified norms which are binding in Canadian law and those with no effect. However, normativity in national law is not binary, but rather a phenomenon marked by a diversity of forms. Each act of the State, official by its very nature, constitutes a juridical fact that produces effects the courts must recognize. The rather schizophrenic alternative to recognizing this amounts to the claim that the executive can exist in a dual reality, completely detached from the national context from which it derives its political legitimacy.

The doctrine of legitimate expectations aims to recognize the fallacious character of this proposition, as well as to acknowledge that the ratification of a treaty is a public and official act on the basis of

50. Minister of State for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273. The legitimate expectation created is a purely procedural (non-substantial) one.

51. *Baker, supra* note 5, at § 80 (Justice Iacobucci, dissenting).

52. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 292-93 (1997).

53. *See David Daube*, The Scales of Justice, *63* JURIDICAL REV. 109-29 (1951).

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which citizens can act. This does not lead to a direct application of the norm in the same way as if a statute of incorporation had been passed by the legislature. Rather, it leads to the recognition of the effects of every act of the executive, including the ratification of treaties. Although the law places a limit on the effects of treaty ratification in national law, it does not preclude the existence of effects which fall under the framework of regulatory discretion. In other words, it seems perfectly legitimate for treaty ratification to give rise to an internal effect if the executive could have created the same effect using its regulatory powers. For example, to use the facts of *Baker*, there is no doubt that the government could have issued a regulation directing that immigration officers allow the best interests of children to play a dominant role in any decision on deportation. There is no risk of upsetting the balance of Canadian Parliamentary tradition by allowing a similar effect to flow from ratification of the *Convention on the Rights of the Child*.

We might also inquire about the extent of the court's refusal to allow the executive to bind citizens in the context of the doctrine of legitimate expectations. Even if one considers it a fundamental principle that the executive has no powers of this nature, it does not follow that the application of this doctrine will bind citizens—rather, it binds the executive. The effect of this doctrine is to allow citizens to act on the assumption that the executive will respect certain procedural guarantees, unless it has expressed its intent not to conform to these guarantees in a particular case, or in a more general way. The result of a partial application of international norms in national law in the form of the doctrine of legitimate expectations does not restrict the rights of citizens, but rather increases them, while the executive will see its freedom of action limited in an equivalent manner. As was well explained by the High Court of Australia in *Teoh*—an analysis restated by Justice Rosenberg in his dissent in *Ahani*—it is difficult to reconcile the general principle of the obligation to act in good faith with the rejection of the doctrine of legitimate expectations. To take the contrary position amounts to affirming that the executive ratifies a given treaty on the basis of its total absence of internal effects, which does not appear to be the case. On the contrary, the refusal to directly apply international norms in national law aims to protect legislative power and the rights of citizens. Refusing the doctrine of legitimate expectations fulfills neither of these objectives, serving only the unjustifiable end of protecting the executive from the consequences of its own actions.[54] This position reflects the well-recognized principle that, according to Canadian law, the State can *legislate* contrary to its international obligations; this is a prerogative of the legislature rather than of the executive.

54. See *Ahani*, *supra* note 17, at §§ 91-92 (Justice Rosenberg, dissenting).

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The dialogue between the judiciary and the legislature on the internal effect of ratified but unincorporated treaties suffers from a lack of imagination on both sides. There is a lack of imagination on the part of judges, who too often perceive the choice as one between the direct application of norms on the same level as a statute or their complete non-application. There is also a lack of imagination on the part of legislatures, which too often limit their actions in this domain to the rare formal incorporation of treaties by way of statutes. We must enrich this dialogue by calling upon the whole spectrum of normativity, both national and international in origins, in order to arrive at solutions which reflect the diverse levels of interaction between the national and international normative spheres.

III. The Normativity of International Law in National Law

What would a portrait of the normativity of international law in national law, painted with the entire spectrum of norms, look like? The answer depends in a large part on what we define as legal normativity. On the basis of a discussion of the significance of the bindingness of international norms (part A), we will then be able to outline the elements of this portrait (part B).

A. The Significance of Bindingness

In *Suresh*, the Supreme Court makes a surprising assertion when it specifies that it is calling upon international law not because it governs the issue, but in order to confirm the principles of fundamental justice guaranteed by the *Charter of Rights and Freedoms*: "[o]ur concern is not with Canada's international obligations *qua* obligations" (Para. 60). If the long analysis of Canada's international obligations which follows this assertion is not offered because these norms are binding, then why are they invoked? At a 2002 conference, Justice LeBel addressed this issue in his analysis of the Supreme Court's recent jurisprudence involving international law. He argued that international law is used by the Court as comparative law, which permits it to avoid having to rule on the status of international law.[55] This appears consistent with a certain judicial practice of allowing expert testimony on the content of international law and, in Québec, the requirement that unincorporated treaties and international customary law be pleaded.[56] The essential quality of compara-

55. LeBel & Chao, *supra* note 40, at 45.

56. Art. 2807, Civil Code of Québec ("Judicial notice shall be taken of law in force in Québec. However, statutory instruments in force in Québec but not published in the Gazette officielle du Québec or in any other manner prescribed by law, international treaties and agreements applicable to Québec but not contained in a text of law, and customary international law, shall be pleaded."). This is said to be a purely procedural rule meant to assist the judge rather than a substantive block to the Court's ability to consider international law: J-Maurice Arbour & Geneviève Parent,

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tive law is that the sources to which it points are not binding but merely persuasive. This position seems to lead to the conclusion that the binding force of international norms is irrelevant to the analysis of their effects in national law.

For some, this approach creates a useful loophole in the debate on the application of international law in Canadian law, a debate said to be unproductively focused on the question of the bindingness of norms.[57] The traditional approach requires the judge to make a binary choice between the binding or non-binding nature of a norm, which leads to an all-or-nothing conclusion.[58] The model of transgovernmentalism developed by Anne-Marie Slaughter has been used to suggest that analogizing international law to comparative law frees judges from the difficult task of having to rule on the binding or non-binding character of international norms, permitting the use of these norms based on the values shared by national and international law. Paradoxically, according to this approach, international law must be seen as more foreign to imbue it with greater utility.

Although the courts have never explicitly analogized international law to comparative law, this explanation seems to fit well with the vagueness that surrounds the Supreme Court's recourse to international norms in *Baker* and *Suresh*. We can, however, question the conception of legal normativity which underlies this analysis. To accept the import and relevance of the binding nature of international norms does not ineluctably lead to the binary choices of binding/non-binding and direct application/non-application in national law. On the contrary, as was suggested earlier, legal normativity is a fluid concept which varies as much in its international as its national manifestations. Therefore, the judge must make use of international law norms of variable normative character. Some are entirely binding for Canada in the international legal order, such as obligations flowing from a ratified treaty or from custom. Others will have attenuated binding force and are referred to collectively as *soft law*. Finally, we find norms that are not binding, such as unratified treaties. The penetration of international norms into the Canadian legal system should, therefore, also be variable. Certain norms of international law will have direct application in national law, for example the customary rules on state immunity.[59] Others will have a weakened binding force, as the development of the doctrine of legitimate

DROIT INTERNATIONAL PUBLIC 200 (5th ed. 2006); JEAN-CLAUDE ROYER, LA PREUVE CIVILE 61-62 (3d ed. 2003). *Bouzari*, *supra* note 21, at § 68, offers that the trial judge's reliance on the opinion of one expert rather than another on the state of international law is not a finding of fact but is nevertheless "based on the evidence she heard."

57. Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U.J. INT'L L. & POL. 501 (2000).

58. *Id.* at 515.

59. State Immunity Act, R.S.C. c. S-18 (1985); Trendtext Trading Corp. v. Central Bank of Nigeria, [1977] 1 ALL E.R. 881 (Engl. C.A.).

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expectations in *Teoh* demonstrates. There are two distinct questions regarding bindingness: the first examines the binding nature of the norm *for* Canada (in the international sphere), and the second examines the binding nature of the norm *in* Canada (in the internal sphere). Furthermore, there is no requirement of systematic correspondence between the two levels of normativity, meaning that a norm with full binding force in international law might have a lesser effect in national law. Accepting the relevance of the bindingness of an international norm in Canadian law does not necessarily provoke the binary choice criticized by some. On the contrary, bindingness and variable legal normativity can coexist peacefully within the same norm.

Invoking the persuasive force of international law, in keeping with the comparative law approach, should not obfuscate the relevance of the question of its bindingness. While it is true that non-binding norms may have considerable persuasive force, as foreign laws can have, it goes too far to claim that there is no link between persuasive force and bindingness. Could a judge find that an international norm is binding and yet conclude that it is unpersuasive? The discourse of persuasiveness centers the analysis around the perception of the agent called to apply the norm, in this case the judge, whereas the discourse of bindingness centers on the process by which a norm acquires a particular status within the domestic legal sphere. The comparative approach amounts to denying the relevance of legal normativity, not only relative to international law, but to law in general. This type of criticism of legal normativity is of course possible, indeed one might say persuasive, but one cannot insert it in the analysis of the formal application of law by courts in Canada, which is necessarily predicated upon the validity of formal law. The attraction of the comparative law approach, focused as it is on the persuasive force of norms, lies in its purely auxiliary character, namely the idea that international law can only supplement national law. At a certain level, it is clear that domestic legislators can choose to effectively violate their international obligations in national law, and in this respect international law plays an auxiliary role in the internal sphere. We should not forget, however, that there is an essential difference between comparative law and international law. Whereas the former is not part of a normative regime that includes the State, the latter establishes the boundaries of a regime binding on the State. International law, therefore, does not only play an auxiliary role: it frames the State's conduct with just as much effectiveness as national law, each in its own normative sphere. The fundamental question is, therefore, that of the identity of national courts as conceived by domestic judges. An inward-looking stance and the institutional "blinders" that block the consideration of an international dimension make it possible to construct a narrow conception of the judicial function

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which, in turn, leads to a rigidly dualistic stance and to a denial of any direct application of international law in national law. International law, just like comparative law, therefore constitutes "the law of others."[60] The reality of globalization is that it has become illusory to cling to such blinders, because the economic, political, and legal interpenetration of all States—including Canada—means that the actions we take resonate beyond our borders, and vice versa. By recognizing a complex identity that reflects our membership in superimposed communities, Canadian judges would be doing nothing more than echoing this reality.

B. Portrait of the Impact of International Law in Canadian Law

The preceding analysis led to the conclusion that the bindingness of international norms must constitute an element of their adaptation in the internal legal sphere. Building upon this conclusion, the portrait which follows offers a short overview of the impact of international law in Canadian law on the basis of the degree of bindingness of an international norm. We will thus differentiate amongst international norms according to whether or not they imply international obligations for Canada. The object of this portrait is not to offer a comprehensive account of the jurisprudence bearing on the place of international law in Canadian law, but rather to illustrate the richness and variety of forms that international norms can take in national law.[61]

1. The Spectrum of Bindingness

Turning initially to the norms of international law which are not binding on Canada, we will first want to differentiate amongst those which can never become binding and those which could become binding following State assent. In the first category are the customary and conventional norms related to regimes which do not include Canada, such as the *African Charter on Human and Peoples' Rights*.[62] In this case, the international law in question is truly part of foreign law, the only difference being the supranational character of the norms involved. This "law of others" will not be invoked by a domestic court except on the basis of its persuasive force, which will depend on factors such as the common origins of the national and international norms or the similarity of context.[63] In the case of *Les Immeubles Ni / Dia Inc.* for example, the Québec Human Rights Tribunal invoked the

60. *See* Stephen Toope, *Inside and Out: The Stories of International Law and Domestic Law*, 50 U.N.-B. L.J. 11, at 26 (2001); Brunnée & Toope, *supra* note 4, at 46.

61. For a systematic exposé, see Brunnée & Toope, *id.*, at 58-63; Weiser, *supra* note 33.

62. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58.

63. *See* Stéphane Beaulac, *National Application of International Law: The Statutory Interpretation Perspective*, 41 CAN. Y.B. INT'L L. 225, at 264-66 (2003).

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relationship between the social contexts of Québec and Europe to justify its recourse to the jurisprudence of the bodies of the *European Convention on Human Rights*[64] regarding the characterization of common law relationships as a component of an individual's civil status.[65] In *Canadian Federation for Children v. Canada*, the Supreme Court discussed the reasonableness of a criminal code provision allowing parents to physically punish their children in light of both the *Convention on the Rights of the Child* and the *Covenant on Civil and Political Rights*, and, again, the *European Convention on Human Rights*.[66]

In the same category are international norms which do not have binding force in the international sphere, in particular the qualified norms of *soft law*. For Canada, the non-bindingness of these elements of international law means that they do not create formal obligations, so that there is no direct application of these norms. Although we cannot formally speak of comparative law in this context, the analogy with comparative law remains the best one considering the embryonic nature of international norms. These non-binding international norms potentially have considerable persuasive force, which explains the frequency with which Canadian judges invoke them. The decision of the Québec Human Rights Tribunal in *Gagné* clearly expresses the relevance of having recourse to these non-binding norms of international law.[67] The Tribunal, in its analysis of protection against exploitation granted to elderly and handicapped persons under the *Québec Charter of Human Rights and Freedoms*,[68] refers to the *Universal Declaration of Human Rights*[69] and the *International Plan of Action on Ageing*,[70] two resolutions of the United Nations General Assembly (Para. 65): "Même si ces instruments n'ont pas comme tel un caractère contraignant, ils n'en traduisent pas moins les objectifs et standards communs visés par l'ensemble des États membres de la communauté internationale et qui, à ce titre, inspirent à tout le moins leur législation nationale."[71]

64. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

65. Commission des droits de la personne v. Les Immeubles Ni/Dia Inc., Québec Human Rights Tribunal, Beauharnois (Oct. 26, 1992), 550-53-000001-928.

66. Canadian Federation for Children v. Canada [2004] 1 S.C.R. 76, at § 31.

67. Commission des droits de la personne et des droits de la jeunesse v. Gagné, Québec Human Rights Tribunal, Joliette (Dec. 16, 2002), 705-53-000017-023.

68. Québec Charter of Human Rights and Freedoms R.S.Q. ch. C-12 (2002).

69. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., Supp. No. 13, U.N. Doc. A/810 71 (Dec. 12, 1948).

70. International Plan of Action on Ageing, G.A. Res. 37/51, U.N. GAOR, 51st Sess., U.N. Doc. A/Res/37/51 (Aug. 6, 1982).

71. Roughly translated as: "Even if these instruments do not have such a binding function, they convey objectives and common standards aimed at the whole of the international community which at the very least inspire States' national legislation." On this point, see Weiser, *supra* note 33, at 150-54.

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This category shows that the non-binding character of an international norm does not necessarily imply its uselessness to the administration of national law by Canadian judges. The fact remains, however, that recourse to non-binding international norms is purely optional and varies according to their persuasive value.

In the second category are conventional norms which do not create international obligations for Canada because they have not been consented to. The absence of consent can arise either from Canada's indecision or from a stand taken against ratification.[72] Although these are international norms which once again have no binding force for Canada, the position of the judge vis-à-vis these norms is radically different from that in the preceding category. Earlier, it was stressed that the transparency of State consent to international norms facilitates their invocation by national judges. If Canada clearly declares its intention not to ratify a treaty, the treaty's conventional norm forms part of an international legal regime in which Canada does not take part. This law becomes "other" and judges will only be able to make use of it for comparative purposes, provided that it possesses persuasive force. In any case, Canada's rejection of a given treaty would likely affect its persuasive force and, therefore, decrease its normative influence in national law. That being said, like most States, Canada seldom officially rejects treaties. The preferred method is maintaining a vague or nuanced position vis-à-vis treaties, the content or import of which raises difficulties. The position of Canadian courts proves to be more uncomfortable here because it is marked by uncertainty as to the bond between Canada and the international norm. Judges can neither assume the power to make the norm binding nor reject the treaty; this remains a political decision which must be made by the executive. The existence of a potential bond between Canada and the international norm makes it such that the norm cannot be fully associated with the notion of "foreign law," marked by complete alterity.

Following the solution of international law to this problem of normative witching hour, found in Article 18 of the *Vienna Convention on the Law of Treaties*, national judges should attempt to interpret national law in such a way as to avoid contravening the object or purpose of international norms.[73] This is a vaguer and more general

72. For custom, one can equate the case of the persistent objector to the decision not to ratify a treaty. In as much as the doctrine of persistent objection is accepted in international law, it acts in one case as in the other as a decision made by the State to reject the international norm. The commentary remains primarily theoretical for Canada, which is not a persistent objector to any customary international law norms.

73. Vienna Convention on the Law of Treaties, § 18, Jan. 27, 1980, Can T.S. No 37: "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or b) It has expressed its con-

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standard than that of the presumption of compatibility of national law with binding international norms, which will be dealt with below. Beyond this weakened binding effect, Canadian courts have complete freedom to consider unratified but unrejected treaties as potentially having persuasive force. There are frequent appeals in the case-law to this kind to treaties which have not been ratified by Canada. In *Suresh*, the Supreme Court looked to the *International Convention for the Suppression of the Financing of Terrorism*,[74] then unratified by Canada, to determine if the word "terrorism" in the *Immigration Act* was vague to the point of being unconstitutional.[75] Similarly, in the *Birkett* case, the Québec Human Rights Tribunal invoked the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*,[76] unratified by Canada, to contextualize the problem of sexual harassment.[77] In these cases, the international norm is not being applied in national law—which would be illegitimate—but is rather being invoked to situate the juridical analysis of Canadian law in the international context. To use the language of *Baker*, non-binding international norms can "help inform the contextual approach to statutory interpretation and judicial review" (Para. 70).

If we turn now to norms of international law which are binding upon Canada, we usually distinguish between norms that have been incorporated into national law by legislation and those that have not. Regarding the former, it is acknowledged that conventional norms incorporated by legislation as well as customary norms are directly applicable in national law.[78] Although many technical questions arise from the issue of what constitutes "incorporation" of treaty obligations by the legislature, it is generally accepted that the consequence of direct application is to accord the international norm binding force similar to the one possessed by statute.[79] For the judge, the effect of incorporation is to transform an exotic norm of uncertain normativity into a domestic norm subject to the usual rules of legal interpretation

sent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

74. International Convention for the Suppression of the Financing of Terrorism, 9 G.A. Res. 109, U.N. GAOR 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109, (2000) (Dec. 9, 1999) 39 I.L.M. 270 [*entered into force* Apr. 10, 2002].

75. *Suresh, supra* note 11, at §§ 93-99.

76. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, General Assembly of the O.A.S., Doc. OEA/Ser.P AG/doc.3115/94 rev.2, (June 9, 1994) (1994) 33 I.L.M. 1534.

77. Commission des droits de la personne et des droits de la jeunesse v. Birkett, Québec Human Rights Tribunal, Montréal (Apr. 12, 2000), 500-53-000125-995, at §§ 18-19. *See also* Fraser v. Canada (Attorney General), (2005) 511 mm. L. Rev. (3rd) 101 (Ontario Court of Justice) (which refers to the International Convention on the Rights of All Migrant Workers and their Families, which has not been ratified by Canada).

78. *Hape*, *supra* note 16, at § 39; *Bouzari, supra* note 21, at § 65.

79. *See e.g.*, CURRIE, *supra* note 31, at 226.

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and application. It should be recalled that incorporated international norms do not necessarily have hierarchical superiority over other norms. In the event of conflict, it will be necessary to attempt to reconcile the two norms, and failing this, to resort to the presumptions as to the most recent of the norms, the most specific norm, etc. It should be understood that a "domesticated" international norm becomes a rule of national law; for this reason it seems unjustified to only accord it a limited contextual role in interpreting other indigenous Canadian norms. It is difficult to find applications of this principle in Canadian jurisprudence, specifically as regards international custom automatically incorporated into national law. As *Spraytech* illustrates, Courts generally confine custom to the periphery of an argument instead of granting it the weight it is accorded as a matter of law.

In its recent discussion of international custom in *Hape*, the Supreme Court sought to clearly indicate that the doctrine of automatic adoption of customary law prevailed in Canada. The manner in which the Court explained the consequences of direct application of custom, however, is not free of ambiguity. Referring to English law and the seminal case of *Trendtex Trading*, the Supreme Court found that "[a]ccording to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule" (Para. 36). Indeed, in the English case in question, Lord Denning held that, in the absence of any legislation on the matter, the international customary rule of state immunity would render inadmissible a claim against a foreign State. That said, in embracing the doctrine of adoption for Canada in *Hape*, the Supreme Court concluded that "[a]bsent an express [statutory] derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (Para. 39). Despite the overt adoption of automatic incorporation on the English model, the statement could be taken as implying that the impact of custom on domestic law is limited in Canada to an interpretive aid, as opposed to direct application of customary law by English Courts. The explanation for the ambiguous formulation may be that, in *Hape*, the Supreme Court was concerned with the impact of the customary principle of state sovereign equality on the application of the constitutional *Charter*. In other words, in this particular case, there was a clear hierarchical relationship between the incorporated custom and the national norm, such that the only possible impact of the international rule was at the level of the interpretation of the constitution. When constitutional norms are not at play, the import of the Supreme Court's holding in *Hape* should properly be that customary norms are applied as common law rules by Canadian courts.

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The great majority of Canada's international treaty obligations have not been incorporated into national law by the legislature, which raises the difficult question of their impact in national law. The issue of the internal effect of ratified but unincorporated treaties constitutes the greatest source of friction between the internal and international legal spheres. With the proliferation of international treaties in almost all fields of social and economic activity, parties increasingly seek to support their legal arguments by invoking conventional norms, and litigants and judges do not always clearly distinguish between treaties which have been ratified, rejected, or ignored by their government. The importance of the binding force of international norms for their translation into national law was stressed earlier, and we will now examine in detail the status of treaties which give rise to international obligations for Canada. The treatment of conventional norms by courts is made more difficult by the polarization of the arguments produced by an adversarial judicial process. Because they repeatedly face parties who argue that treaties should have a direct effect, while others argue that treaties should have no impact at all, courts often perceive their choice as one of these two extremes. Accordingly, as is well illustrated by the majority and the dissent in *Baker*, any openness to recognizing that international norms could have an effect in national law appears difficult. As was outlined previously, however, the notion of complete inapplicability suffers from the same defects as that of direct application without legislative incorporation. We must therefore move away from these two poles to sail the troubled waters of a variable and mitigated normativity of conventional norms in national law. By way of example, we will examine the presumption of conformity of national law to international law, the doctrine of legitimate expectations, and the possibility of legal declarations of non-conformity of national law with international law.

2. Presumption of Conformity

The presumption of conformity of Canadian law with international law calls for an interpretation of national law which reconciles it, if at all possible, with Canada's international obligations. This presumption is based on the idea that Canadian legislatures do not violate their international obligations lightly, and that they will, therefore, clearly indicate their intention to do so. This being said, as the Supreme Court has repeated in a number of cases, the legislature preserves the prerogative to freely violate Canada's international obligations if it so desires, and in the event of unambiguous and irreconcilable incompatibility between Canadian and international norms,

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the judge will simply apply the internal norm.[80] We are dealing here with real, albeit attenuated, application of international norms in Canadian law. According to this presumption, the judge must simultaneously interpret Canadian law and relevant international norms in order to then situate the Canadian norm within the limits of the international norm, if this is possible. We must contrast this exercise with the judge's optional recourse to non-binding international norms (if they are judged to be persuasive) in order to contextualise a Canadian norm.[81] Whereas the legislator is supposed to be aware of and try to respect Canada's international obligations when enacting laws—the decision to do so thus forms part of legislative intent—the non-binding international context is one fact among many which a judge can consider when applying the law. The distinction seems echoed by the Supreme Court in the 2007 *Hape* decision (Para. 53):

> It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. [. . .] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation.

In this passage, the Court makes a distinction between binding international obligations, which create a duty for courts to strive to interpret domestic in a manner consistent with international law, and "the values and principles of customary and conventional law," which provide a backdrop to judicial interpretation of domestic law. The language used by the Supreme Court does not track the semantic cat-

80. *Hape*, *supra* note 16, at §§ 53-56; Schreiber v. Canada, [2002] 3 S.C.R. 269, at § 50; R. v. Cook, [1998] 2 S.C.R. 597 at §§ 147-48 (Bastarache J.); Daniels v. White [1968] S.C.R. 517 at 541.

81. This is presented by Beaulac as a spectrum of influence, whereby the international legal context to interpretation goes from "internal-immediate" to "external-extended": Beaulac, *supra* note 63.

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egories familiar to international lawyers, but nevertheless suggests a distinction based on the relative bindingness of international norms. The difference is one of degree, but is nevertheless real and important.

It is difficult to find a clear application of the demarcation between these different types of international norms in the jurisprudence. In *Baker*, the majority of the Supreme Court invokes the *Convention on the Rights of the Child*, ratified by Canada, in an excessively vague manner. Far from analyzing the import of the *Convention's* "best interests of the child" rule to determine whether the *Immigration Act* can be interpreted in conformity with Canada's international obligations, the Court announces that we may "take into account" the "values reflected in international law" in "the contextual approach to statutory interpretation" (Para. 70). Moreover, the utility of such an appeal in *Baker* seems rather limited. More promisingly, in *Suresh*, the Court indicates that the provisions of the *Immigration Act* "must be considered in their international context" and furthermore, that a proper understanding of the *Act* "requires consideration of the international perspective" (Para. 59). We therefore pass from permissive language in *Baker* to prescriptive language in *Suresh*, which appears to better reflect the application of the presumption of conformity. The reference in *Suresh* to the "international context" rather than to the relevant international obligations, such as those in the *Convention Relating to the Status of Refugees*[82] and the CAT, leaves one somewhat perplexed, especially given the Court's statement that "our concern is not with Canada's international obligations *qua* obligations" (Para. 60). However, the analysis which follows this statement of principle is an evaluation of the impact of Canada's international obligations and an attempt to reconcile them with the *Immigration Act*. In spite of the Court's disconcertingly ambiguous language, this seems to be a progression towards a position more compatible with the principle of the presumption of conformity of Canadian law with international obligations.[83]

It should be noted that the preceding remarks are equally applicable to norms developed in administrative law as well as at common law. In *Hape*, the Supreme Court noted that courts may look to automatically incorporated international customary norms to aid in the development of the common law (Para. 39). Nothing is said in Canadian cases regarding the impact of binding but unincorporated international obligations. This is, of course, in contrast to English and Australian law where it is clearly recognized that judges, by inter-

82. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

83. It must be stressed, however, that in *Suresh*, the Supreme Court treats binding and non-binding sources of international law in similar fashion.

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preting and developing the common law and administrative law in a progressive manner, must consider international law.[84] It is not in these countries a question of direct application that would invalidate an inconsistent domestic norm, but rather an attenuated effect by which the ambiguities of municipal law will be exploited to make it compatible with international law, if possible. As for the *Canadian Charter of Rights and Freedoms*, courts have treated it as unique from the outset. As it is a text directly inspired by various norms of international law of which only some are binding internationally for Canada, it was initially indicated that international human rights law was to guide the interpretation of the provisions of the *Charter*, rather than to affirm that courts had the duty to interpret it in conformity with Canada's international obligations.[85] There were attempts to justify this reticence by referring to the constitutional nature of the *Charter*, which implies that judicial interpretation in light of international law is not subject to subsequent legislative rejection, except through the application of Section 33 of the *Charter*.[86] Once more, the Supreme Court in *Hape* seems to have sought to put to rest any uncertainty by affirming that "[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction" (Para. 56).

84. *See* Attorney-General v. BBC, [1981] A.C. 303 at 354 (Lord Scarman); Attorney-General v. Guardian Newspapers Ltd. (No 2), [1988] All E.R. 545 at 660 (Lord Goff); Director of Public Prosecutions v. Jones, [1999] 2 All E.R. 257 at 266-67 (Lord Irvine), 272 (Lord Slynn), 283 (Lord Hope); *Teoh* at § 28 (Chief Justice Mason and Justice Deane); Mabo v. Queensland (No 2), (1992) 175 C.L.R. 1; MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS 149 (1997); E.M. Hyland, *International Human Rights Law and the Tort of Torture: What Possibility for Canada?, in* TORTURE AS TORT 401 (Craig Scott ed., 2001).

85. Reference *re* Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 349 (Chief Justice Dickson, dissenting); Slaight Communications v. Davidson, [1989] 1 S.C.R. 1038 at 1056; *Suresh* at § 60; Brunnée & Toope, *supra* note 4, at 37; Schabas, *supra* note 4, at 185-91.

86. Brunnée & Toope, *id.* at 37-38; David Dyzenhaus, *Constituting the Rule of Law: Fundamental Values in Administrative Law*, 27 QUEEN'S L.J. 445, at 501-02 (2002); Anne Warner La Forest, *Domestic Application of International Law in Charter Cases: Are We There Yet?*, 37 U. BRIT. COLUM. L. REV. 157 (2003). Section 33 provides for the possibility of a legislative override of some rights entrenched in the *Charter*: "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of a re-enactment made under subsection (4)."

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As previously noted, the presumption of conformity of Canadian law with international law fits within the dynamic of a dialogue between the judicial branch and the legislative branch. By presuming that the legislator takes its international obligations into account when creating norms, we open the door to the influence of treaties that have been ratified but remain unincorporated. It goes without saying that if the legislature played a role—even a purely formal one—at the time of the ratification (for example, by means of a resolution approving the ratification), the basis of this presumption will be further reinforced. Additionally, mention of the international legal context during parliamentary consideration of a bill or mention of international instruments in the preamble to a law can produce similar effects.[87] Judicial intervention leaves the door open to dialogue since the legislature can always revisit the issue and clarify its intention to derogate from international obligations, except with regard to certain parts of the *Charter*.[88]

3. The Doctrine of Legitimate Expectations

The doctrine of legitimate expectations constitutes a second example of the partial penetration of the domestic legal sphere by international law, resulting in an attenuated form of normativity of international norms in national law. The doctrine of legitimate expectation initially arose in administrative law, originating in a case in which Lord Denning found that the government could behave in such a way as to give birth to a reasonable expectation that a right or liberty will be conferred or not curtailed.[89] According to this doctrine as it relates to international law, the ratification of a treaty by the executive gives rise to a legitimate expectation on the part of citizens to the effect that the executive will conform to its international commitments. Only procedural rights can normally be created this way, and then only if the executive has not indicated its intention to act in a manner contrary to the treaty in a particular case or in a general way. As the High Court of Australia explained in *Teoh*, the creation of a legitimate expectation does not necessarily force the executive to act in a certain manner; rather it obliges the executive to inform con-

87. The Québec Court of Appeal in Reference *re* Bill C-7 on the Criminal Justice System for Young Persons states that the mention of the Convention on the Rights of the Child in the preamble of the federal law creates a "relative interdependence" between the two instruments (§ 92).

88. This also answers a criticism of the idea of constitutional dialogue between courts and legislators, according to which there is no true dialogue because courts give themselves the last word by invoking the Constitution (putting aside the restricted field of application of the *Charter*'s article 33): Jean Leclair, *Réflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien*, 2003 REVUE DU BARREAU 379, at 392. Courts that use international law do not give themselves the last word, as the legislature can always adopt a law which unambiguously contravenes Canada's international obligations.

89. Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch. 149.

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cerned citizens of its intent to act contrary to the treaty.[90] In *Teoh*, the consequence of the doctrine of legitimate expectations was not to prevent Australia from deporting Mr. Teoh contrary to the best interests of the child, nor even to require that the best interests of the child be accorded primary importance when that decision was made. Rather, it was to let the applicant know that the administration would make its decision without giving primacy to the best interests of the child. As such, the applicant should have been afforded an opportunity to present arguments to the contrary. The Australian High Court later emphasized the limits of *Teoh*, insisting in particular that the case does not justify the creation of substantive rights.[91] The doctrine of legitimate expectations was accepted without hesitation by the English Court of Appeal in the 1998 case of *Ex parte Ahmed*. When referring to *Teoh*, Lord Woolf, M.R., concluded:

> I will accept that the entering into a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it would be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the Treaty. This legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reasons, acted inconsistently with the obligations which this country had undertaken.[92]

The Privy Council confirmed this conclusion in *Thomas v. Baptiste*, clearly underscoring the distinction between legitimate expectations which are procedural in nature and those which are substantive in nature. This, however, has not prevented more recent English cases from flirting with a more substantive version of the doctrine.[93]

90. *Teoh*, *supra* note 50, at 291 (Chief Justice Mason and Justice Deane). *See also* Fisher v. Minister of Public Safety (No 2), (2000) 1 A.C. 434 (Privy Council). *See* Margaret Allars, *One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh's Case and the Internationalisation of Administrative Law*, 17 SYDNEY L. REV. 204 (1995).

91. *Re* Minister for Immigration and Multicultural Affairs: Ex Parte Lam, [2003] H.C.A. 6 (Feb. 12, 2003), § 148 (Justice Callinan). More generally, several judges in *Lam* express scepticism as to the foundation of the doctrine of legitimate expectations created in *Teoh* without directly contesting its legitimacy: *id.*, §§ 102 (Justices McHugh & Gummow), 121-22 (Justice Hayne) & 140-48 (Justice Callinan). *See* Wendy Lacey, *A Prelude to the Demise of* Teoh: *The High Court Decision in Re* Minister for Immigration and Multicultural Affairs: Ex Parte Lam, 26 SYDNEY L. REV. 131 (2004).

92. R. v. Secretary of State for the Home Department, *ex parte* Mohammed Hussain Ahmed, [1999] Imm. App. Rep. 22 (Court of Appeals).

93. Thomas v. Baptiste, [1999] 3 W.L.R. 249 at 263 (Lord Millet) and 268 (Lord Goff of Chieveley & Lord Hobhouse of Woodborough); R. v. Director of Public Prosecution, ex parte Kebeline, [1999] All E.R. 801, at 825 (Queen's Bench Division, Lord Laws); R. v. North and East Devon Health Authority, ex parte Coughlan, [2000] 2 W.L.R. 622 (Court of Appeals); Higgs v. Minister of National Security, [2000] 2 A.C.

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In Canada, the validity of the doctrine of legitimate expectations as it relates to international law is more uncertain. The only direct judicial discussion of *Teoh* is found in the Federal Court of Appeal decision in *Baker*, which was issued shortly after the Australian decision. Writing for the Court, Justice Strayer asked the question whether the doctrine of legitimate expectations meant that the ratification of the *Convention on the Rights of the Child* gave rise to a duty for immigration officers to give priority to the best interests of children in any decisions concerning them.[94] This is a substantive version of the doctrine of legitimate expectations, which is not supported by *Teoh*. Justice Strayer, in the name of the division of powers between the executive and the legislature, rejected this expansive version without reaching a conclusion about the purely procedural variety which had been accepted in Australia. On appeal to the Supreme Court, Justice L'Heureux-Dubé, writing for the majority, limited herself to recalling that the doctrine of legitimate expectations, which is well-known in Canadian administrative law, can only give rise to procedural rights and not substantive ones (Para. 26).[95] Looking at the effects of ratifying the *Convention on the Rights of the Child*, Justice L'Heureux-Dubé concluded that the provisions of the *Convention* could not create for Mrs. Baker a legitimate expectation of procedural guarantees higher than what equity already required. Secure in this conclusion, the majority abstained from deciding whether the ratification of a treaty could, in principle, give rise to a legitimate expectation (Para. 29). This judicial shirking was followed by an elliptical discussion in *Suresh* aimed at understanding the impact of the ratification of the *Convention against Torture* on the interpretation of procedural justice guaranteed by Section 7 of the *Charter*. Although this discussion takes place in the context of *Charter* interpretation, and although the Court does not employ the expression "legitimate expectation," the reasoning appears perfectly compatible with the position of the High Court of Australia in *Teoh*:

228 at 241 (Privy Council, Lord Hoffmann); R. (European Roma Rights Centre) v. Immigration Officer at Prague Airport, [2004] Q.B. 511; Richard Clayton, *Legitimate Expectations, Policy, and the Principle of Consistency*, 62 CAMB. L.J. 93 (2003).

94. Baker v. Canada, [1997] 2 F.C. 127. The judge does not say that every legitimate expectation arising from the ratification of the Convention created an obligation for the officer to give the priority to the best interest of the child. He says on the contrary that "it is well established that the doctrine creates no substantive rights" (§ 31) and concludes that the *Convention* "cannot prescribe . . . the obligation to give the best interests of children . . . superior weight to some other factors. Such a prescription would give rise to a substantive, not merely a procedural, right and cannot be the subject of legitimate expectations." (§ 40). *See also* Torres-Samuels (Guardian of) v. Canada (Minister of Citizenship and Immigration), B.C.C.A. CA024341, at § 30 (Oct. 27, 1998).

95. *See* Mount Sinai Hospital Centre v. Québec (Minister for Health and Social Services), [2001] 2 S.C.R. 281.

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> It is only reasonable that the same executive that bound itself to the CAT [*Convention against Torture*] intends to act in accordance with the CAT's plain meaning. Given Canada's commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s.53(1)(b) stage of the proceedings. More particularly, the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds.[96]

Legitimate expectations slip in here under the cover of *Charter* interpretation, but nevertheless, this passage remains an interesting opening to the internal effects of treaty ratification. The majority of the Ontario Court of Appeal in *Ahani* applies a restrictive reading of the Supreme Court ruling in *Suresh*. The majority refuses to conclude that Canada's ratification of the *ICCPR Optional Protocol* could have the effect of widening the protections offered by Section 7 of the *Charter* so as to suspend the deportation of Ahani until the Human Rights Committee had decided on his petition (Paras. 23-57). The very short discussion of the doctrine of legitimate expectations bears only on past practices of the Canadian government, without turning to the link established in *Teoh* between this doctrine and the ratification of an international treaty (Paras. 58-63). If Canadian jurisprudence does not reject the link which has been accepted in Australia and the UK between the ratification of a treaty and legitimate expectations, we await a clear statement on the validity of the doctrine in Canada. For the moment, we note that the Supreme Court's decisions in *Baker* and *Suresh* offer fertile ground in which such a development could find root. An opening to legitimate expectations in this context falls under a relationship of dialogue between the judiciary and the executive. Judges give effect to the executive's decision to ratify a treaty, a statement that Canada will behave in a manner consistent with the obligations created by that instrument, but leave open the possibility that the executive might inform the governed—and the judiciary—that its ratification should not have such consequences.

4. Judicial Declarations of Incompatibility

Judicial declarations of incompatibility constitute a third and last example of the partial penetration of the national legal sphere by international norms. Here we are contemplating a finding by a judge that domestic law is not in conformity with the state's international obligations by means of a declaratory judgment to this effect, or within the course of interpreting domestic law.

In *Reference re Bill C-7 on the Criminal Justice System for Young Persons*, the Québec Court of Appeal initiated the first jurispruden-

96. *Suresh*, *supra* note 11, at § 119.

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tial discussion of the admissibility in Canada of such declarations of incompatibility. In this case, the government of Québec addressed a reference to the Court of Appeal, presenting a series of questions on the constitutionality of a federal bill. These questions examined the bill's constitutionality vis-à-vis the division of legislative powers and the provisions of the *Canadian Charter of Rights and Freedoms*, as well as the compatibility of this bill with international conventions ratified by Canada. The Court stressed that the provincial government was asking for a declaration of incompatibility with international law (as opposed to a conclusion of invalidity with reference to constitutional norms) and that, consequently, such a declaration of incompatibility would not likely produce any direct or constraining effect (Paras. 101-102). For the Court, the only possible usefulness of a declaration of this kind would be its use as a tool for pressuring Parliament to change the law, giving the judgement a manifest and primarily political dimension (Para. 105). The absence of any legal effect could lead the Court to "appear to be used as a political instrument," a valid reason for refusing to answer a question posed by way of reference (Para. 113). However, the Court avoided this outcome, concluding that the possible impact of international law on the application of Section 1 of the *Charter* lent, *in extremis*, minimal relevance to the analysis of international law so as to render this question justiciable (Para. 115). A study of the provisions of the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child* finally led the Court to deny any incompatibility between international law and the federal bill.

The discussion on the usefulness and appropriateness of a judicial declaration of incompatibility in this decision illustrates the uncertainty of judges as to the legitimacy of recourses to international law. The doctrine of political questions, or the "justiciability" of questions submitted to the judges underpins the reasoning of the Court of Appeal and forms part of a tendency which equates international law to a non-juridical phenomenon. The application of this doctrine to the analysis of the compatibility of national law and Canada's international obligations, however, raises several problems. In support of its position, the Court invoked the decisions of the Supreme Court in *Reference re Canada Assistance Plan (B.C.)*,[97] *Reference re Secession of Québec*,[98] and *Reference re Amendment of Canadian Constitution*.[99] In all of these cases, the Supreme Court delimited the boundaries of judicial activity on the basis of the function courts must perform, and not on the basis of the possible effects a court order might have. This distinction was at the heart of *Operation Dismantle*,

97. Reference *re* Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525.
98. Reference *re* Secession of Québec, [1998] 2 S.C.R. 217.
99. Reference *re* Amendment of Canadian Constitution, [1982] 2 S.C.R. 793.

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in which the constitutionality of granting the United States permission to test cruise missiles on Canadian territory was challenged.[100] The objection was that this decision of the Canadian government was an entirely political one, and that the Court should therefore declare itself incompetent to hear this matter. Justice Wilson, in agreement on this point with the majority, unambiguously rejected this argument:

> Because the *effect* of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts.[101]

In this decision, as in the others quoted by the Québec Court of Appeal, the Supreme Court asks whether the question posed is one of law, calling for the application of legal norms, or rather a question which must be answered on the basis of non-legal criteria. In other words, as the Supreme Court writes in *Reference re Canada Assistance Plan (B.C.)*, a justiciable question falling within the competence of the courts will be a question that "has a sufficient legal component to warrant the intervention of the judicial branch."[102] In *Reference re Bill C-7 on the Criminal Justice System for Young Persons*, the Court of Appeal's analysis of the federal bill's compatibility with international law vividly illustrates that this question presents essentially legal aspects. The detailed study of international law that the Supreme Court offers in the *Secession Reference* clearly demonstrates the fact that the recourse to international law by a court would not in itself be considered a non-justiciable element.[103] The Supreme Court, however, established a requirement that the international law question be connected to Canadian law, in order to prevent domestic judges from acting as an international court. To avoid dragging Canadian judges into an issue of "pure" international law, there needs to

100. Reference *re* Operation Dismantle, [1985] 1 S.C.R. 441.

101. *Id.* at 472, § 63 [underlining in original]. *See also* Justice Dickson for the majority, who declares that he agrees with this passage at 459.

102. *Supra* note 97, at 545.

103. Reference *re* Secession of Québec, [1998] 2 S.C.R. 217 at 235, §§ 21-22. ("Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. This concern is groundless."), and at 236-37. *See also* HOGG, *supra* note 52, at § 33.5.

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be a point of attachment to national law.[104] We can differentiate, for example, between the question of the legality of American military intervention in Iraq—a question of "pure" international law without a point of attachment to Canadian law—and the question of the compatibility of a federal or provincial statute with Canada's international obligations, a question well anchored in the Canadian legal sphere.

One aspect of the discussion of the justiciability of a declaration of incompatibility with national law seems to have greatly disturbed the Court of Appeal in the *Reference re Bill C-7 on the Criminal Justice System for Young Persons*, i.e., the lack of constraining effects of such a declaration. The Court of Appeal melds two distinct concepts, one bearing on the nature of a court's functions and the other on the normative impact of a judgement. Justiciability, as has been previously noted, relates only to the former. The fact that a court renders a decision that cannot be enforced does not affect its legal nature nor the legitimacy of the exercise of the judicial function. Constitutional conventions are the classic illustration of this principle. As the decisions of the Supreme Court show, constitutional conventions are unwritten legal norms that courts can interpret and apply, but they are not judicially enforceable.[105] Lorne Sossin summarizes the question well:

> Constitutional conventions are unwritten rules that governments are obliged to follow. However if these conventions are not followed, a court cannot enforce them. *The violation of a convention, in other words, gives rise to political, not legal, sanctions.* Conventions are thus justiciable in the sense that a court could interpret the scope of a convention and declare whether a convention had been breached by government action. They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention.[106]

The decisions of the Supreme Court on constitutional conventions have had a considerable impact in spite of the absence of formally enforceable constraint.[107] Additionally, decisions made by Canadian courts on the basis of references suffer from a similar lack of enforceability. The Privy Council in the *Reference Appeal* in 1912 underlined that references are of a consultative nature and therefore

104. *Id.*, at 234-35.

105. *Id.* at § 98.

106. LORNE SOSSIN, BOUNDARIES OF JUDICIAL REVIEW: THE LAW OF JUSTICIABILITY IN CANADA 7 (1999) [my emphasis].

107. *See* HOGG, *supra* note 52, at 19-23.

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carry "no more effect than the opinion of law officers."[108] It is because of this non-compulsory character that the Supreme Court refused to issue an enforceable judgement in the *Reference re Remuneration of Judges (No. 2)*.[109] Yet, as Peter Hogg notes, there is no known instance of a judgement issued on the basis of a reference not being respected.[110] In some ways, this resembles the approach to the derogation clause in Section 33 of the *Charter*. The legislature is given power to suspend the application of certain basic rights guaranteed by the *Charter* in a wholly legal fashion: the cost of such action is purely political. We see, therefore, that Canadian constitutional law incorporates extra-legal elements into its framework of juridical mechanisms. A declaration of incompatibility of a statute with international obligations would have the same effect. It seems that the Québec Court of Appeal's confusion in *Reference re Bill C-7 on the Criminal Justice System for Young Persons* led it astray in its reasoning. The constitutional conventions example evinces the dissociability of the issues of justiciability and enforceability as well as the undeniable usefulness of declarations, even as they are deprived of the usual binding force of judicial decisions.

The binary vision of normativity which seems to inspire the Court of Appeal's analysis in this reference pushes it to make an all-or-nothing choice between full and direct application of international norms in national law and complete absence of effect of these norms. As direct application does not appear at all justified, the Court regards international law as a non-normative fact, and therefore non-justiciable. However, as noted earlier, the doctrine of justiciability in Canadian law does not lend itself to the use made of it by the Court of Appeal. The non-direct applicability of international law does not in any way support a preclusion of judicial declarations of incompatibility. It should be remembered that the principle of the matter is that the legislature can decide to enact a statute contrary to international law. That being said, in order to decide whether this is the case, we must interpret internal and international norms simultaneously to identify possible conflicts. In the event of an irreconcilable conflict, a domestic court will apply the internal norm, but this does not prohibit it from also noting the incompatibility of this norm with Canada's international obligations. Which national actors are qualified to interpret norms of internal and international law in order to reveal their degree of concurrence, if not judges? How can the legislature know that it must amend the law if it desires to remedy Canada's violation of its international obligations?

108. Attorney General of Ontario v. Attorney General of Canada (Reference Appeal), [1912] A.C. 571 (Privy Council).

109. Reference *re* Remuneration of Judges (No 2), [1998] 1 S.C.R. 3, at § 9.

110. HOGG, *supra* note 52, at § 8.6(d).

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The Ontario Court of Appeal's decision in *Bouzari* provides an interesting example of such an approach. In that case, the Court first examines whether the Canadian *State Immunities Act* allows an exception to foreign state immunities for liability for acts of torture committed abroad. On a careful reading of the statute, the Court concludes that there is clearly no such exception: "Canada has clearly legislated so as not to create this exception to state immunity whether it has an international law obligation to do so or not. However, the more fundamental question is whether Canada has the international law obligations contented for by the appellant."[111] The Court then proceeds to examine the existence of an international obligation to allow for a civil redress for torture committed abroad by a foreign State, first under Canada's treaty obligations and then under customary international law. The sequencing of the analysis may be surprising, as one would expect a court to first determine the existence of an international obligation so as to determine whether to apply the presumption of conformity as an interpretive principle. Apparently, the statute's clarity meant that the presumption could not effectively operate here, highlighting all the more the autonomous nature of the assessment of the compatibility of Canadian law with international law. This suggests the unquestionable usefulness of judicial declarations of incompatibility. Inversely, according non-incorporated international norms minimal weight in national law allows the executive's discretion to triumph over norms binding on Canada under international law. Yet, one may doubt that this fully reflects the idea of the rule of law entrenched in the Canadian Constitution. Certainly, there may be elements which limit the scope of the rule of law, such as the need to be able to efficiently conduct foreign relations. But what is the justification for setting up a veil protecting the Canadian government from judicial review of the legality of its actions *inside* Canada? There does not seem to be any. On the contrary, judicial declarations of incompatibility would enrich the dialogue between the executive, the legislature and the judiciary in Canada, while not opening judges to the criticism that they are giving themselves the last word.

Perhaps the clearest endorsement of the usefulness of judicial declarations of incompatibility is the adoption of the 1998 *Human Rights Act* by the UK Parliament. The *Human Rights Act* incorporated the *European Convention on Human Rights* into domestic law, but refrained from granting British courts the power to set aside legislation on the basis of incompatibility with the *Convention*. Rather, courts are directed to interpret domestic law to render it compatible with international norms, if at all possible (Section 3). If the statutory provision simply cannot be so interpreted, a formal declaration of

111. *Bouzari*, *supra* note 21, at §§ 67-68.

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incompatibility may be issued by the judiciary (Section 4). Even if a declaration of incompatibility is made, the impugned legislation remains fully binding on British courts, government agencies, and litigants. There is no obligation on the part of the government to enact legislation to cure the incompatibility, and the failure to do so is not judicially reviewable (Section 6(6)). Courts are thus directed to issue declarations with no operative or coercive effect. It is instructive to survey the reaction of British judges faced with the choice between statutory interpretation, a quintessentially judicial function, and the issuance of a declaration with a purely political effect.[112] In a series of cases, the House of Lords has favored a more liberal use of declarations of incompatibility under Section 4 as opposed to the overstrained construction of domestic statutes under Section 3.[113] The legislative reaction to these declarations, despite their purely political effect, has been to take the necessary steps to render British law compatible with the *Convention*.[114] Of course, it would be entirely legitimate for Parliament to determine that policy considerations demand that the incompatibility be maintained, something which has not yet occurred but which might conceivably arise with regard to highly sensitive issues such as abortion rights or antiterrorism legislation.[115] Still, the impact of declarations of incompatibility has been to reinforce the dialogic nature of the relationship between courts and legislatures while at the same time maintaining a balance in their respective roles.[116]

The preceding argument calls for Canadian courts to pursue a more complex application of international law in national law. The degree of penetration of international law should reflect the variable normativity of norms in the international law sphere and the full spectrum of possible effects of international norms in Canadian law. To do this however, the Canadian judge must go beyond a dialogue merely between national institutions and expand it to include international actors. This implies the redefinition, to a certain extent, of the paradigm of the judicial function in Canada.

112. A v. Secretary of State for the Home Department, [2005] 2 W.L.R. 87 (House of Lords) ("The import of such a declaration is political, not legal" – Lord Scott).

113. R. (Wilkinson) v. Commissioner of Inland Revenue, [2005] 1 W.L.R. 1718 (House of Lords); R. (Anderson) v Secretary of State for Home Department, [2003] 1 A.C. 837; Bellinger v. Bellinger, [2003] 2 A.C. 467; *In re S (Minors)*, [2002] 2 A.C. 291. *See* Danny Nicol, *Statutory Interpretation and Human Rights After Anderson*, *in* [2004] PUB. L. 274, at 281.

114. House of Lords and House of Commons, Joint Committee on Human Rights, 19th Report, HL 112/HC 552, Session 2004-2005 (2005).

115. *See* K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN L. REV. 79, at 92 (1999); Robert Wintemute, *The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Rights?*, 17 KING'S COLL. L.J. 209 (2006).

116. Richard Clayton, *Judicial Deference and "Democratic Dialogue": the Legitimacy of Judicial intervention Under the Human Rights Act 1998*, [2004] PUB. L. 33, at 46-47.

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IV. External Dialogue: Redefining the Paradigm of the Judicial Function

The hesitations of Canadian judges, like that of their counterparts in many other jurisdictions, concerning the proper attitude vis-a-vis the legitimate place of international norms within domestic law speaks not only to the continuing need to redefine, by way of what may be called a dialogue, the respective roles of the various branches of government. Beyond this internal dialogue among actors connected to the same state, reliance on international law also highlights exchanges taking place between domestic judges and actors located beyond the borders of the state. This second type of exchanges, which could be described as an external dialogue, is very seldom explicitly acknowledged by domestic courts, although it emerges in some of the case law discussing the application of international norms in national law.

In attempting to characterize the contribution of international law to Canadian law, we initially identified two distinct approaches. The first likens international law to comparative law. Judges turn to international norms not because these norms imply obligations for Canada, but rather to find an alternate model with which to contrast national law in order to shed new light upon it. One finds an echo of this "denormativization" of international law in the Supreme Court's analysis in *Suresh*, when the Court declares that "[i]nternational treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment" and, therefore, that recourse to international law does not imply its bindingness (Para. 60).[117] It would be an exaggeration to claim that such a position denies any value to the recourse to international norms in Canadian law—far from it—but this position nonetheless eliminates an important dimension of international law. The paradigm of the judicial function as projected by such an approach still erects impenetrable walls around Canadian law. This obscures the fact that Canada is bound by unincorporated international law, at least in the international legal sphere. The position of the Court can be justified to a certain extent by the fact that it is the Canadian political community from which the court draws its legitimacy. Such an autarkical vision of Canada, however, does not reflect the growing legal, social, political, and economic interpenetration of states.

A second approach eschews legal isolationism to give some judicial recognition to the web of normative interactions between a municipal legal system and the international community. The domestic court is not uprooted to be transformed into an organ of the international community, severed from the political community from which

117. *See also* La Forest, *supra* note 30, at 100; LeBel & Chao, *supra* note 40, at 47.

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it derives its legitimacy; nor is it reduced to a mere conduit through which international norms and values are channelled from abroad into national law. Rather, the intensity of exchanges taking place across national borders is recognized by the representation of the judicial identity as complex, having links not only with other domestic actors but also with actors located abroad. In acting as translators connecting international norms and domestic law, as in any type of translation, judges do not abandon but rather necessarily assert their complex identity.[118] As such, this redefined paradigm of the judicial function stands in sharp contrast to the strand of international legal doctrine which frequently advocated the conscription of national judges in the battle to ensure state compliance with international obligations, hoping to remedy the institutional weaknesses of international law.[119] According to these agendas, domestic courts were becoming organs of the international community, by way of a "*dédoublement fonctionnel*," which required judges to fulfill a function centered on the international community and severed them from their national basis of legitimacy.[120] Instead, the paradigmatic shift in judicial attitudes identified here, suggests that courts act on a more sophisticated understanding of the interconnection between the nation state and the international community.[121]

Does this second characterization of the judicial function conflict with a realistic vision of the proper role of courts in Canadian law? In this regard, it is useful to return to the description of the bonds between the executive and the judiciary offered by the Ontario Court of Appeal in *Ahani*, which represents the most complete discussion of the division of powers regarding a State's management of international norms in Canada. In this case, the majority suggested that courts lack the competence to judge the good or bad faith of Canada in its refusal to respect the provisional measures recommended by the Human Rights Committee (Para. 48). The majority added in the same passage that Canada must reconcile various international obligations, a task which as of right belongs to the executive and not the judiciary. As we have seen in the context of the discussion of the doctrine of political questions, the division of powers between the judiciary and the executive should rest on a functional basis. We must therefore consider the nature of the decision to be taken, either on the basis of the application of legal norms or on the basis of political expe-

118. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURE AND LEGAL CRITICISM 264 (1990).

119. This results in approaches the formalism of which varies considerably. *See, e.g.*, Benedetto Conforti, *The Activities of National Judges and the International Relations of their State*, 65:1 ANN. INST. DR. INT. 327 (1993); Harold Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599, at 2603 (1997).

120. GEORGES SCELLE, MANUEL DE DROIT INTERNATIONAL PUBLIC 21-23 (1948).

121. *See* JULIE ALLARD & ANTOINE GARAPON, LES JUGES DANS LA MONDIALISATION 72-76 (2005).

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diency. It is clear that the decision to ratify a treaty constitutes a political choice. In the same way, Canadian constitutional law recognizes that the legislative branch has the power to enact laws which contravene international obligations binding on Canada, which is, once again, a political decision. The analysis of the conformity of Canadian governmental action in Canadian territory with its international obligations calls for an analysis and application of the relevant norms of international law. The fact that several international norms are involved does not change the nature of the analysis, which remains a legal one. This is well illustrated by *Suresh*, in which the Supreme Court tried to reconcile Canada's obligations under the *Convention against Torture* and the *Convention Relating to the Status of Refugees*.

We find a similar approach in the case-law concerning the judicial review of the use of the royal prerogative in Canada, which partially intersects with the doctrine of justiciability examined earlier. The royal prerogative encompasses the residual powers held by the Crown which are the object of legislative regulation. This includes certain legislative powers (e.g., the dissolution of Parliament), executive powers (e.g., the appointment of ministers), and judicial powers (e.g., *nolle prosequi*).[122] The conduct of foreign affairs, which includes the ratification of treaties and declarations of war, falls within the scope of the royal prerogatives which are executive in nature. In *Black v. Canada*, the Ontario Court of Appeal updated various principles relating to judicial control of the royal prerogative.[123] In this case, the claimants sought a declaration of the illegality of the Prime Minister of Canada's decision to advise the Queen of England not to grant Mr Black a distinction (a peerage), the reason being that Canadian citizens should not receive distinctions from foreign governments without permission from Canada. Relying on British cases, the Court of Appeal concluded that the controllable character of the exercise of the royal prerogative depends not on the source of the power but rather on the object of its use (Paras. 47-49). If the decision affects the rights or legitimate expectations of a citizen it will be subject to judicial control, except as it relates to "high policy" such as the decision to ratify a treaty or to enter a war.[124] The "high policy" exception erects a barrier which prevents judges from deciding ques-

122. *See* Brigid Hadfield, *Judicial Review and the Prerogative Powers of the Crown*, *in* THE NATURE OF THE CROWN 197, at 198 (Maurice Sunkin & Sebastian Payne, eds., 1999).

123. Black v. Canada (2001) 199 D.L.R. (4th) 228 (Ont. C.A.). *See* Lorne Sossin, *The Rule of Law and the Justiciability of Prerogative Powers: A Comment on* Black v. Chrétien, 47 MCGILL L.J. 435 (2002).

124. In *Black*, the Court of Appeal concluded that the act of the Prime Minister did not affect a right or legitimate expectation of the applicant as no one has a right or legitimate expectation of receiving a foreign honorary title.

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tions of pure international law.[125] It is for this reason that the Federal Court refused to consider the legality under international law of a Canadian military intervention in Iraq undertaken without the authorization of the United Nations Security Council.[126] In another case involving the decision to participate in the NATO bombardment of Kosovo and Yugoslavia—a decision also qualified as one of "high policy"—the majority of the Divisional Court of Ontario distinguished "state-to-state" activities from activities aimed at particular members of the Canadian political community.[127] For the majority, only the latter lent themselves to judicial control. Of course, we cannot conclude from these decisions that every act of the executive arises from the royal prerogative; in fact, that has become an exception because government activity today is largely framed by statutes. Instead, the discussion is interesting because it illustrates the existence of other doctrines which protect the freedom of the executive to conduct foreign affairs beyond the control of national courts, at least in its fundamental elements. Because of the existence of the royal prerogative, it does not seem justified for courts to refuse the application of international law in Canadian law on the grounds that they protect the executive's freedom of action.

All this shows that a judicial opening to the modulated penetration of international law into the Canadian legal sphere does not transform the judge into a steward of Canada's international relations on par with the executive. The fact that a court's decision has an impact beyond the national territory does not in itself signal a lack of legitimacy of the judicial function. The dialogue which links the judiciary to the executive and legislative branches bears on a wide range of questions which are not neatly confined to the domestic sphere. This mirrors what some describe as the phenomenon of the growing disintegration of the State, which suggests that the concept of the State represents a diversity of elements greater than just the government apparatus or even the executive. As Anne-Marie Slaughter stresses, this means a great deal for the conduct of foreign affairs:

> The primary State actors in the international realm are no longer foreign ministries and heads of state, but the same

125. The Ontario Court of Appeal nevertheless declared that the violation of a right guaranteed by the *Canadian Charter* constitutes a limit to the "high policy" exception, such that an exercise of the royal prerogative which results in a violation of the *Charter* would be subject to the supervisory powers of the courts: *Black*, § 52.

126. Blanco v. Canada, (2003) 231 FTR 3; Turp v. Chrétien, (2003) 111 C.R.R. (2nd) 184 (Fed. Ct).

127. Aleksic v. Canada (Attorney General), [2002] 215 D.L.R. (4th) 720 at § 68 (Justice Heeney). Note the interesting dissent of Justice Wright, for whom this question does not belong to the royal prerogative but rather to the application of the National Defence Act; he concludes that "[i]n my view, in determining the propriety of the Executive's actions or omissions, the trial court might consider their legality not only under domestic law but also under international law." (§ 12).

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> government institutions that dominate domestic politics: administrative agencies, courts, and legislatures. The traditional actors continue to play a role, but they are joined by fellow government officials pursuing quasi-autonomous policy agendas. The disaggregated State, as opposed to the mythical unitary State, is thus hydra-headed, represented and governed by multiple institutions in complex interactions with one another abroad as well as at home.[128]

In practice, as alluded to earlier, courts enter into a dialogue with courts in other nations dealing with similar questions, a phenomenon which has been described as "transjudicialism."[129] For example, the analysis of constitutional norms on the protection of human rights in Canada is enriched by the study of foreign law in a comparative perspective. Such a transnational dialogue is even more directly evident when national courts of various countries consider the same rule of international law. This external conversation ties Canadian judges not only to other judges, but also to other types of foreign national institutions, to international organizations, and to non-governmental organizations. This is not a recent occurrence, as illustrated by extradition proceedings in which the executive of other States directly converse with Canadian judges. Unfortunately, however, the reality of the international dimension of the judicial function in Canada seems absent from the paradigmatic vision judges have of themselves. That said, the jurisprudence signals an evolution which is noteworthy. It calls upon judges to reconceptualize themselves as one of the elements of the State in international law, capable not only of entering into autonomous exchanges with other foreign or international institutions, but also as one of the points that tie Canada to the international community.[130]

Any suggested change in the paradigm of the judicial function in domestic law will inevitably run up against the desire of judges to put the exercise of their power on a basis of incontestable legitimacy. As arbiters, in large measure, of the division of powers between the various branches of the State, the courts do not want to be perceived as

128. Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks, in* The Role of Law in International Politics 177, at 178 (Michael Byers ed., 2000). The argument is further elaborated in Anne-Marie Slaughter, A New World Order (2004).

129. See the comments of Justice L'Heureux-Dubé, *supra* note 3, and of Slaughter, *supra* note 3.

130. The phenomenon of transjudicialism is sometimes linked to the globalization of law, in the context of which the interaction among judges of different jurisdictions would lead to a substantive convergence of legal norms. *See* Allard & Garapon, *supra* note 121, at 91; Mireille Delmas-Marty, Le relatif et l'universel 412 (2004); Slaughter, *id.* This view has attracted significant criticism and is clearly an issue distinct from the role of domestic judges in the administration of the interface between domestic law and international law binding on the State.

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attempting to assume capacities which as of right belong to others.[131] Yet, the preceding analysis illustrates the dangers of a simplistic vision which would place all powers relating to international relations, and even the application of international norms, with the executive. International law, after all, regards national legal systems as having the potential to correct themselves. In many situations, international law will mandate intervention only when all internal recourses have been exhausted and the conduct of the State remains in violation of international law. It therefore falls to national law to fulfill the promise of self-correction as much as possible, so that any remaining violations of international law arise from an intentional policy of the State and not from the inattention or lack of coordination of internal institutions. The predicate that such a policy ought to issue from a democratic process does not, however, lead to the exclusion of judges. While an elected branch of government enjoys greater legitimacy in this respect than an unelected judiciary, a compelling argument can be made that all these institutions acting constantly together can more effectively foster democratic ideals than any single one acting on its own.[132] In other words, concerns about the legitimacy of judicial reliance on international law should lead to reject the practice of judging in splendid isolation in favor of judging in splendid interaction.

131. *See* Vriend v. Alberta, [1998] 1 S.C.R. 493, at § 135 (Justice Iacobucci).

132. *See* ALLARD & GARAPON, *supra* note 121, at 76-80; Leslie Green, *Law's Rule*, 24 OSGOODE HALL L.J. 1023, at 1040 (1986); Leighton MacDonald, *Rights, 'Dialogue' and Democratic Objections to Judicial Review* 32 FED. L. REV. 1, at 26 (2004).

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TAB 3

Gérard V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can. YB Intl. L. 89

The Expanding Role of the Supreme Court of Canada in International Law Issues

THE HONOURABLE MR. JUSTICE
GÉRARD V. LA FOREST*

THE EXPONENTIAL GROWTH OF interstate activities in recent years, whether by states, corporations, or private individuals, has produced a corresponding demand for the resolution of legal disputes arising out of these activities. The world community has responded to this rapidly increasing need in many ways. These range from the establishment of a wide assortment of international bodies, from war crimes tribunals to permanent and *ad hoc* trade enforcement tribunals, to private corporations resorting to international arbitration.

National courts, as the principal fora for individuals who seek recourse to legal processes in relation to claims arising out of transnational activities, have also been significantly affected by the rapid globalization that marks our era. Increasingly, our courts have had to deal with both a larger number and a wider range of international and transnational issues than was the case only a few years ago. This development has been increasingly felt by the Supreme Court of Canada, which in many areas has attempted to reformulate existing principles to meet modern needs, as well as to foster compliance with international law. In undertaking these tasks, the Court has increasingly adopted interpretive techniques under international law. These techniques not only assist understanding but also promote uniformity in applying international norms.

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* The author is a justice of the Supreme Court of Canada. This article is based on an address given at the Banquet of the Annual Conference of the Canadian Council on International Law, October 18, 1996. The theme of the Conference was "Fostering Compliance with International Law."

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The number of cases in which the Court has dealt with international issues in recent years is itself informative. Since my arrival on the Court in 1985, we have dealt with some thirty cases involving issues of public international law.[1] As well, as early as 1988, our Court had made use, in about twenty-five cases, of the major international instruments for the protection of human rights in interpreting the Canadian Charter of Rights and Freedoms.[2] The number is at least

[1] *Libman* v. *The Queen*, [1985] 2 S.C.R. 178; *Krug* v. *The Queen*, [1985] 2 S.C.R. 255; *Spencer* v. *The Queen*, [1985] 2 S.C.R. 278; *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500; *Argentina* v. *Mellino*, [1987] 1 S.C.R. 536; *United States* v. *Allard*, [1987] 1 S.C.R. 564; *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401; *R.* v. *Parisien*, [1988] 1 S.C.R. 950; *United States* v. *Cotroni; United States* v. *El Zein*, [1989] 1 S.C.R. 1469; *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dersch* v. *Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *United States* v. *Allard*, [1991] 1 S.C.R. 861; *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *Re Canada Labour Code*, [1992] 2 S.C.R. 50; *McVey (Re); McVey* v. *United States*, [1992] 3 S.C.R. 475; *Idziak* v. *Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Canada (Attorney General)* v. *Ward*, [1993] 2 S.C.R. 689; *Ontario Hydro* v. *Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327; *United States* v. *Lépine*, [1994] 1 S.C.R. 286; *R.* v. *Finta*, [1994] 1 S.C.R. 701; *Thomson* v. *Thomson*, [1994] 3 S.C.R. 551; *Chen* v. *Canada (Minister of Employment and Immigration)*, [1995] 1 S.C.R. 725; *Crown Forest Industries Ltd.* v. *Canada*, [1995] 2 S.C.R. 802; *R.* v. *Harrer*, [1995] 3 S.C.R. 562; *Chan* v. *Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593; *Swantje* v. *Canada*, [1996] 1 S.C.R. 73; *United States* v. *Jamieson*, [1996] 1 S.C.R. 465; *United States* v. *Whitley*, [1996] 1 S.C.R. 467; *United States* v. *Ross*, [1996] 1 S.C.R. 469; *United States* v. *Leon*, [1996] 1 S.C.R. 888; *R.* v. *Terry*, [1996] 2 S.C.R. 207.

[2] These were earlier discussed in G. V. La Forest, "The Use of International Law in the Supreme Court of Canada" (1988), Proceedings of the 17th Annual Conference of the Canadian Council on International Law at 230. The cases are the following: *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357; *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Valente* v. *The Queen*, [1985] 2 S.C.R. 673; *R.* v. *Oakes*, [1986] 1 S.C.R. 103; *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383; *Mills* v. *The Queen*, [1986] 1 S.C.R. 863; *R.* v. *Jones*, [1986] 2 S.C.R. 284; *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R.* v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Canada* v. *Schmidt*, *supra* note 1; *Argentina* v. *Mellino*, *supra* note 1; *United States* v. *Allard*, *supra* note 1; *R.* v. *Rahey*, [1987] 1 S.C.R. 588; *R.* v. *Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045; *R.* v. *Lyons*, [1987] 2 S.C.R. 309; *R.* v. *Milne*, [1987] 2 S.C.R. 512; *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30; *R.* v. *Hufsky*, [1988] 1 S.C.R. 621; *R.* v. *Corbett*, [1988] 1 S.C.R. 670.

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twice that large today.[3] The Charter has become the instrument of choice in fostering compliance with international human rights law in Canada. In tabulating international law cases, one should not overlook eight recent private international law cases, four of which have begun a process of reformulating the general structure of that branch of the law in a manner explicitly anchored in the international legal order in transnational cases, and in federalism in interprovincial matters.[4] Furthermore, we have heard at least six maritime law cases in the same general period.[5] These are frequently of a transnational character, and, in any event, in formulating or adjusting the applicable rules, we often must keep an eye on what is done in other countries so as to ensure as much uniformity as possible in the interests of international commerce.

The subject matter of the cases that have come before us is diverse, and I shall give only a sampling of the activities they include. Many of the public and private international cases include

[3] *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143; *United States* v. *Cotroni; United States* v. *El Zein*, *supra* note 1; *R.* v. *Kalanj*, [1989] 1 S.C.R. 1594; *R.* v. *Conway*, [1989] 1 S.C.R. 1659; *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530; *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R.* v. *Brydges*, [1990] 1 S.C.R. 190; *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697; *Canada (Human Rights Commission)* v. *Taylor*, [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139; *R.* v. *Lippé*, [1991] 2 S.C.R. 114; *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Kindler* v. *Canada (Minister of Justice)*, *supra* note 1; *R.* v. *Butler*, [1992] 1 S.C.R. 452; *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R.* v. *Zundel*, [1992] 2 S.C.R. 731; *R.* v. *Tran*, [1994] 2 S.C.R. 951; *Dagenais* v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Miron* v. *Trudel*, [1995] 2 S.C.R. 418; *Ruffo* v. *Conseil de la magistrature*, [1995] 4 S.C.R. 267; *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

[4] *Moran* v. *Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077; *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hunt* v. *T&N Plc*, [1993] 4 S.C.R. 289; *Thomson* v. *Thomson*, *supra* note 1; *Tolofson* v. *Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, [1994] 3 S.C.R. 1022; *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27; *W.(V.)* v. *S.(D.)*, [1996] 2 S.C.R. 108.

[5] *ITO-International Terminal Operators Ltd.* v. *Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Ontario (Attorney General)* v. *Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206; *Q.N.S. Paper Co.* v. *Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *Whitbread* v. *Walley*, [1990] 3 S.C.R. 1273; *Sunrise Co.* v. *Lake Winnipeg (The)*, [1991] 1 S.C.R. 3; *Monk Corp.* v. *Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779.

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issues involving such apparently local matters as family disputes[6] and private commerce, including torts arising in relation to that commerce.[7] Private commerce includes illicit commerce, especially organized crime, which (notably in relation to the drug trade) has become largely international.[8] And, of course, there are problems regarding the taxation of people who move around the globe.[9] The Charter cases, dealing as they do with human rights, arise in a myriad of settings.[10] Nor should we forget the human rights issues in which public international law is more directly applied — for example, in cases involving refugees,[11] war crimes and crimes against humanity,[12] and humanitarian exceptions to extradition.[13] The international cases in our Court thus affect a very wide cross-section of human activity. With the recent reference to the Court of the constitutional and international law implications of unilateral declarations of independence, we shall soon have to brush up on such topics as self-determination and state succession.

One of the areas in which our Court has taken steps to reformulate the law is that concerning crimes having international dimensions. This is necessary to confront the challenge posed by criminal activities in an age of instant communication and rapid transportation. In a world where crime has become international, malefactors display respect to national borders only to the extent that they help frustrate the efforts of law enforcement officials. That issue arose in the very first case on which I sat after joining the Court, *Libman* v. *The Queen*.[14] The case involved a prosecution for criminal conspiracy regarding telephone sales solicitations emanating from Toronto to persuade United States citizens to purchase shares in two Central American companies on the basis of misrepresentations. Payment for the shares was made in Central America, where the accused received his portion of the proceeds to take back to Toronto. The

6 See, e.g., *Thomson* v. *Thomson*, *supra* note 1.

7 See, e.g., *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, *supra* note 4.

8 See, e.g., *Libman* v. *The Queen*, *supra* note 1.

9 See, e.g., *Swantje* v. *Canada*, *supra* note 1.

10 See the *Charter* cases, *supra* notes 2 and 3.

11 See, e.g., *Canada (Attorney General)* v. *Ward*, *supra* note 1.

12 See, e.g., *R.* v. *Finta*, *supra* note 1.

13 See, e.g., *Kindler* v. *Canada (Minister of Justice)*, *supra* note 1.

14 *Supra* note 1.

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issue was whether Canada had jurisdiction to prosecute the accused. The Court said yes.

Earlier cases had clouded the issue by focusing on such technical matters as where the gravamen of the offence occurred.[15] Depending on the nature of the offence or the way it was framed, this could be where the accused's activities took place or where the effects were felt. Under this regime, one had to determine which country had jurisdiction by notionally finding where the crime took place. This approach had the effect of ignoring the interests of *both* or *all* countries concerned in prosecuting what was in substance an international evil that took place in all countries with which it had a real and substantial connection. Our Court concluded that all such countries could prosecute. In this field, as the Court noted, we are all our brother's keeper, or for that matter our sister's. This echoes the sentiments of Lord Salmon in a drug case that "it hardly seems in accordance with international comity that our courts should treat the defendants with special leniency because their crimes were more likely to ruin young lives in the United States than in this country."[16]

Our Court took a similar view when the shoe was on the other foot — in *United States of America* v. *Lépine*.[17] In this case, the United States sought to extradite Canadian drug traders who had arranged in the United States to fly drugs from Columbia to Canada and were indicted in the United States where they had landed on their way to Canada. Moreover, a majority of the Court held that, under the extradition treaty, the issue of territoriality in a case of this kind was for the executive and not the government to determine. An interesting sequel to the latter pronouncement has recently arisen in relation to an alleged murder on the high seas of citizens of one state by those of another. Currently, the victims' state is seeking the extradition of the suspected perpetrators of the crime from Canada, where they were arrested on arrival. Whether the doctrine applied in *Lépine* extends to the more recent case, and what modalities there may be for judicial review of the executive's decision, will, no doubt, figure largely in the discussion, about which, of course, I refrain from commenting.

[15] These are fully discussed in *Libman* v. *The Queen*, *supra* note 1.

[16] See *Director of Public Prosecutions* v. *Doot*, [1973] A.C. 807 at 831, cited with approval in *Libman* v. *The Queen*, *supra* note 1, at 197.

[17] *Supra* note 1.

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The Court has acted in other ways to simplify procedure in extradition cases so as to facilitate bringing offenders to trial. It first had to address a number of Charter challenges. A number of these that related to the right to be tried within a reasonable time and the right not to be deprived of liberty except in accordance with the principles of fundamental justice were disposed of in a series of 1987 cases: *Canada* v. *Schmidt*;[18] *Argentina* v. *Mellino*;[19] and *United States* v. *Allard*.[20] Later, in *United States* v. *Cotroni* and *United States* v. *El Zein*,[21] the Court took the view that the overriding importance of extradition for the administration of justice overrode the Charter right of Canadians to remain in Canada. It was much affected by the consideration that modern communications make transnational criminal activity and evasion from prosecution ever easier. Extradition does not, the Court held, lie at the heart of the core values of this constitutional guarantee, as was evidenced by similar guarantees in other countries where extradition was omitted.

The Court did, however, leave open the possibility of refusing extradition in situations that were wholly unacceptable or shocked the conscience — for example, where the requesting state imposed torture. Nevertheless, in *Reference Re Ng Extradition (Canada)*[22] and *Kindler* v. *Canada (Minister of Justice)*,[23] the Court was not prepared to override the minister's discretion in two cases of the most serious forms of murder committed by Americans in their own country, even though these were there punishable by death. The majority was persuaded by the danger that Canada would otherwise become a haven for such criminals, given the ease with which they could move to Canada from the United States, as was the situation in both cases. The searingly difficult nature of these cases is evident from the close vote. In a series of later cases, however, the Court was unanimous in holding that very long sentences for drug offences did not violate the Charter.[24]

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 See *United States* v. *Jamieson*, *supra* note 1; *United States* v. *Whitley*, *supra* note 1; *United States* v. *Ross*, *supra* note 1; *United States* v. *Leon*, *supra* note 1.

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The Court in other cases has also acted to get rid of extradition practices that had built up over the years but that the Court found were not really required by the act or the treaties or by the need to protect fugitives. This was true especially of the practice of requiring proof of foreign law that, the majority thought, served no useful purpose and constituted a considerable source of delay, expense, and confusion: *McVey (Re); McVey* v. *United States.*[25]

Another area where the Court has reformulated the law to respond to modern conditions is in that relating to sovereign immunity. In *Re Canada Labour Code,*[26] the Court had to deal with the issue of whether the United States could successfully plead sovereign immunity to prevent a union of Canadian workers on an American military base from being certified as a bargaining agent under the Canada Labour Relations Act. The union argued it could not, because this activity was commercial and so not subject to sovereign immunity. The distinction between commercial and sovereign activities has led to considerable difficulties in other countries, and the answer was not entirely clear under our recent Sovereign Immunity Act. The Court, by majority, concluded that certification had, as is so often the case, a hybrid aspect. Obviously it was commercial in the sense that it governed the contractual relationship between an employer and its employees, and if this had been all, our Court would not have accorded sovereign immunity. But the activity these employers were engaged in — the operation of a military base that collected sensitive information — was quintessentially a sovereign activity. The Court concluded that for the Labour Board to assert jurisdiction and regulatory control over labour relations on the base in these circumstances would constitute an unacceptable interference with American sovereignty.

Most recently, we have become more deeply involved in the extent to which the Canadian Charter can be applied to a Canadian prosecution taking place in another country. We had earlier refused to countenance the notion that a Canadian witness in a taxation case in Canada could refuse to testify about events that had taken place when he was a bank manager in another country, because he would be put in jeopardy, contrary to principles of fundamental justice, under the law of that country for revealing the information if he should wish to return there. This, we thought, would permit a foreign country to

[25] *Supra* note 1.

[26] *Ibid.*

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frustrate the administration of justice in this country in relation to a Canadian citizen in respect of an essentially domestic situation.[27]

Recently, in *R.* v. *Harrer*,[28] the Court held that answers to questions put to a Canadian accused by American police in the course of questioning the accused respecting an American offence could be used in Canada. The warning given the accused in relation to the right against self-incrimination, though legal under United States law, was not as stringent as that required in Canada under the Canadian Charter, but the Court held that the evidence was nonetheless admissible since, on the facts, its admissibility would not result in an unfair trial. A sequel to that case, *R.* v. *Terry*,[29] came to the same conclusion on similar facts except that the questions put by American police were in respect of a Canadian offence.

These cases do not necessarily signal that the Charter has no application outside Canada to the activities of Canadian officers against Canadian citizens, but it does indicate that the actions of foreign police in questioning people in their country in respect of an alleged crime here is viewed as appropriate. We are not prepared to impose the rules of our internal processes on them in such circumstances, but we will ensure that a trial here is not thereby made unfair. The Court has approached these cases gingerly, saying no more than was necessary for each decision. Since there is currently a highly publicized case involving a search abroad, it would be well for me to emulate the Court's diffidence.

I do not wish to go further into an examination of this type of question, but I would simply make two points. First, our Court, as is especially evident in *Libman*[30] and *Re Canada Labour Code*,[31] is willing to recast the law, if need be, to conform to evolving international conditions. Second, consistent with the doctrine that national courts constitute a source, though a subsidiary source, of international law, we have not hesitated to examine carefully what sister courts in other countries have had to say on the issues, and I add that a reciprocal tendency exists in other countries.[32]

[27] See *Spencer* v. *The Queen*, *supra* note 1.

[28] *Supra* note 1.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] This mutual reliance can be seen in, e.g., *Chan* v. *Canada (Minister of Employment and Immigration)*, *supra* note 1.

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As will be evident, our Court has dealt with numerous cases involving issues of public international law, many going to the structure of international law and some to its application. But perhaps the most interesting development has been in relation to issues that some may perceive as being simply domestic law, but which relate in substance to structural issues concerning the international legal order — namely, the limitations placed on states in the exercise of their sovereign authority. The most obvious of these limitations are the general documents of the United Nations relating to human rights, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. It is fair to say that the international implementation mechanisms for these norms are still weak, and direct enforcement as customary law in Canada raises difficult problems. But the limitations on the power to enforce international human rights standards in Canada seem to have diminished in importance since the enactment of the Canadian Charter of Rights and Freedoms in 1982, given the manner in which the courts, particularly our Court, has chosen to approach this constitutional document.

The Charter was, as is well known, based in part on our own traditions (including their British roots), on the United States Bill of Rights, on the international instruments of the kind mentioned above, and on the European Convention for the Protection of Human Rights and Fundamental Freedoms.[33] In approaching Charter issues, the courts have relied on all these sources. Reference to American authority abounds, especially in the earlier cases.[34] But so do references to the general international covenants already mentioned,[35] to the International Convention on the Elimination of All Forms of Racial Discrimination,[36] the European Convention for the

[33] 213 U.N.T.S 221.

[34] For a discussion, see Gérard V. La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46 Maine Law Rev. 211.

[35] See the cases listed, *supra* notes 2 and 3.

[36] See, *inter alia*, *R.* v. *Keegstra*, *supra* note 3; *Canada (Human Rights Commission)* v. *Taylor*, *supra* note 3; *R.* v. *Zundel*, *supra* note 3.

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Protection of Human Rights and Fundamental Freedoms, and the European Court of Human Rights,[37] among others.[38]

From a technical perspective, we do not seek proof of these documents. We take judicial notice of them as we do of the law of the land. And we do not confine ourselves to polite references to the international agreements themselves, but examine with care the interpretations given to them by international institutions and domestic courts of many countries, as well as in the writings of learned authors. This is, of course, in line with the principle that the decisions of national courts and specialists constitute a subsidiary source of international law. What is happening, then, is that we are absorbing international legal norms affecting the individual through our constitutional pores. The courts of other countries, as far away and as far apart as Israel and New Zealand, are in turn looking to decisions of our Supreme Court for assistance in interpreting their own constitutional or quasi-constitutional norms. Although in some cases — usually where the Charter language expressly stipulates otherwise — our Court has departed from international norms,[39] this should not blind us to the overwhelming prevailing trend.

Nor is this development confined to constitutional issues. Increasingly, through general conventions and treaties, the international community is creating international institutions and norms governing transnational activities and concerns. But these initiatives cannot be successful unless these international norms are applied with sophistication and understanding by the various national decision-makers before whom they are invoked. Unless these norms are integrated into the various national governmental processes, the rule of law cannot expand to adequately protect individuals throughout the world. It is interesting, therefore, to note that a similar approach to that appearing in Charter litigation was adopted by our Court in interpreting specialized United Nations conventions, such as the Convention Relating to the Status

[37] See, *inter alia*, *Ford* v. *Quebec (Attorney General)*, *supra* note 3; *Andrews* v. *Law Society of British Columbia*, *supra* note 3; *United States* v. *Cotroni; United States* v. *El Zein*, *supra* note 1; *R.* v. *O'Connor*, [1995] 4 S.C.R. 411.

[38] See, e.g., *Kindler* v. *Canada (Minister of Justice)*, *supra* note 1 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); *Ruffo* v. *Conseil de la magistrature*, *supra* note 3 (Universal Declaration on the Independence of Justice).

[39] See, e.g., *R.* v. *Milne*, *supra* note 2.

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of Refugees,[40] and other multilateral agreements such as the Convention on the Civil Aspects of International Child Abduction.[41]

In *Canada (Attorney General)* v. *Ward*,[42] the Court was called upon to determine whether a person who had fled his homeland was a refugee by reason of fear of prosecution, when the fear emanated not from state action but from persons within the state whom the state was unable to control. The Court took the view that he was. In interpreting the applicable provisions of the Immigration Act incorporating the Refugees Convention, we examined the relevant national and international background, and firmly grounded our analysis in the international community's commitment to the assurance of basic human rights without discrimination. We permitted the United Nations High Commissioner for Refugees to intervene so as to afford us a better insight into the problems. Significantly, we relied in our judgment on the consensus of international experience as reflected in the *UNHCR Handbook*. Moreover, we did not, as had generally been the case previously, approach the interpretation of the Refugees Convention in the common law manner. Rather, we relied on *travaux préparatoires*, as international courts do. This method promotes conformity not only with the intentions of the framers but with interpretations in other countries. Here again we referred to sources in other countries.

A similar methodology was used by all members of the Court in the more recent case of *Chan* v. *Canada (Minister of Employment and Immigration)*,[43] where the Court had to consider the issue of forced sterilization under the Chinese one-child policy. The majority disposed of the case on a factual issue, but the minority, who saw the facts differently, reiterated the generous approach set forth in *Ward*.

The same approach was applied beyond the human rights field in *Thomson v. Thomson*,[44] where the Court dealt with the Convention on the Civil Aspects of International Child Abduction. After citing Article 32 of the Vienna Convention on the Law of Treaties, which deals with supplementary means of interpretation, the Court noted that: "It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the

[40] See 189 U.N.T.S. 137.

[41] See [1983] 35 Can. T.S.

[42] *Supra* note 1.

[43] *Ibid.*

[44] *Ibid.*

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treaty must have intended."[45] I add that this approach has been extended beyond the Convention to include legislation intended to foster its goals. Thus in *W.(V.)* v. *S.(D.)*,[46] the Court held that the Quebec statute intended to give effect to the goals of the Convention on the Civil Aspects of International Child Abduction should be largely interpreted in the same manner as the Convention, even though that document was not incorporated in the statute.

Nor is the development confined to multilateral treaties. A similar approach had already been adopted in interpreting bilateral treaties that included clauses similar to those in bilateral treaties between other countries. Thus in *R.* v. *Parisien*,[47] where the Court was asked to interpret a so-called specialty clause, which prohibits the prosecution of a person extradited for a crime other than that for which the person was surrendered, the Court examined international law regarding the general context, as well as cases on the specific issue in the United States, Venezuela, Switzerland, and Hungary, as well as American and Israeli academic works on the subject.

This is not to say that we may not, at times, be missing some opportunities for fostering compliance with international law through our domestic courts. I thought so in *R.* v. *Finta*.[48] In my view, both the Charter and Parliament had provided an avenue for local prosecution of war crimes and crimes against humanity that was equal to the task. But the majority, for reasons that were laudable but, as I viewed them, off the mark, came to a conclusion that correctly predicted would make it well-nigh impossible to implement Canada's obligation in this domain through our domestic courts.

Nevertheless, the result of the developments I have described — and there are others — is that in the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is

[45] *Ibid.*, 578

[46] *Supra* note 4.

[47] *Supra* note 1.

[48] *Supra* note 1.

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important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.

I might mention that other advantages flow from the adoption of such a perspective. The habit of thinking in global terms and of looking to see what others do has led our Court routinely to comparative law methods to deal with many other aspects of law, both public and private.[49] Thus our Court has been rethinking our system of private international law with a view to devising principles for settling interstate disputes between individuals in a manner that promotes the movement of people, wealth, and skills across state lines in conformity with the principles of order and justice.[50] In this task again we have benefitted greatly from the experience of others. Similarly, we have gained many advantages, even in areas as apparently local as civil liability, by reference to the experience of other countries, not only those with similar legal systems but others with systems of law that are quite different.[51]

Judges in the national courts of the world have sensed the need to understand one another better, and this has led to numerous official and unofficial exchanges and visits. We have had such exchanges with the final courts and judges of a wide spectrum of nations — the United States, the Commonwealth, Western and Eastern Europe, and Asia. And last year our Court was host to the judiciary of the world at the International Appellate Judges Conference. These meetings help us understand that we are engaged in a common task and appreciate the conditions under which we individually operate. Thus, I hope you will agree that Canada's courts are not lagging behind the courts of other countries in advancing the common endeavour of fostering compliance with international law and the rule of law generally.

[49] For a brief discussion, see La Forest, *supra* note 34, esp. at 216-20; see also Gérard V. La Forest, "Who is Listening to Whom? The Discourse between the Canadian Judiciary and Academics," an address delivered to the Centre for the Advanced Study of European and Comparative Law, Nov. 15, 1996 (in press).

[50] *Morguard Investments Ltd.* v. *De Savoye*, *supra* note 4; *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, *supra* note 4; *Hunt* v. *T&N Plc*, *supra* note 4; *Tolofson v. Jensen; Lucas (Litigation Guardian of)* v. *Gagnon*, *supra* note 4.

[51] See, e.g., *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.

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Sommaire

L'accroissement récent des activités de la Cour suprême du Canada touchant le droit international

L'augmentation rapide des activités interétatiques qui marque notre époque a conduit à des demandes croissantes de solution aux conflits en découlant par des moyens juridiques. Partout de par le monde, les tribunaux nationaux sont grandement touchés par ce développement. Le présent article décrit l'accroissement récent des activités de la Cour suprême du Canada en ce qui concerne des questions juridiques transnationales, notamment des questions touchant le droit international public, le droit international privé, les droits de la personne, le droit maritime, ainsi que des questions de droit privé ayant des ramifications internationales. Il retrace l'évolution de l'approche de la Cour à l'égard des questions internationales et souligne sa volonté de reformuler les principes applicables de manière à pouvoir répondre aux exigences du monde moderne et de favoriser le respect des normes du droit international. L'attitude plus cosmopolite qui en découle contribue à la volonté toujours plus grande de la Cour de recourir aux techniques du droit comparé en s'acquittant de sa tâche de résoudre des conflits locaux.

Summary

The Expanding Role of the Supreme Court of Canada in International Law Issues

The rapid globalization that marks our era has resulted in increasing demands for the legal resolution of disputes arising out of interstate activities. National courts throughout the world have been significantly affected by this development. This article describes the recent expansion of the work of the Supreme Court of Canada in relation to transnational legal issues, including issues of public and private international law, human rights, admiralty law, and issues of private law having international ramifications. It traces the Court's evolving approach to international law issues and its willingness to reformulate its principles to meet modern conditions and to foster compliance with its norms. The more cosmopolitan attitude thereby generated has worked in concert with the Court's increasing willingness to rely on comparative law techniques in assisting in the resolution of issues of a localized character.

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TAB 4

CESCR, General Comment No 9: The Domestic Application of the Covenant, UN Doc E/C.12/1998/24 (3 December 1998)

UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/C.12/1998/24
3 December 1998

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Nineteenth session
Geneva, 16 November-4 December 1998
Agenda item 3

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft general comment No. 9: The domestic application of the Covenant*

A. The duty to give effect to the Covenant in the domestic legal order

1. In its General Comment No. 3 (1990) the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

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* Adopted at the 51st meeting on 1 December 1998 (nineteenth session).

GE.98-14836 (E)

2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. 1/ This issue is considered further by the Committee in its General Comment No. 12 (1998). The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The Covenant contains no direct counterpart to article 2.3 (b) of the International Covenant on Civil and Political Rights which obligates States parties to, inter alia, "develop the possibilities of judicial remedy". Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2.1 of the Covenant or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other "means" used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

C. The role of legal remedies

Legal or judicial remedies?

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, 2/ in relation to which the provision of some form of judicial remedy would seem indispensable

in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 it cited, by way of example, articles 3, 7 (a) (i), 8, 10.3, 13.2 (a), 13.3, 13.4 and 15.3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Self-executing

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered “non-self-executing” were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

D. The treatment of the Covenant in domestic courts

12. In the Committee's guidelines for States' reports, States are requested to provide information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities". 3/ Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

Notes

1.A/CONF.39/27.

2.Pursuant to article 2.2 States "undertake to guarantee" that the rights in the Covenant are exercised "without discrimination of any kind".

3.Reporting guidelines, E/C.12/1990/8, Annex IV.

TAB 5

UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/79/Add.105 (7 April 1999)

United Nations CCPR/C/79/Add.105

International Covenant on Civil and Political Rights

Distr.: General
7 April 1999

Original: English

Human Rights Committee
Sixty-fifth session

Consideration of reports submitted by States parties under article 40 of the Covenant

Concluding observations of the Human Rights Committee

Canada

1. The Committee considered the fourth periodic report of the Government of Canada (CCPR/C/103/Add.5) at its 1737th and 1738th meetings (CCPR/SR.1737–1738), held on 26 March 1999, and adopted the following concluding observations at its 1747th meeting (CCPR/C/SR.1747), held on 6 April 1999.

A. Introduction

2. The Committee welcomes the comprehensive fourth periodic report as well as the additional written information covering the period since the submission of that report. The Committee expresses its appreciation for the presence of the large delegation representing the Government of Canada and for the frank and forthright replies furnished by the delegation to the issues raised by the Committee. However, the Committee is concerned that the delegation was not able to give up-to-date answers or information about compliance with the Covenant by the provincial authorities.

B. Principal positive aspects

3. The Committee welcomes the delegation's commitment to take action to ensure effective follow-up in Canada of the Committee's concluding observations and to further develop and improve mechanisms for ongoing review of compliance of the State party with the provisions of the Covenant. In particular, the Committee welcomes the delegation's commitment to inform public opinion in Canada about the Committee's concerns and recommendations, to distribute the Committee's concluding observations to all members of Parliament and to ensure that a parliamentary committee will hold hearings of issues arising from the

Committee's observations.

4. The Committee welcomes the final report of the Royal Commission on Aboriginal Peoples and the declared commitment of federal and provincial governments to work in partnership with aboriginal peoples to address needed reforms.

5. The Committee commends the Government of Canada in regard to the Nunavut land and governance agreement of the eastern Arctic.

6. The Committee welcomes the implementation of the Employment Equity Act, which entered into force in October 1996, establishing a compliance regime that requires federal departments to ensure that women, persons belonging to aboriginal and visible minorities and disabled persons constitute a fair part of their workforce.

C. Principal areas of concern and recommendations

7. The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report.

8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

9. The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination.

10. The Committee is concerned that gaps remain between the protection of rights under the Canadian charter and other federal and provincial laws and the protection required under the Covenant, and recommends measures to ensure full implementation of Covenant rights. In this regard the Committee recommends that consideration be given to the establishment of a public body responsible for overseeing implementation of the Covenant and for reporting on any deficiencies.

11. The Committee is deeply concerned that the State party so far has failed to hold a thorough public inquiry into the death of an aboriginal activist who was shot dead by provincial police during a peaceful demonstration regarding land claims in September 1995, in Ipperwash. The Committee strongly urges the State party to establish a public inquiry into all aspects of this matter, including the role and responsibility of public officials.

12. The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.

13. The Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk.

14. The Committee expresses its concern that the State party considers that it is not required to comply with requests for interim measures of protection issued by the Committee. The Committee urges Canada to revise its policy so as to ensure that all such requests are heeded in order that implementation of Covenant rights is not frustrated.

15. The Committee remains concerned about Canada's policy in relation to expulsion of long-term alien residents, without giving full consideration in all cases to the protection of all Covenant rights, in particular under articles 23 and 24.

16. The Committee is concerned about the increasingly intrusive measures affecting the right to privacy, under article 17 of the Covenant, of people relying on social assistance, including identification techniques such as fingerprinting and retinal scanning. The Committee recommends that the State party take steps to ensure the elimination of such practices.

17. The Committee notes with concern that the State party has not secured throughout its territory freedom of association. In particular, the Act to Prevent Unionization with respect to Community Participation under the Ontario Works Act, passed by the Ontario legislature in November 1998, which denies participants in "workfare" the right to join a trade union and to bargain collectively, affects implementation of article 22 of the Covenant. The Committee recommends that the State party take measures to ensure compliance with the Covenant.

18. The Committee is concerned that differences in the way in which the National Child Benefit Supplement for low-income families is implemented in some provinces may result in a denial of this benefit to some children. This may lead to non-compliance with article 24 of the Covenant.

19. The Committee is concerned about ongoing discrimination against aboriginal women. Following the adoption of the Committee's Views in the Lovelace case in July 1981, amendments were introduced to the Indian Act in 1985. Although the Indian status of women who had lost status because of marriage was reinstituted, this amendment affects only the woman and her children, not subsequent generations, which may still be denied membership in the community. The Committee recommends that these issues be addressed by the State party.

20. The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.

21. The Committee sets the date for the submission of Canada's fifth periodic report as ..... . It urges the State party to make available to the public the text of the State party's fourth periodic report and these concluding observations. It requests that the next periodic report be widely disseminated among the public, including to non-governmental organizations operating in Canada.

TAB 6

UN Human Rights Committee, General Comment No. 36, Article 6: Right to Life, UN Doc. CCPR/C/GC/36 (2018)

United Nations CCPR/C/GC/36

International Covenant on Civil and Political Rights

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Human Rights Committee

General comment No. 36

Article 6: right to life*, **

I. General remarks

1. This general comment replaces general comments No. 6, adopted by the Committee at its sixteenth session (1982), and No. 14, adopted by the Committee at its twenty-third session (1984).

2. Article 6 of the International Covenant on Civil and Political Rights recognizes and protects the right to life of all human beings. The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation.[1] The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right,[2] the effective protection of which is the prerequisite for the enjoyment of all other human rights and the content of which can be informed by other human rights.

3. The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.

4. Paragraph 1 of article 6 of the Covenant provides that no one shall be arbitrarily deprived of life and that this right shall be protected by law. It lays the foundation for the obligation of States parties to respect and ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.

5. Paragraphs 2, 4, 5 and 6 of article 6 of the Covenant set out specific safeguards to ensure that in States parties that have not yet abolished the death penalty, death sentences are not applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits (see part IV below). The prohibition on arbitrary deprivation of life contained in article 6 (1) further limits the ability of States parties to apply the death penalty. The provisions in paragraph 3 regulate specifically the relationship between article 6 of the Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide.

* Adopted by the Committee at its 124th session (8 October–2 November 2018).
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6. Deprivation of life involves intentional[3] or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.[4]

7. States parties must respect the right to life. This entails the duty to refrain from engaging in conduct resulting in arbitrary deprivation of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State.[5] The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life.[6]

8. Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.[7] In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.[8] For example, they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion[9] or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers[10] to effective access by women and girls to safe and legal abortion,[11] including barriers caused as a result of the exercise of conscientious objection by individual medical providers,[12] and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys,[13] to quality and evidence-based information and education on sexual and reproductive health[14] and to a wide range of affordable contraceptive methods,[15] and prevent the stigmatization of women and girls who seek abortion.[16] States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls,[17] in all circumstances and on a confidential basis.[18]

9. While acknowledging the central importance to human dignity of personal autonomy, States should take adequate measures, without violating their other Covenant obligations, to prevent suicides, especially among individuals in particularly vulnerable situations,[19] including individuals deprived of their liberty. States parties that allow medical professionals to provide medical treatment or the medical means to facilitate the termination of life of afflicted adults, such as the terminally ill, who experience severe physical or mental pain and suffering and wish to die with dignity,[20] must ensure the existence of robust legal and institutional safeguards to verify that medical professionals are complying with the free, informed, explicit and unambiguous decision of their patients, with a view to protecting patients from pressure and abuse.[21]

II. Prohibition against arbitrary deprivation of life

10. Although it inheres in every human being,[22] the right to life is not absolute. While the Covenant does not enumerate the permissible grounds for deprivation of life, by requiring that deprivations of life must not be arbitrary, article 6 (1) implicitly recognizes that some deprivations of life may be non-arbitrary. For example, the use of lethal force in self-defence, under the conditions specified in paragraph 12 below, would not constitute an arbitrary deprivation of life. Even those exceptional measures leading to deprivations of life that are not arbitrary per se must be applied in a manner that is not arbitrary in fact. Such exceptional

measures should be established by law and accompanied by effective institutional safeguards designed to prevent arbitrary deprivations of life. Furthermore, States that have not abolished the death penalty and that are not parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or other treaties providing for the abolition of the death penalty can apply the death penalty only in a non-arbitrary manner, for the most serious crimes and subject to a number of strict conditions elaborated in part IV below.

11. The second sentence of article 6 (1) requires that the right to life be protected by law, while the third sentence requires that no one be arbitrarily deprived of life. The two requirements partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature. For example, a death sentence issued following legal proceedings conducted in violation of domestic laws of criminal procedure or evidence will generally be both unlawful and arbitrary.

12. Deprivation of life is, as a rule, arbitrary if it is inconsistent with international law or domestic law.[23] A deprivation of life may, nevertheless, be authorized by domestic law and still be arbitrary. The notion of "arbitrariness" is not to be fully equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,[24] as well as elements of reasonableness, necessity and proportionality. In order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate;[25] the amount of force applied cannot exceed the amount strictly needed for responding to the threat;[26] the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury.[27] The use of potentially lethal force for law enforcement purposes is an extreme measure[28] that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat.[29] It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others.[30] The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat.[31]

13. States parties are expected to take all necessary measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions. These measures include putting in place appropriate legislation controlling the use of lethal force by law enforcement officials, procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life,[32] mandatory reporting, review and investigation of lethal incidents and other life-threatening incidents, and supplying forces responsible for crowd control with effective, less-lethal means and adequate protective equipment in order to obviate their need to resort to lethal force (see also para. 14 below).[33] In particular, all operations of law enforcement officials should comply with relevant international standards, including the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[34] and law enforcement officials should undergo appropriate training designed to inculcate these standards[35] so as to ensure, in all circumstances, the fullest respect for the right to life.

14. While preferable to more lethal weapons, States parties should ensure that less-lethal weapons are subject to strict independent testing and evaluate and monitor the impact on the right to life of weapons such as electro-muscular disruption devices (Tasers),[36] rubber or foam bullets, and other attenuating energy projectiles,[37] which are designed for use or are actually used by law enforcement officials, including soldiers charged with law enforcement missions.[38] The use of such weapons must be restricted to law enforcement officials who have undergone appropriate training, and must be strictly regulated in accordance with applicable international standards, including the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[39] Furthermore, less-lethal weapons must be employed only subject to strict requirements of necessity and proportionality, in situations in which other less harmful measures have proven to be or clearly are ineffective to address the

threat.[40] States parties should not resort to less-lethal weapons in situations of crowd control that can be addressed through less harmful means,[41] especially situations involving the exercise of the right to peaceful assembly.

15. When private individuals or entities are empowered or authorized by a State party to employ force with potentially lethal consequences, the State party is under an obligation to ensure that such employment of force actually complies with article 6 and the State party remains responsible for any failure to comply.[42] Among other things, a State party must rigorously limit the powers afforded to private actors and ensure that strict and effective measures of monitoring and control, as well as adequate training, are in place in order to guarantee, inter alia, that the powers granted are not misused and do not lead to arbitrary deprivation of life. For example, a State party must take adequate measures to ensure that persons who were involved or are currently involved in serious human rights violations or abuses are excluded from private security entities empowered or authorized to employ force.[43] It must also ensure that victims of arbitrary deprivation of life by private individuals or entities empowered or authorized by the State party are granted an effective remedy.[44]

16. Paragraphs 2, 4 and 5 of article 6 implicitly recognize that countries that have not abolished the death penalty and have not ratified the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, are not legally barred under the Covenant from applying the death penalty with regard to the most serious crimes, subject to a number of strict conditions. Other procedures regulating activity that may result in deprivation of life, such as protocols for administering new drugs, must be established by law, accompanied by effective institutional safeguards designed to prevent arbitrary deprivation of life, and must be compatible with other provisions of the Covenant.

17. The deprivation of life of individuals through acts or omissions that violate provisions of the Covenant other than article 6 is, as a rule, arbitrary in nature. This includes, for example, the use of force resulting in the death of demonstrators exercising their right to freedom of assembly[45] and the passing of a death sentence following a trial that failed to meet the due process requirements of article 14 of the Covenant.[46]

III. Duty to protect life

18. The second sentence of article 6 (1) provides that the right to life “shall be protected by law”. This implies that States parties must establish a legal framework to ensure the full enjoyment of the right to life by all individuals as may be necessary to give effect to the right to life. The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.

19. The duty to protect by law the right to life requires that any substantive ground for deprivation of life must be prescribed by law and must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[47] Since deprivation of life by the authorities of the State is a matter of the utmost gravity, the law must strictly control and limit the circumstances in which a person may be deprived of his or her life by those authorities,[48] and States parties must ensure full compliance with all of the relevant legal provisions. The duty to protect by law the right to life also requires States parties to organize all State organs and governance structures through which public authority is exercised in a manner consistent with the need to respect and ensure the right to life,[49] including establishing by law adequate institutions and procedures for preventing deprivation of life, investigating and prosecuting potential cases of unlawful deprivation of life, meting out punishment and providing full reparation.

20. States parties must enact a protective legal framework that includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in deprivation of life, such as intentional and negligent homicide, unnecessary or disproportionate use of firearms,[50] infanticide,[51] “honour” killings,[52] lynching,[53] violent hate crimes,[54] blood feuds,[55] ritual killings,[56] death threats and terrorist attacks. The criminal sanctions attached to these crimes must be commensurate with their gravity,[57] while remaining compatible with all the provisions of the Covenant.

21. The duty to take positive measures to protect the right to life derives from the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1) when read in conjunction with article 6, as well as from the specific duty to protect the right to life by law, which is articulated in the second sentence of article 6. States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them[58] in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State.[59] Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups (see also para. 23 below).[60] States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life[61] and reduce the proliferation of potentially lethal weapons to unauthorized individuals.[62] States parties must further take adequate measures of protection, including continuous supervision,[63] in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities, such as private transportation companies, private hospitals[64] and private security firms.

22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory[65] or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction,[66] are consistent with article 6, taking due account of related international standards of corporate responsibility[67] and of the right of victims to obtain an effective remedy.

23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats[68] or pre-existing patterns of violence. Such persons include human rights defenders (see also para. 53 below),[69] officials fighting corruption and organized crime, humanitarian workers, journalists,[70] prominent public figures, witnesses to crime[71] and victims of domestic and gender-based violence and human trafficking. They may also include children,[72] especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities,[73] indigenous peoples,[74] lesbian, gay, bisexual, transgender and intersex persons,[75] persons with albinism,[76] alleged witches,[77] displaced persons, asylum seekers, refugees[78] and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

24. Persons with disabilities, including psychosocial or intellectual disabilities, are also entitled to specific measures of protection so as to ensure their effective enjoyment of the right to life on an equal basis with others.[79] Such measures of protection must include the provision of reasonable accommodation when necessary to ensure the right to life, such as ensuring access of persons with disabilities to essential facilities and services,[80] and specific measures designed to prevent unwarranted use of force by law enforcement agents against persons with disabilities.[81]

25. States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State,[82] since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives[83] and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.[84] The same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State. The duty to protect the life of all detained individuals includes providing them with the necessary medical care and appropriate regular monitoring of their health,[85] shielding them from inter-prisoner violence,[86] preventing

suicides and providing reasonable accommodation for persons with disabilities.[87] A heightened duty to protect the right to life also applies to individuals quartered in liberty-restricting State-run facilities, such as mental health facilities,[88] military camps,[89] refugee camps and camps for internally displaced persons,[90] juvenile institutions and orphanages.

26. The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence,[91] pervasive traffic and industrial accidents,[92] degradation of the environment (see also para. 62 below),[93] deprivation of indigenous peoples' land, territories and resources,[94] the prevalence of life-threatening diseases, such as AIDS, tuberculosis and malaria,[95] extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.[96] The measures called for to address adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food,[97] water, shelter, health care,[98] electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions, such as the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes. States parties should also develop strategic plans for advancing the enjoyment of the right to life, which may comprise measures to fight the stigmatization associated with disabilities and diseases, including sexually transmitted diseases, which hamper access to medical care;[99] detailed plans to promote education for non-violence; and campaigns for raising awareness of gender-based violence[100] and harmful practices,[101] and for improving access to medical examinations and treatments designed to reduce maternal and infant mortality.[102] Furthermore, States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters that may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radioactive accidents and massive cyberattacks resulting in disruption of essential services.

27. An important element of the protection afforded to the right to life by the Covenant is the obligation on the States parties, where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute the perpetrators of such incidents, including incidents involving allegations of excessive use of force with lethal consequences (see also para. 64 below).[103] The duty to investigate also arises in circumstances in which a serious risk of deprivation of life was caused by the use of potentially lethal force, even if the risk did not materialize (see also para. 7 above). This obligation is implicit in the obligation to protect and is reinforced by the general duty to ensure the rights recognized in the Covenant, which is articulated in article 2 (1), when read in conjunction with article 6 (1), and the duty to provide an effective remedy to victims of human rights violations[104] and their relatives,[105] which is articulated in article 2 (3) of the Covenant, when read in conjunction with article 6 (1). Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice,[106] at promoting accountability and preventing impunity,[107] at avoiding denial of justice[108] and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations.[109] Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.[110] Given the importance of the right to life, States parties must generally refrain from addressing violations of article 6 merely through administrative or disciplinary measures, and a criminal investigation is normally required, which should lead, if enough incriminating evidence is gathered, to a criminal prosecution.[111] Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, and comparable measures leading to de facto or de jure impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy.[112]

28. Investigations into allegations of violations of article 6 must always be independent,[113] impartial,[114] prompt,[115] thorough,[116] effective,[117] credible[118] and transparent (see also para. 64 below).[119] In the event that a violation is found, full reparation must be provided, including,

in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction.[120] States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future.[121] Where relevant, the investigation should include an autopsy of the victim's body,[122] whenever possible, in the presence of a representative of the victim's relatives.[123] States parties need to take, among other things, appropriate measures to establish the truth relating to the events leading to the deprivation of life, including the reasons and legal basis for targeting certain individuals and the procedures employed by State forces before, during and after the time at which the deprivation occurred,[124] and identify the bodies of the individuals who have lost their lives.[125] States parties should also disclose relevant details about the investigation to the victim's next of kin,[126] allow the next of kin to present new evidence, afford the next of kin legal standing in the investigation,[127] and make public information about the investigative steps taken and the findings, conclusions and recommendations emanating from the investigation,[128] subject to absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals. States parties must also take the necessary steps to protect witnesses, victims and their relatives and persons conducting the investigation from threats, attacks and any act of retaliation. An investigation into violations of the right to life should commence when appropriate ex officio.[129] States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6.[130]

29. Loss of life occurring in custody, in unnatural circumstances, creates a presumption of arbitrary deprivation of life by State authorities, which can only be rebutted on the basis of a proper investigation that establishes the State's compliance with its obligations under article 6.[131] States parties also have a particular duty to investigate allegations of violations of article 6 whenever State authorities have used or appear to have used firearms or other potentially lethal force outside the immediate context of an armed conflict, for example, when live fire has been used against demonstrators,[132] or when civilians have been found dead in circumstances fitting a pattern of alleged violations of the right to life by State authorities.[133]

30. The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated.[134] Such a risk must be personal in nature[135] and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases.[136] For example, as explained in paragraph 34 below, it would be contrary to article 6 to extradite an individual from a country that had abolished the death penalty to a country in which he or she might face the death penalty.[137] Similarly, it would be inconsistent with article 6 to deport an individual to a country in which a fatwa had been issued against him or her by local religious authorities, without verifying that the fatwa was not likely to be followed;[138] or to deport an individual to an extremely violent country in which he or she had never lived, had no social or family contacts and could not speak the local language.[139] In cases involving allegations of risk to the life of the removed individual emanating from the authorities of the receiving State, the situation of the removed individual and the conditions in the receiving States need to be assessed, inter alia, based on the intent of the authorities of the receiving State, the pattern of conduct they have shown in similar cases,[140] and the availability of credible and effective assurances about their intentions. When the alleged risk to life emanates from non-State actors or foreign States operating in the territory of the receiving State, credible and effective assurances for protection by the authorities of the receiving State may be sought and internal flight options could be explored. When relying upon assurances from the receiving State of treatment upon removal, the removing State should put in place adequate mechanisms for ensuring compliance with the issued assurances from the moment of removal onwards.[141]

31. The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.[142]

IV. Imposition of the death penalty

32. Paragraphs 2, 4, 5 and 6 of article 6 regulate the imposition of the death penalty by those countries that have not yet abolished it.

33. Paragraph 2 of article 6 strictly limits the application of the death penalty, firstly, to States parties that have not abolished the death penalty, and secondly, to the most serious crimes. Given the anomalous nature of regulating the application of the death penalty in an instrument enshrining the right to life, the contents of paragraph 2 have to be narrowly construed.[143]

34. States parties to the Covenant that have abolished the death penalty, through amending their domestic laws, becoming parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, or adopting another international instrument obligating them to abolish the death penalty, are barred from reintroducing it. Like the Covenant, the Second Optional Protocol does not contain termination provisions and States parties cannot denounce it. Abolition of the death penalty is therefore legally irrevocable. Furthermore, States parties may not transform into a capital offence any offence that, upon ratification of the Covenant or at any time thereafter, did not entail the death penalty. Nor can they remove legal conditions from an existing offence with the result of permitting the imposition of the death penalty in circumstances in which it was not possible to impose it before. States parties that have abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained.[144] In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained.

35. The term “the most serious crimes” must be read restrictively[145] and appertain only to crimes of extreme gravity[146] involving intentional killing.[147] Crimes not resulting directly and intentionally in death,[148] such as attempted murder,[149] corruption and other economic and political crimes,[150] armed robbery,[151] piracy,[152] abduction,[153] drug[154] and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty. States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes that do not qualify as the most serious crimes.[155] They should also revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes.

36. Under no circumstances can the death penalty ever be applied as a sanction against conduct the very criminalization of which violates the Covenant, including adultery, homosexuality, apostasy,[156] establishing political opposition groups[157] or offending a head of State.[158] States parties that retain the death penalty for such offences commit a violation of their obligations under article 6, read alone and in conjunction with article 2 (2) of the Covenant, as well as of other provisions of the Covenant.

37. In all cases involving the application of the death penalty, the personal circumstances of the offender and the particular circumstances of the offence, including its specific attenuating elements,[159] must be considered by the sentencing court. Hence, mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature.[160] The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty.[161]

38. Article 6 (2) also requires States parties to ensure that any death sentence would be "in accordance with the law in force at the time of the commission of the crime". This application of the principle of legality complements and reaffirms the application of the principle of *nulla poena sine lege* found in article 15 (1) of the Covenant. As a result, the death penalty can never be imposed if it was not provided by law for the offence at the time of its commission. Nor can the imposition of the death penalty be based on vaguely defined criminal provisions,[162] whose application to the convicted individual depend on subjective or discretionary considerations,[163] the application of which is not reasonably foreseeable.[164] On the other hand, the abolition of the death penalty should apply retroactively to individuals charged or convicted of a capital offence in accordance with the retroactive leniency (*lex mitior*) principle, which finds partial expression in the third sentence of article 15 (1), requiring States parties to grant offenders the benefit of lighter penalties adopted after the commission of the offence. The retroactive application of the abolition of the death penalty to all individuals charged or convicted of a capital crime also derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished.

39. Article 6 (3) reminds all States parties that are also parties to the Convention on the Prevention and Punishment of the Crime of Genocide of their obligations to prevent and punish the crime of genocide, which include the obligation to prevent and punish all deprivations of life, which constitute part of a crime of genocide. Under no circumstances can the death penalty be imposed as part of a policy of genocide against members of a national, ethnic, racial or religious group.

40. States parties that have not abolished the death penalty must respect article 7 of the Covenant, which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The Committee has already opined that stoning,[165] injection of untested lethal drugs,[166] gas chambers,[167] burning and burying alive[168] and public executions[169] are contrary to article 7. For similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant. Failure to provide individuals on death row with timely notification about the date of their execution constitutes, as a rule, a form of ill-treatment, which renders the subsequent execution contrary to article 7 of the Covenant.[170] Extreme delays in the implementation of a death penalty sentence that exceed any reasonable period of time necessary to exhaust all legal remedies[171] may also entail the violation of article 7 of the Covenant, especially when the long time on death row exposes sentenced persons to harsh[172] or stressful conditions, including solitary confinement,[173] and when sentenced persons are particularly vulnerable due to factors such as age, health or mental state.[174]

41. Violation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty would render the sentence arbitrary in nature, and in violation of article 6 of the Covenant.[175] Such violations might involve the use of forced confessions;[176] the inability of the accused to question relevant witnesses;[177] lack of effective representation involving confidential attorney-client meetings during all stages of the criminal proceedings,[178] including criminal interrogation,[179] preliminary hearings,[180] trial[181] and appeal;[182] failure to respect the presumption of innocence, which may manifest itself in the accused being placed in a cage or being handcuffed during the trial;[183] lack of an effective right of appeal;[184] lack of adequate time and facilities for the preparation of the defence, including the inability to access legal documents essential for conducting the legal defence or appeal, such as official prosecutorial applications to the court,[185] the court's judgment[186] or the trial transcript; lack of suitable interpretation;[187] failure to provide accessible documents and procedural accommodation for persons with disabilities; excessive and unjustified delays in the trial[188] or the appeal process;[189] and general lack of fairness of the criminal process,[190] or lack of independence or impartiality of the trial or appeal court.

42. Other serious procedural flaws not explicitly covered by article 14 of the Covenant may nonetheless render the imposition of the death penalty contrary to article 6. For example, a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations, resulting in the imposition of the death penalty,[191] and failure to afford individuals about to be deported to a country in which

their lives are claimed to be at real risk the opportunity to avail themselves of available appeal procedures[192] would violate article 6 (1) of the Covenant.

43. The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases,[193] to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence. States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies, including studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.

44. The death penalty must not be imposed in a discriminatory manner contrary to the requirements of articles 2 (1) and 26 of the Covenant. Data suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty, which raises concerns under article 2 (1) read in conjunction with article 6, as well as under article 26.[194]

45. According to the last sentence of article 6 (2), the death penalty can only be carried out pursuant to a judgment of a competent court. Such a court must be established by law within the judiciary, be independent of the executive and legislative branches and be impartial.[195] It should be established before the commission of the offence. As a rule, civilians must not be tried for capital crimes before military tribunals[196] and military personnel can be tried for offences carrying the death penalty only before a tribunal affording all fair trial guarantees. Furthermore, the Committee does not consider courts of customary justice to constitute judicial institutions offering sufficient fair trial guarantees to enable them to try capital crimes. The issuance of a death penalty without any trial, for example in the form of a religious edict[197] or military order that the State plans to carry out or allows to be carried out, violates both articles 6 and 14 of the Covenant.

46. Any penalty of death can be carried out only pursuant to a final judgment, after an opportunity to resort to all judicial appeal procedures has been provided to the sentenced person, and after petitions to all other available non-judicial avenues have been resolved, including supervisory review by prosecutors or courts, and consideration of requests for official or private pardon. Furthermore, death sentences must not be carried out as long as international interim measures requiring a stay of execution are in place. Such interim measures are designed to allow review of the sentence before international courts, human rights courts and commissions, and international monitoring bodies, such as the United Nations treaty bodies. Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies.[198]

47. States parties are required pursuant to article 6 (4) to allow individuals sentenced to death to seek pardon or commutation, to ensure that amnesties, pardons and commutation can be granted to them in appropriate circumstances, and to ensure that sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures.[199] No category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.[200] Article 6 (4) does not prescribe a particular procedure for the exercise of the right to seek pardon or commutation and States parties consequently retain discretion in spelling out the relevant procedures.[201] Still, such procedures should be specified in domestic legislation,[202] and they should not afford the families of victims of crime a preponderant role in determining whether the death sentence should be carried out.[203] Furthermore, pardon or commutation procedures must offer certain essential guarantees, including certainty about the processes followed and the substantive criteria applied and the rights for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances, to be informed in advance when the request will be considered, and to be informed promptly about the outcome of the procedure.[204]

48. Article 6 (5) prohibits the imposition of the death penalty for crimes committed by persons below the age of 18 at the time of the offence.[205] This necessarily implies that such persons can never face the death penalty for that offence, regardless of their age at the time of sentencing or at the time foreseen for carrying out the sentence.[206] If there is no reliable and conclusive proof that the person was not below the age of 18 at the time the crime was committed, he or she will have the right to the benefit of the doubt and the death penalty cannot be imposed.[207] Article 6 (5) also prohibits States parties from carrying out the death penalty on pregnant women.

49. States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psychosocial or intellectual disabilities impede their effective defence,[208] and on persons who have limited moral culpability. They should also refrain from executing persons who have a diminished ability to understand the reasons for their sentence, and persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as persons of advanced age,[209] parents of very young or dependent children, and individuals who have suffered serious human rights violations in the past.[210]

50. Article 6 (6) reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable[211] and necessary for the enhancement of human dignity and progressive development of human rights.[212] It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate of use of and the extent to which they resort to the death penalty,[213] or to reduce the number of pardons and commutations they grant.

51. Although the allusion to the conditions for application of the death penalty in article 6 (2) suggests that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se,[214] subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances.[215] The increasing number of States parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment.[216] Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.

V. Relationship of article 6 with other articles of the Covenant and other legal regimes

52. The standards and guarantees of article 6 both overlap and interact with other provisions of the Covenant. Some forms of conduct simultaneously violate both article 6 and another article. For example, applying the death penalty in response to a crime that does not constitute a most serious crime (see also para. 35 above) would violate both article 6 (2) and, in light of the extreme nature of the punishment, article 7.[217] At other times, the contents of article 6 (1) are informed by the contents of other articles. For example, application of the death penalty may amount to an arbitrary deprivation of life under article 6 by virtue of the fact that it represents a punishment for exercising freedom of expression, in violation of article 19.

53. Article 6 also reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for promoting and striving to protect and realize human rights, including through cooperation or communication with the Committee.[218] States parties must take the necessary measures to respond to death threats and

to provide adequate protection to human rights defenders,[219] including the creation and maintenance of a safe and enabling environment for defending human rights.

54. Torture and ill-treatment, which may seriously affect the physical and mental health of the mistreated individual, could also generate the risk of deprivation of life. Furthermore, criminal convictions resulting in the death penalty that are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons would violate articles 7 and 14 (3) (g) of the Covenant, as well as article 6 (see also para. 41 above).[220]

55. Returning individuals to countries where there are substantial grounds for believing that they face a real risk to their lives violates articles 6 and 7 of the Covenant (see also para. 31 above).[221] In addition, making an individual who has been sentenced to death believe that the sentence has been commuted only to inform him or her later that it has not, [222] and placing an individual on death row pursuant to a death sentence that is void ab initio,[223] would run contrary to both articles 6 and 7.

56. The arbitrary deprivation of life of an individual may cause his or her relatives mental suffering, which could amount to a violation of their own rights under article 7 of the Covenant. Furthermore, even when the deprivation of life is not arbitrary, failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7,[224] as could failure to inform them of the location of the body,[225] and, where the death penalty is applied, of the date on which the State party plans to carry out the death penalty.[226] Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish.[227]

57. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6 (1), may overlap with the right to security of person guaranteed by article 9 (1). Extreme forms of arbitrary detention that are themselves life-threatening, in particular enforced disappearances, violate the right to personal liberty and personal security and are incompatible with the right to life (see also para. 58 below).[228] Failure to respect the procedural guarantees found in article 9 (3) and (4), designed inter alia to prevent disappearances, could also result in a violation of article 6.[229]

58. Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life.[230] The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable.[231] It thus results in a violation of the right to life as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of person) and article 16 (right to recognition as a person before the law). States parties must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance. States parties should also ensure that the enforced disappearance of persons is punished with appropriate criminal sanctions, and introduce prompt and effective procedures for cases of disappearance to be investigated thoroughly by independent and impartial bodies[232] that operate, as a rule, within the ordinary criminal justice system. They should bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation. [233] Under no circumstances should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation.[234] States parties should also provide families of victims of disappeared persons with the means to regularize their legal status in relation to the disappeared persons after an appropriate period of time.[235]

59. A particular connection exists between article 6 and article 20, which prohibits any propaganda for war and certain forms of advocacy constituting incitement to discrimination, hostility or violence. Failure to comply with these obligations under article 20 may also constitute a failure to take the necessary measures to protect the right to life under article 6.[236]

60. Article 24 (1) of the Covenant entitles every child to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the

State. This article requires adoption of special measures designed to protect the life of every child, in addition to the general measures required by article 6 for protecting the lives of all individuals.[237] When taking special measures of protection, States parties should be guided by the best interests of the child,[238] and by the need to ensure all children's survival, development[239] and well-being.[240]

61. The right to life must be respected and ensured without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status, including caste,[241] ethnicity, membership of an indigenous group, sexual orientation or gender identity,[242] disability,[243] socioeconomic status,[244] albinism[245] and age.[246] Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination.[247] Any deprivation of life based on discrimination in law or in fact is ipso facto arbitrary in nature. Femicide, which constitutes an extreme form of gender-based violence that is directed against girls and women, is a particularly grave form of assault on the right to life.[248]

62. Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.[249] The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[250] Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[251]

63. In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control.[252] This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner (see para. 22 above).[253] States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life.[254] Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea.[255] Given that the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.[256]

64. Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities.[257] While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive.[258] Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure

to apply the principles of precaution and proportionality, and the use of human shields would also violate article 6 of the Covenant.[259] States parties should, in general, disclose the criteria for attacking with lethal force individuals or objects whose targeting is expected to result in deprivation of life, including the legal basis for specific attacks, the process of identification of military targets and combatants or persons taking a direct part in hostilities, the circumstances in which relevant means and methods of warfare have been used,[260] and whether less harmful alternatives were considered. They must also investigate alleged or suspected violations of article 6 in situations of armed conflict in accordance with the relevant international standards (see paras. 27–28 above).[261]

65. States parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life.[262] For example, the development of autonomous weapon systems lacking in human compassion and judgment raises difficult legal and ethical questions concerning the right to life, including questions relating to legal responsibility for their use. The Committee is therefore of the view that such weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.[263]

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations.[264] They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control,[265] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.[266]

67. Article 6 is included in the list of non-derogable rights in article 4 (2) of the Covenant. Hence, the guarantees against arbitrary deprivation of life contained in article 6 continue to apply in all circumstances, including in situations of armed conflict and other public emergencies.[267] The existence and nature of a public emergency that threatens the life of the nation may, however, be relevant to a determination of whether a particular act or omission leading to deprivation of life is arbitrary and to a determination of the scope of the positive measures that States parties must take. Although some Covenant rights other than the right to life may be subject to derogation, derogable rights that support the application of article 6 must not be diminished by measures of derogation.[268] Such rights include procedural guarantees, such as the right to fair trial in death penalty cases, and accessible and effective measures to vindicate rights, such as the duty to take appropriate measures to investigate, prosecute, punish and remedy violations of the right to life.

68. Reservations with respect to the peremptory and non-derogable obligations set out in article 6 are incompatible with the object and purpose of the Covenant. In particular, no reservation is permitted to the prohibition against arbitrary deprivation of life of persons and to the strict limits provided in article 6 with respect to the application of the death penalty.[269]

69. Wars and other acts of mass violence continue to be a scourge of humanity resulting in the loss of many thousands of lives every year.[270] Efforts to avert the risks of war and any other armed conflict, and to strengthen international peace and security, are among the most important safeguards of the right to life.[271]

70. States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life,[272] including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while

respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

Notes

[1] International Covenant on Civil and Political Rights, art. 4; Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 1; general comment No. 14 (1984) on the right to life, para. 1; *Camargo v. Colombia*, communication No. 45/1979, para. 13.1; *Baboeram-Adhin et al. v. Suriname*, communications Nos. 146/1983 and 148–154/1983, para. 14.3.
[2] Universal Declaration of Human Rights, preamble.
[3] *Camargo v. Colombia*, para. 13.2.
[4] Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, paras. 9 and 55.
[5] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8. See also European Court of Human Rights, *Osman v. United Kingdom* (case No. 87/1997/871/1083), judgment of 28 October 1998, para. 116.
[6] *Chongwe v. Zambia* (CCPR/C/70/D/821/1998), para. 5.2. See also European Court of Human Rights, *İlhan v. Turkey* (application No. 22277/93), judgment of 27 June 2000, paras. 75–76; Inter-American Court of Human Rights, *Rochela massacre v. Colombia*, judgment of 11 May 2007, para. 127.
[7] *Mellet v. Ireland* (CCPR/C/116/D/2324/2013), paras. 7.4–7.8; CCPR/C/IRL/CO/4, para. 9.
[8] Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women, para. 10. See also, e.g., CCPR/C/ARG/CO/4, para. 13; CCPR/C/JAM/CO/3, para. 14; CCPR/C/MDG/CO/3, para. 14.
[9] CCPR/C/79/Add.97, para. 15.
[10] See, e.g., CCPR/CO/79/GNQ, para. 9; CCPR/C/ZMB/CO/3, para. 18; CCPR/C/COL/CO/7, para. 21; CCPR/C/MAR/CO/6, para. 22; CCPR/C/CMR/CO/5, para. 22.
[11] See, e.g., CCPR/C/PAN/CO/3, para. 9; CCPR/C/MKD/CO/3, para. 11. See also World Health Organization, *Safe abortion: technical and policy guidance for health systems*, 2nd ed. (Geneva, 2012), pp. 96–97.
[12] CCPR/C/POL/CO/7, para. 24; CCPR/C/COL/CO/7, para. 21.
[13] CCPR/C/CHL/CO/6, para. 15; CCPR/C/KAZ/CO/1, para. 11; CCPR/C/ROU/CO/5, para. 26.
[14] CCPR/C/LKA/CO/5, para. 10; CCPR/C/MWI/CO/1/Add.1, para. 9; CCPR/C/ARG/CO/5, para. 12.
[15] CCPR/C/POL/CO/6, para. 12; CCPR/C/COD/CO/4, para. 22.
[16] CCPR/C/PAK/CO/1, para. 16; CCPR/C/BFA/CO/1, para. 20; CCPR/C/NAM/CO/2, para. 16.
[17] CCPR/C/PAK/CO/1, para. 16.
[18] Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention, para. 11.
[19] CCPR/C/79/Add.92, para. 11.
[20] Committee on Economic, Social and Cultural Rights' general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 25.
[21] CCPR/C/NLD/CO/4, para. 7.
[22] Universal Declaration of Human Rights, preamble.
[23] African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)* (2015), para. 12.
[24] *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; *Van Alphen v. Netherlands*, communication No. 305/1988, para. 5.8.
[25] *Camargo v. Colombia*, para. 13.2.
[26] Ibid., paras. 13.2–13.3.
[27] A/HRC/17/28, para. 60.
[28] Code of Conduct for Law Enforcement Officials, commentary to art. 3.
[29] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[30] African Commission on Human and Peoples' Rights, *Kazingachire et al v. Zimbabwe* (communication No. 295/04), decision of 12 October 2013, paras. 118–120.
[31] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, para. 9.
[32] European Court of Human Rights, *McCann and others v. United Kingdom* (application No. 18984/91), judgment of 27 September 1995, para. 150.
[33] A/HRC/31/66, para. 54.
[34] CCPR/C/NPL/CO/2, para. 10; CCPR/CO/81/LIE, para. 10.
[35] CCPR/C/KEN/CO/3, para. 11; CCPR/C/CAF/CO/2, para. 12.
[36] CCPR/C/USA/CO/4, para. 11; CCPR/C/USA/CO/3/Rev.1, para. 30.
[37] CCPR/C/GBR/CO/6, para. 11.
[38] Code of Conduct for Law Enforcement Officials, commentary to art. 1.

[39] A/HRC/31/66, para. 55.
[40] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), para. 14.
[41] CCPR/CO/74/SWE, para. 10.
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TAB 7

International Court of Justice, Obligations of States in Respect of Climate Change, Advisory Opinion, 23 July 2025

23 JUILLET 2025

AVIS CONSULTATIF

OBLIGATIONS DES ÉTATS EN MATIÈRE DE CHANGEMENT CLIMATIQUE

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OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

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ABBREVIATIONS, ACRONYMS AND SHORT FORMS

Institutions

CMA	Conference of the Parties serving as the meeting of the Parties
COP	Conference of the Parties
ICAO	International Civil Aviation Organization
IPCC	Intergovernmental Panel on Climate Change
ILC	International Law Commission
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
UNEP	United Nations Environment Programme
WHO	World Health Organization
WMO	World Meteorological Organization

Conventions

Biodiversity Convention	Convention on Biological Diversity
Climate change treaties	UNFCCC, Kyoto Protocol and Paris Agreement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Montreal Protocol	Montreal Protocol on Substances that Deplete the Ozone Layer
Desertification Convention	United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC or Framework Convention	United Nations Framework Convention on Climate Change
Ozone Layer Convention	Vienna Convention for the Protection of the Ozone Layer

IPCC Documents

IPCC, *Climate Change 2023: Synthesis Report*	IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change
IPCC, 2023 Summary for Policymakers	IPCC, 2023, Summary for Policymakers, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change
IPCC 2023 Glossary	IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary
IPCC, 2022 contribution of Working Group III	IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change
IPCC, 2022 contribution of Working Group II	IPCC, 2022, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change

Other abbreviations

ILC Articles on State Responsibility	International Law Commission, Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two
EIA	Environmental impact assessment
GHG	Greenhouse gas
NDC	Nationally determined contribution

INTERNATIONAL COURT OF JUSTICE

YEAR 2025

2025
23 July
General List
No. 187

23 July 2025

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

Jurisdiction and discretion.

Questions submitted to the Court are legal in character — The Court has jurisdiction to give the advisory opinion requested — No compelling reasons for the Court to decline to give the advisory opinion requested.

* *

Context of the adoption of resolution 77/276 — Severe and far-reaching consequences of climate change — Most relevant steps taken from 1968 to 2015 at international level to identify risks in order to protect climate system and other parts of the environment — Relevant scientific background — Reports of the Intergovernmental Panel on Climate Change (IPCC) constitute the best available science on the causes, nature and consequences of climate change — Findings of the IPCC on the causes and consequences of climate change — Greenhouse gas (GHG) emissions and climate change — Mitigation and adaptation measures.

* *

Scope and meaning of the questions posed by the General Assembly.

Questions (a) *and* (b) *are interrelated and require the Court to identify the obligations of States in respect of activities that adversely affect the climate system and the legal consequences*

arising from the breach of these obligations — Relevant conduct comprises all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions — Material scope of the questions encompasses full range of human activities that contribute to climate change as a result of the emission of GHGs — No territorial limits to the Court's inquiry — Temporal scope.

Meaning and scope of question (a) *— The General Assembly seeks the Court's opinion on the obligations incumbent upon States under international law — Question* (a) *is limited to identifying the existing obligations.*

Meaning and scope of question (b) *— Legal consequences arise from a breach by a State of obligations identified under question* (a) *— The Court is requested to address legal consequences in a general manner, not with regard to any particular State or group of States — Consequences for States that, by their actions or omissions, may have adversely affected the climate system and other parts of the environment through GHG emissions — Consequences with respect to States that are "specially affected" or "are particularly vulnerable" — Application of rules on State responsibility under customary international law does not differ depending on the category or status of an injured State — The Court is not called upon to determine specific legal consequences with respect to particular injured States or groups of States — Legal consequences with respect to "peoples and individuals" — Relevance of specific treaties and other legal instruments creating procedural and substantive rights and obligations.*

* *

Question (a) *put to the Court: obligations of States in respect of climate change.*

Applicable law — List established by the Court without prejudice to other rules of international law that may also be relevant.

Most directly relevant treaty law — Charter of the United Nations — Climate change treaties — United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement — United Nations Convention on the Law of the Sea (UNCLOS) — Environmental treaties — Ozone Layer Convention, Montreal Protocol, Kigali Amendment to Montreal Protocol, Biodiversity Convention and Desertification Convention.

Most directly relevant customary international law — Duty of States to prevent significant environmental harm — Duty to co-operate for the protection of the environment.

Most directly relevant international human rights law — Core human rights treaties — International Covenant on Economic, Social and Cultural Rights — International Covenant on Civil and Political Rights — Human rights recognized under customary international law.

Guiding principles for the interpretation and application of the most directly relevant legal rules — Principle of sustainable development — Principle of common but differentiated responsibilities and respective capabilities — Equity — Intergenerational equity — Precautionary approach or principle.

Lex specialis *does not lead to general exclusion by climate change treaties of other rules of international law.*

Obligations of States under the climate change treaty framework.

Examination of climate change treaties and relevant decisions of their governing bodies — Distinction between "obligations of conduct" and "obligations of result" not necessarily impermeable — Principle of common but differentiated responsibilities and respective capabilities in the climate change treaties — Precautionary approach or principle incorporated into Kyoto Protocol and Paris Agreement by reference — Principle of sustainable development incorporated in climate change treaties — Equity and intergenerational equity incorporated in climate change treaties — Duty to co-operate identified as principle within climate change treaty framework — Relevance and legal effect of decisions of governing bodies of climate change treaties.

Relationship between UNFCCC, Kyoto Protocol and Paris Agreement — Lex posterior *rule — No incompatibility between the three climate change treaties.*

Obligations of States under UNFCCC — General framework for addressing climate change caused by anthropogenic GHG emissions — Mitigation obligations — Obligations for Annex I parties — Adaptation obligations — Obligations of co-operation and assistance — Duty to co-operate is obligation of conduct, whose fulfilment is assessed against standard of due diligence.

Obligations of States under Kyoto Protocol — Protocol concretized certain obligations under UNFCCC by requiring quantified emission reduction commitments for certain parties — Protocol specifies and strengthens mitigation obligations under UNFCCC — Kyoto Protocol remains in force.

Obligations of States parties under Paris Agreement — Obligations relating to mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building — The 1.5°C threshold of Article 2 is the parties' agreed primary temperature goal for limiting the global average temperature increase — Relevance of principle of common but differentiated responsibilities and respective capabilities — Duty to co-operate reflected in several provisions — Mutually supportive obligations of conduct and obligations of result— Compliance of parties with obligations of conduct to be assessed on basis of whether party in question exercised due diligence and employed best efforts.

Mitigation obligations — Article 4, paragraph 2, of Paris Agreement — Obligation of result to prepare, communicate and maintain nationally determined contributions (NDCs) — Parties have limited discretion with regard to content of NDCs — Relevance of the principle of common but differentiated responsibilities and respective capabilities — NDCs must, when taken together, be capable of realizing objectives of Paris Agreement — Obligations of conduct to implement NDCs and to take domestic mitigation measures — Obligations require parties to act with due diligence — Standard of due diligence stringent.

Adaptation obligations — Article 7, paragraph 9, of Paris Agreement — Fulfilment of adaptation obligations of parties is to be assessed against a standard of due diligence — Adaptation obligations complement mitigation obligations.

Obligations of co-operation, including financial assistance, technology transfer and capacity-building — Customary duty to co-operate for protection of environment reinforces treaty-based co-operation obligations under Paris Agreement — States free to select means of co-operating — Means must be consistent with obligations of good faith and due diligence — Principal forms of co-operation include financial assistance, technology transfers and capacity-building.

Obligations of States under customary international law relating to climate change.

Duty to prevent significant harm to environment — Application of this duty to climate system — Risk of significant harm to the environment necessary to trigger application of the duty — Probability or foreseeability of occurrence of harm and severity or magnitude thereof — Accumulation of GHG emissions in the atmosphere causing significant harm to the climate system and other parts of the environment — Application of duty not precluded by diffuse and multifaceted nature of various forms of conduct that contribute to anthropogenic climate change — Due diligence as the required standard of conduct — Relevance of scientific and technological information — Role of decisions of Conferences of the Parties — Capabilities of State key factor for determining applicable standard of due diligence — Precautionary approach or principle guides States in determining required standard of conduct — Environmental impact assessment (EIA) — Specific nature of EIA in context of climate change — Notification and consultation.

Duty to co-operate — Specific character of climate change requires States to take individual measures in co-operation with other States — States required to make good faith efforts to arrive at appropriate forms of collective action — Special importance of the duty in the context of need to reach a collective temperature goal — Duty to co-operate applies to all States.

Relationship between obligations arising from treaties and customary international law relating to climate change — Treaty rules and rules of customary international law have separate existence — Obligations arising from climate change treaties and State practice in implementing them inform general customary obligations and vice versa — Compliance by State with climate change treaties suggests that the State substantially complies with general customary duties to prevent significant harm to environment and to co-operate — Non-party State co-operating with community of States parties to climate change treaties in a way equivalent to co-operation of a State party may be considered to fulfil customary obligations — Burden of non-party State to demonstrate that its policies and practices are in conformity with its customary obligations.

Obligations of States under environmental treaties — Ozone Layer Convention — Montreal Protocol — Biodiversity Convention — Desertification Convention — Court not called upon to address all treaties that are applicable and may be relevant for the protection of the climate system — Obligations under environmental treaties are relevant to protection of climate system — Environmental treaties, climate change treaties and relevant obligations under customary international law inform each other.

Obligations of States under law of the sea and related issues — Obligations of States under UNCLOS — Anthropogenic GHG emissions may be characterized as pollution of marine environment within meaning of UNCLOS — Applicability of Part XII of UNCLOS — Applicability of Articles 192, 193, 194, 197 and 206 of UNCLOS — UNCLOS, climate change treaties, environmental treaties and customary rules of international law inform each other — Obligations of States in relation to sea level rise and related issues — Question of preservation of baselines, maritime entitlements, maritime delimitations and statehood — States parties to UNCLOS under no obligation to update charts or lists of geographical co-ordinates — Once State is established, disappearance of one of its constituent elements would not necessarily entail loss of statehood.

Obligations of States under international human rights law — Adverse effects of climate change on enjoyment of human rights — Protection of environment is precondition for enjoyment of human rights — Human rights whose effective enjoyment may be impaired because of climate change — Right to life — Right to health — Right to an adequate standard of living — Right to privacy, family and home — Rights of women, children and indigenous peoples — Right to clean, healthy and sustainable environment — Territorial scope of human rights treaties to be addressed in light of each instrument's specific provisions.

* *

Question (b) *put to the Court: legal consequences arising from States' acts and omissions that cause significant harm to the climate system and other parts of the environment — Applicability of rules on State responsibility — Responsibility for breaches of obligations in climate change context to be determined by applying rules on State responsibility under customary international law.*

Determination of State responsibility in climate change context — Temporal scope of obligations comprises elements of in concreto *assessment — This question beyond scope of present advisory opinion — Attribution — Difficulties in attributing actions or omissions to a State — Conduct of private actors — Cumulative nature of wrongful conduct — Rules on State responsibility in principle capable of addressing situations where damage caused by multiple States — Each injured State may separately invoke responsibility of every State that has committed internationally wrongful act resulting in damage to climate system and other parts of the environment — Where several States are responsible for same internationally wrongful act, responsibility of each State may be invoked — Causation — Applicability of existing legal standard of sufficiently direct and certain causal nexus — In climate change context, causal link must be established in each case through*

in concreto *assessment — Obligations pertaining to protection of climate system and other parts of environment from anthropogenic GHG emissions are* erga omnes *— Availability of remedies to injured or non-injured States, respectively.*

Legal consequences arising from wrongful acts — Consequences depend on specific breach and nature of particular harm — Duty of performance — Duty of cessation and guarantees of non-repetition — Duty to make reparation through restitution, compensation or satisfaction.

ADVISORY OPINION

Present: *President* IWASAWA; *Vice-President* SEBUTINDE; *Judges* TOMKA, ABRAHAM, YUSUF, XUE, BHANDARI, NOLTE, CHARLESWORTH, BRANT, GÓMEZ ROBLEDO, CLEVELAND, AURESCU, TLADI; *Registrar* GAUTIER.

On the obligations of States in respect of climate change,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions on which the advisory opinion of the Court has been requested are set forth in resolution 77/276 adopted by the United Nations General Assembly (hereinafter the "General Assembly") on 29 March 2023. By a letter dated 12 April 2023 and received on 17 April 2023, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit these questions for an advisory opinion. Certified true copies of the English and French texts of the resolution were enclosed with the letter. The resolution reads as follows:

> "*The General Assembly*,
>
> *Recognizing* that climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it,
>
> *Recalling* its resolution 77/165 of 14 December 2022 and all its other resolutions and decisions relating to the protection of the global climate for present and future generations of humankind, and its resolution 76/300 of 28 July 2022 on the human right to a clean, healthy and sustainable environment,

Recalling also its resolution 70/1 of 25 September 2015 entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’,

Recalling further Human Rights Council resolution 50/9 of 7 July 2022 and all previous resolutions of the Council on human rights and climate change, and Council resolution 48/13 of 8 October 2021, as well as the need to ensure gender equality and empowerment of women,

Emphasizing the importance of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, among other instruments, and of the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects,

Recalling the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, as expressions of the determination to address decisively the threat posed by climate change, urging all parties to fully implement them, and noting with concern the significant gap both between the aggregate effect of States’ current nationally determined contributions and the emission reductions required to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels, and between current levels of adaptation and levels needed to respond to the adverse effects of climate change,

Recalling also that the United Nations Framework Convention on Climate Change and the Paris Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

Noting with profound alarm that emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects, including persistent drought and extreme

weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, leading to displacement of affected persons and further threatening food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development,

Noting with utmost concern the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected,

Acknowledging that, as temperatures rise, impacts from climate and weather extremes, as well as slow-onset events, will pose an ever-greater social, cultural, economic and environmental threat,

Emphasizing the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects,

Expressing serious concern that the goal of developed countries to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation has not yet been met, and urging developed countries to meet the goal,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

> ‘Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?'"

2. By letters dated 17 April 2023, the Deputy-Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Statute.

3. By an Order dated 20 April 2023, the President of the Court decided that the United Nations and its Member States were likely to be able to furnish information on the questions submitted to the Court for an advisory opinion, and fixed 20 October 2023 as the time-limit within which written statements on the questions might be presented to it, in accordance with Article 66, paragraph 2, of the Statute, and 22 January 2024 as the time-limit within which States and international organizations having presented written statements might submit written comments on the written statements made by other States and international organizations, in accordance with Article 66, paragraph 4, of the Statute.

4. By letters dated 21 April 2023, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted a copy of the Order to them.

5. Ruling on requests from the International Union for the Conservation of Nature (dated 19 May 2023), the Commission of Small Island States on Climate Change and International Law (dated 1 June 2023), the European Union (dated 14 June 2023) and the African Union (dated 6 July 2023), the Court decided, in accordance with Article 66 of its Statute, that those international organizations were likely to be able to furnish information on the questions submitted to the Court, and that consequently they might do so within the time-limits fixed for that purpose by the Order of the President of the Court dated 20 April 2023.

6. Pursuant to Article 65, paragraph 2, of the Statute, the Secretariat of the United Nations, under cover of a letter from the United Nations Legal Counsel dated 30 June 2023, communicated to the Court a dossier of documents likely to throw light upon the questions formulated by the General Assembly, which was received in the Registry on 3 July 2023.

7. In July 2023, Vanuatu and 14 co-signatory States, the Commission of Small Island States on Climate Change and International Law, and Chile separately requested that the Court grant a three-month extension to the time-limits fixed by the Order of the President of the Court dated 20 April 2023.

8. By an Order dated 4 August 2023, the President of the Court extended to 22 January 2024 the time-limit within which all written statements on the questions might be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute, and to 22 April 2024 the time-limit within which States and international organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

9. Ruling on a request received from the Organization of the Petroleum Exporting Countries (dated 11 August 2023), the President of the Court decided, in accordance with Article 66 of its Statute, that this international organization was likely to be able to furnish information on the questions submitted to the Court, and that consequently it might do so within the time-limits as extended by the Order of the President of the Court dated 4 August 2023.

10. Ruling on requests received from the Organisation of African, Caribbean and Pacific States (dated 6 September 2023), the Melanesian Spearhead Group (dated 11 September 2023), the Forum Fisheries Agency (dated 11 September 2023), the Pacific Community (dated 25 September 2023) and the Pacific Islands Forum (dated 18 October 2023), the Court decided, in accordance with Article 66 of its Statute, that those international organizations were likely to be able to furnish information on the questions submitted to the Court, and that consequently they might do so within the time-limits as extended by the Order of the President of the Court dated 4 August 2023.

11. Pursuant to Article 65, paragraph 2, of the Statute, the Secretariat of the United Nations, under cover of a letter from the United Nations Legal Counsel dated 30 October 2023, communicated to the Court additional documents to be included in the dossier of documents likely to throw light upon the questions submitted to the Court.

12. In November and December 2023, the Pacific Community, Kiribati, the African Union and Nauru requested that the Court grant an extension of at least four months to the time-limits extended by the Order of the President of the Court dated 4 August 2023.

13. By an Order dated 15 December 2023, the President, taking into consideration the above-mentioned requests, as well as the importance of the Court giving an advisory opinion in a timely manner, extended to 22 March 2024 the time-limit within which all written statements on the questions might be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute, and to 24 June 2024 the time-limit within which States and international organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

14. Ruling on a request received from the Alliance of Small Island States (dated 30 November 2023), the Court decided, in accordance with Article 66 of its Statute, that this international organization was likely to be able to furnish information on the questions submitted to the Court, and that consequently it might do so within the time-limits as extended by the Order of the President of the Court dated 15 December 2023.

15. Ruling on a request received from the Cook Islands on 21 December 2023, the Court decided to authorize the latter to present a written statement and written comments on written statements made by other States or international organizations in the advisory proceedings in accordance with the time-limits as extended by the Order of the President of the Court dated 15 December 2023.

16. Ruling on requests received from the Parties to the Nauru Agreement Office (dated 21 February 2024) and the World Health Organization authorization (dated 21 March 2024), the Court decided, in accordance with Article 66 of its Statute, that those international organizations were likely to be able to furnish information on the questions submitted to the Court, and that consequently they might do so within the time-limits as extended by the Order of the President of the Court dated 15 December 2023.

17. Within the time-limit as extended by the Order of the President of the Court dated 15 December 2023, written statements were filed in the Registry, in order of receipt, by Portugal; the Democratic Republic of the Congo; Colombia; Palau; Tonga; the Organization of the Petroleum Exporting Countries; the International Union for Conservation of Nature; Singapore; Peru; Solomon Islands; Canada; the Cook Islands; Seychelles; Kenya; Denmark, Finland, Iceland, Norway and Sweden (jointly); the Melanesian Spearhead Group; the Philippines; Albania; Vanuatu; the Federated States of Micronesia; Saudi Arabia; Sierra Leone; Switzerland; Liechtenstein; Grenada; Saint Lucia; Saint Vincent and the Grenadines; Belize; the United Kingdom of Great Britain and Northern Ireland; the Kingdom of the Netherlands; the Bahamas; the United Arab Emirates; the Marshall Islands; the Parties to the Nauru Agreement Office; the Pacific Islands Forum; France; New Zealand; Slovenia; Kiribati; the Forum Fisheries Agency; China; Timor-Leste; the Republic of Korea; India; Japan; Samoa; the Alliance of Small Island States; the Islamic Republic of Iran; Latvia; Mexico; South Africa; Ecuador; Cameroon; Spain; Barbados; the African Union; Sri Lanka; the Organisation of African, Caribbean and Pacific States; Madagascar; Uruguay; Egypt; Chile; Namibia; Tuvalu; Romania; the United States of America; Bangladesh; the European Union; Kuwait; Argentina; Mauritius; Nauru; the World Health Organization; Costa Rica; Indonesia; Pakistan; the Russian Federation; Antigua and Barbuda; the Commission of Small Island States on Climate Change and International Law; El Salvador; Bolivia; Australia; Brazil; Viet Nam; the Dominican Republic; Ghana; Thailand and Germany.

18. By a communication dated 28 March 2024, the Registry informed States and international organizations having presented written statements that the statements filed by other States and international organizations could be downloaded from a designated web portal managed by the Registry.

19. The Court authorized, on an exceptional basis, the filing of written statements by Nepal, Burkina Faso and The Gambia, after the expiry of the relevant time-limit.

20. By letters dated 12 April 2024, the Registrar informed the United Nations, as well as States entitled to appear before the Court having not presented written statements, of the list of written statements having been filed in the proceedings.

21. Subsequent to the filing of the written statements, over the course of April and May 2024, Fiji; Nigeria; Bangladesh; Nauru; the Organisation of African, Caribbean and Pacific States; the Cook Islands; Palau; Kiribati; the Forum Fisheries Agency; the Philippines; Antigua and Barbuda; the Melanesian Spearhead Group; Vanuatu; the Commission of Small Island States on Climate Change and International Law; Tuvalu; Samoa; Chile; Timor-Leste; the Alliance of Small Island States; Grenada; Saint Lucia; Saint Vincent and the Grenadines and Egypt requested that the Court grant an additional extension of the time-limit for the submission of written comments.

22. By an Order dated 30 May 2024, the President, taking into consideration the above-mentioned requests, as well as the importance of the Court giving an advisory opinion in a timely manner, extended to 15 August 2024 the time-limit within which States and international organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

23. By communications dated 8 July 2024, the Registry informed the United Nations as well as States and international organizations having been considered likely to be able to furnish information on the questions submitted by the General Assembly that the Court had decided to hold public hearings on the request for an advisory opinion, which would open on 2 December 2024. The addressees were further invited to inform the Registry, by 2 October 2024, if they intended to take part in those hearings. It was specified that, during the oral proceedings, oral statements could be presented by the United Nations, States and international organizations having been considered likely to be able to furnish information regardless of whether they had submitted written statements and, as the case may be, written comments.

24. Within the time-limit as extended by the Order of the President of the Court dated 30 May 2024, written comments on the written statements were filed in the Registry, in order of receipt, by Palau; the Dominican Republic; Timor-Leste; the European Union; the Democratic Republic of the Congo; Seychelles; France; the Melanesian Spearhead Group; Kenya; Antigua and Barbuda; El Salvador; Latvia; Solomon Islands; the Bahamas; Namibia; New Zealand; Colombia; Kiribati; the Cook Islands; the Federated States of Micronesia; Saudi Arabia; Sri Lanka; the Philippines; Switzerland; Costa Rica; the Commission of Small Islands States on Climate Change and International Law; Tuvalu; the Marshall Islands; the Parties to the Nauru Agreement Office; Japan; The Gambia; Vanuatu; Sierra Leone; Albania; the International Union for Conservation of Nature; the United States of America; Barbados; Mauritius; Samoa; the Islamic Republic of Iran; the Organisation of African, Caribbean and Pacific States; Burkina Faso; Chile; Brazil; Nauru; Belize; Cameroon; the United Kingdom of Great Britain and Northern Ireland; Pakistan; Uruguay; Mexico; the Kingdom of the Netherlands; Australia; Ecuador; Grenada; Saint Lucia; Saint Vincent and the Grenadines; Viet Nam; Bangladesh; the African Union; Egypt and the Pacific Islands Forum.

25. By a communication dated 19 August 2024, the Registry informed States and international organizations having presented written statements that written comments on the written statements filed in the Registry within the time-limit, as extended by the Order of the President of the Court dated 30 May 2024, could be downloaded from the designated web portal managed by the Registry.

26. By a communication dated 30 August 2024, the Registry informed States and international organizations having presented written statements that the President of the Court had exceptionally authorized the submission of written comments by Ghana after the expiry of the relevant deadline and that those comments could be downloaded from the aforementioned designated web portal.

27. By communications dated 3 September 2024, the Registry informed the United Nations as well as States entitled to appear before the Court not having presented written statements that the written statements and the written comments filed by participants and international organizations could be downloaded from a designated web portal managed by the Registry.

28. Subsequently, the Registry informed the United Nations as well as States and international organizations having been considered likely to be able to furnish information on the questions submitted by the General Assembly that non-governmental organizations had submitted written statements in the present advisory proceedings on their own initiative, pursuant to Practice Direction XII, and that these statements were available to the addressees on a web portal set up by the Registry for that purpose. The Registry further recalled that, under Practice Direction XII, these statements were "not to be considered part of the case file". According to the same Practice Direction, such statements shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

29. Ruling on a request received from the State of Palestine on 2 October 2024 that it be authorized to participate, pursuant to Article 66 of the Statute, in the oral proceedings, the Court decided that the State of Palestine was likely to be able to furnish information on the questions submitted by the General Assembly. The State of Palestine was therefore authorized to participate in the oral proceedings, in conformity with Article 66 of the Statute.

30. By letters dated 15 October 2024, the Registrar communicated the list of participants in the oral proceedings to those States and international organizations which were taking part in them, and enclosed a detailed schedule of the oral proceedings. By the same letters, he also informed them of certain practical arrangements regarding the organization of the oral proceedings.

31. Further to the Court's decision to allow additional States to participate in the oral proceedings, by a letter dated 5 November 2024, the Registrar communicated an updated schedule of the hearings to those States and international organizations which were taking part in them.

32. By letters dated 6 November 2024, the Registry communicated to the United Nations and those of its Member States which were not taking part in the oral proceedings a schedule of those proceedings, including the list and order of participants.

33. On 26 November 2024, at the invitation of the Court, a group of past and present authors of the reports of the Intergovernmental Panel on Climate Change (hereinafter the "IPCC" or "Panel") met with Members of the Court to enhance the Court's understanding of the key scientific findings

that the IPCC has presented in its periodic assessment reports, which cover the scientific basis, impacts and future risks of climate change, and options for adaptation and mitigation.

34. Pursuant to Article 106 of its Rules, the Court decided to make the written statements and written comments submitted to it accessible to the public after the opening of the oral proceedings. The written statements and written comments of States not taking part in the oral proceedings were made accessible to the public on the first day of the oral proceedings. The written statements and written comments of States and international organizations taking part in the oral proceedings were made accessible at the end of the day on which they presented their oral statements.

35. In the course of the oral proceedings held on 2, 3, 4, 5, 6, 9, 10, 11, 12 and 13 December 2024, the Court heard oral statements, in the following order, by:

for the Republic of Vanuatu and the Melanesian Spearhead Group:	Mr Ralph Regenvanu, Special Envoy for Climate Change and the Environment,
	Mr Arnold Kiel Loughman, Attorney General,
	Mr Ilan Kiloe, Spokesperson, Program Manager Politics, Security and Legal Affairs,
	Mr Julian Aguon, President and Founder, Blue Ocean Law, PC, Hagåtña, Guam,
	Mr Jorge Enrique Viñuales, Harold Samuel Professor of Law and Environmental Policy, University of Cambridge, member of the Institut de droit international,
	Ms Margaretha Wewerinke-Singh, Associate Professor of Sustainability Law, University of Amsterdam, Adjunct Professor of Law, University of Fiji, member of the Bar of Vanuatu, Blue Ocean Law, PC, Hagåtña, Guam,
	Ms Cynthia Rosah Bareagihaka Houniuhi, Spokesperson, Activist, Pacific Islands Students Fighting Climate Change;
for the Republic of South Africa:	Mr Vusimuzi Madonsela, Ambassador of the Republic of South Africa to the Kingdom of the Netherlands,
	Ms Romi Brammer, Principal State Law Adviser, International Law, Department of International Relations and Cooperation,
	Mr Cornelius Scholtz, Legal Counsellor, Embassy of the Republic of South Africa in the Kingdom of the Netherlands;
for the Republic of Albania:	Mr Armand Skapi, Secretary General, Ministry for Europe and Foreign Affairs,
	Ms Cherie Blair, Chair of Omnia Strategy LLP, member of the Bar of England and Wales;

for the Federal Republic of Germany:	Ms Wiebke Rückert, Deputy Legal Adviser and Director for Public International Law, Federal Foreign Office of the Federal Republic of Germany,
	Mr Andreas Zimmermann, Professor of Public Law, Public International and European Union Law, University of Potsdam, Director of the Potsdam Centre of Human Rights;
for Antigua and Barbuda:	HE Mr Gaston Browne, Prime Minister of Antigua and Barbuda,
	Mr Zachary A.R. Phillips, Crown Counsel II, Attorney General's Chambers, Ministry of Legal Affairs;
for the Kingdom of Saudi Arabia:	HH Prince Jalawi Turki Al Saud, Chargé d'affaires, Embassy of the Kingdom of Saudi Arabia in the Kingdom of the Netherlands,
	Sir Michael Wood, KCMG, KC, member of the Bar of England and Wales, Twenty Essex, London,
	Ms Ghaida Bajbaa, Legal Expert;
for Australia:	Mr Jesse Clarke, General Counsel, International Law, Office of International Law, Attorney-General's Department,
	Mr Stephen Donaghue, KC, Solicitor-General of Australia,
	Ms Kate Parlett, member of the Bar of England and Wales, Twenty Essex, London;
for the Commonwealth of the Bahamas:	HE Mr Leo Ryan Pinder, KC, Attorney General, Minister for Legal Affairs,
	Mr Conway Blake, Debevoise & Plimpton LLP, Solicitor Advocate of the Senior Courts of England and Wales, member of the Bar of the Eastern Caribbean Supreme Court;
for the People's Republic of Bangladesh:	HE Mr Tareque Muhammad, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands,
	Mr Payam Akhavan, LLM SJD (Harvard) OOnt FRSC, Senior Fellow and Human Rights Chair, Massey College, University of Toronto, member of the Permanent Court of Arbitration, associate member of the Institut de droit international, member of the Law Society of Ontario, member of the Bar of the State of New York,
	Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bars of the Supreme Court of the United States of America and the State of New York;
for Barbados:	HE Mr Kerrie D. Symmonds, Minister of Foreign Affairs and Foreign Trade,
	HE Mr François Jackman, Representative of Barbados, Ambassador and Permanent Representative of Barbados to the United Nations,

	Mr Robert G. Volterra, Co-Representative of Barbados, Barrister and Solicitor at the Law Society of Upper Canada, Solicitor Advocate in England and Wales, Volterra Fietta, Visiting Professor of Law, University College London, Visiting Senior Lecturer, King's College London,
	Mr Gunjan Sharma, member of the Bar of New York, Volterra Fietta;
for Belize:	Mr Kenrick Williams, Chief Executive Officer, Ministry of Sustainable Development and Climate Change,
	Mr Sam Wordsworth, KC, Barrister, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar,
	Ms Amy Sander, Barrister, Essex Court Chambers, member of the Bar of England and Wales;
for the Plurinational State of Bolivia:	HE Mr Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands;
for the Federative Republic of Brazil:	HE Mr Luiz Alberto Figueiredo Machado, Special Envoy for Climate Change,
	Mr George Rodrigo Bandeira Galindo, Legal Adviser, Ministry of Foreign Affairs;
for Burkina Faso:	HE Mr Léopold Tonguenoma Bonkoungouu, Ambassador of Burkina Faso to the Kingdom of Belgium,
	Mr Mamadou Hébié, Associate Professor of International Law, Leiden University, member of the Permanent Court of Arbitration, member of the Bar of the State of New York;
for the Republic of Cameroon:	HE Ms Madeleine Liguemoh Ondoua, Ambassador of the Republic of Cameroon to the Kingdom of the Netherlands,
	Mr Pierre-Olivier Savoie, Partner, Savoie Arbitration, Paris, member of the Bars of Ontario, New York and Paris;
for the Republic of the Philippines:	HE Mr J. Eduardo Malaya III, Ambassador of the Republic of the Philippines to the Kingdom of the Netherlands,
	Mr Menardo Guevarra, Solicitor General,
	HE Mr Carlos Sorreta, Permanent Representative of the Republic of the Philippines to the United Nations Office and other international organizations in Geneva;
for Canada:	Mr Louis-Martin Aumais, Legal Adviser and Director General, International Law Bureau, Global Affairs Canada;
for the Republic of Chile:	HE Ms Ximena Fuentes Torrijo, Ambassador of the Republic of Chile to the United Kingdom of Great Britain and Northern Ireland,
	Ms Valeria Chiappini Koscina, Legal Adviser, International Law, Treaties and Legislative Affairs Division, Ministry of Foreign Affairs;

for the People's Republic of China:	HE Mr Xinmin Ma, Legal Adviser, Ministry of Foreign Affairs, member of the International Law Commission;
for the Republic of Colombia:	HE Mr Luis Gilberto Murillo Urrutia, Minister for Foreign Affairs,
	HE Ms Carolina Olarte Bácares, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands;
for the Commonwealth of Dominica:	Mr Levi Peter, Attorney General,
	Ms Vanica Sobers-Joseph, Legal Advocate, Senior State Attorney;
for the Republic of Korea:	Mr Jun-Shik Hwang, Director General for International Legal Affairs, Ministry of Foreign Affairs,
	Mr Keun-Gwan Lee, Professor, Seoul National University School of Law;
for the Republic of Costa Rica:	HE Mr Arnoldo Brenes Castro, Ambassador of the Republic of Costa Rica to the Kingdom of the Netherlands,
	Mr Marcelo Kohen, Professor Emeritus of International Law, Geneva Graduate Institute of International and Development Studies, titular member and former Secretary-General of the Institut de droit international;
for the Republic of Côte d'Ivoire:	Mr Eugène Zagre, Director of Legal Affairs and Litigation, Ministry of the Environment and Sustainable Development,
	Mr Arman Sarvarian, Counsel, Reader in Public International Law, University of Surrey;
for the Kingdom of Denmark, the Republic of Finland, Iceland, the Kingdom of Norway and the Kingdom of Sweden (jointly):	Ms Kaija Suvanto, Director General for Legal Affairs, Ministry of Foreign Affairs of the Republic of Finland,
	Mr Kristian Jervell, Director General for Legal Affairs, Ministry of Foreign Affairs of the Kingdom of Norway,
	HE Ms Vibeke Pasternak Jørgensen, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs of the Kingdom of Denmark;
for the Arab Republic of Egypt:	Mr Wael Aboulmagd, Assistant Minister for Climate Change, Environmental Affairs and Sustainable Development, Ministry of Foreign Affairs, Emigration and Egyptian Expatriates;
for the Republic of El Salvador:	HE Mr Agustín Vásquez Gómez, Ambassador of the Republic of El Salvador to the Kingdom of the Netherlands,
	Mr Fernando Lusa Bordin, Associate Professor, Sidney Sussex College, University of Cambridge, member of the Brazilian Bar;
for the United Arab Emirates:	HE Mr Abdulla Balalaa, Assistant Minister for Energy and Sustainability Affairs, Ministry of Foreign Affairs;
for the Republic of Ecuador:	HE Mr Marcelo Vázquez-Bermúdez, Ambassador, Permanent Representative of the Republic of Ecuador to the United Nations Office and other international organizations in Geneva, member of the International Law Commission,

	Mr Alfredo Crosato Neumann, Assistant Professor of International Law, Kadir Has University, Istanbul, member of the Lima Bar,
	Mr Omri Sender, SJD, Attorney at Law, S. Horowitz and Co.;
for the Kingdom of Spain:	Ms Consuelo Castro Rey, State Attorney, Office of the Attorney General,
	Mr Oriol Solà Pardell, Legal Adviser, International Legal Office, Ministry of Foreign Affairs, European Union and Cooperation,
	Mr Santiago Ripol Carulla, Head of the International Legal Office, Ministry of Foreign Affairs, European Union and Cooperation;
for the United States of America:	Ms Margaret Taylor, Legal Adviser, United States Department of State;
for the Russian Federation:	Mr Maksim Musikhin, Director, Legal Department, Ministry of Foreign Affairs;
for the Republic of Fiji:	HE Mr Luke Daunivalu, Permanent Representative of the Republic of Fiji to the United Nations Office and other international organizations in Geneva,
	Mr Graham Leung, Attorney General;
for the Republic of France:	Mr Diégo Colas, Legal Adviser, Director of Legal Affairs, Ministry for Europe and Foreign Affairs;
for the Republic of Sierra Leone:	HE Mr Mohamed Lamin Tarawalley, Attorney General and Minister of Justice,
	Mr Charles Chernor Jalloh, Professor of International Law and Richard A. Hausler Chair in Law, University of Miami Law School, member and Special Rapporteur of the International Law Commission, member of the Ontario Bar;
for the Republic of Ghana:	HE Mr Francis Danti Kotia, Ambassador of the Republic of Ghana to the Kingdom of the Netherlands,
	Ms Sylvia Ama Adusu, Chief State Attorney and Director of International Law Division, Office of the Attorney General and Ministry of Justice,
	HE Ms Namira Negm, Ambassador, former Legal Counsel of the African Union,
	Mr Muin Boase, Great James Street Chambers, member of the Bar of England and Wales, Senior Lecturer in International Law, University of Derby;
for Grenada:	Ms Rae Thomas, Crown Counsel, Office of the Attorney General and Ministry of Legal Affairs,
	HE Ms Claudette Joseph, Attorney General and Minister for Legal Affairs,
	Mr Justin Sobion, Senior Tutor, Faculty of Law, University of Auckland, New Zealand;

for the Republic of Guatemala:	HE Ms Ana Cristina Rodríguez Pineda, Ambassador of the Republic of Guatemala to the Kingdom of the Netherlands;
for the Cook Islands:	Ms Sandrina Thondoo, Director, Treaties, Multilaterals and Oceans Division, Ministry of Foreign Affairs and Immigration,
	Mr Fuimaono Dylan Asafo, Senior Lecturer, Faculty of Law, University of Auckland;
for the Republic of the Marshall Islands:	HE Mr John Silk, Ambassador and Permanent Representative of the Republic of the Marshall Islands to the United Nations, New York,
	Ms Kathy Jetnil-Kijiner, Climate Envoy,
	Mr Johnathen Kawakami, Deputy Attorney General;
for Solomon Islands:	Mr John Muria Jnr., Attorney General,
	Mr Harjeevan Narulla, Barrister, Doughty Street Chambers, London;
for the Republic of India:	Mr Luther Rangreji, Joint Secretary and Legal Adviser, Ministry of External Affairs;
for the Islamic Republic of Iran:	Mr Seyed Ali Mousavi, Director General, Department for International Legal Affairs, Ministry of Foreign Affairs;
for the Republic of Indonesia:	Mr Arif Havas Oegroseno, Vice-Minister for Foreign Affairs;
for Jamaica:	HE Ms Kamina Johnson Smith, Minister for Foreign Affairs and Foreign Trade,
	Ms Sherise Gayle, Senior Assistant to the Attorney General, Attorney General's Chambers,
	Ms Michelle Walker, Deputy Solicitor General, Attorney General's Chambers;
for the Independent State of Papua New Guinea:	HE Mr Fred Sarufa, Ambassador and Permanent Representative of the Independent State of Papua New Guinea to the United Nations, New York,
	HE Mr Pila Kole Niningi, Attorney General and Minister for Justice,
	Mr Eric Lokai Kwa, Secretary, Department of Justice and Attorney General,
	Mr Leslie Benjamin Mamu, Public Solicitor;
for the Republic of Kenya:	HE Ms Halima Mucheke, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands,
	Ms Phoebe Okowa, Professor of Public International Law, Queen Mary University, London, member of the International Law Commission, Advocate of the High Court of Kenya;
for the Republic of Kiribati:	HE Mr Teburoro Tito, Ambassador and Permanent Representative of the Republic of Kiribati to the United Nations, New York,
	Mr Aretaake Ientaake, Director of Human Rights, Ministry of Justice,

	Mr Eyal Benvenisti, Emeritus Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international;
for the State of Kuwait:	HE Mr Talal Sulaiman Al-Fassam, Ambassador of the State of Kuwait to the Republic of Austria, Permanent Representative of the State of Kuwait to the United Nations and international organizations in Vienna,
	Mr Dan Sarooshi, KC, Legal Adviser;
for the Republic of Latvia:	HE Ms Solvita Āboltiņa, Ambassador Extraordinary and Plenipotentiary of the Republic of Latvia to the Kingdom of the Netherlands,
	Mr Mārtiņš Paparinskis, Professor of Public International Law, University College London, member of the International Law Commission, member of the Permanent Court of Arbitration;
for the Principality of Liechtenstein:	HE Mr Pascal Schafhauser, Ambassador of the Principality of Liechtenstein to the Kingdom of Belgium;
for the Republic of Malawi:	HE Mr Thabo Chakaka-Nyirenda, Attorney General,
	Ms Tafadzwa Pasipanodya, Partner, Foley Hoag LLP;
for the Republic of the Maldives:	HE Mr Ahmed Usham, Attorney General,
	Ms Jessica Wells, member of the Bar of England and Wales, Essex Court Chambers,
	Ms Naomi Hart, member of the Bar of England and Wales, Essex Court Chambers;
for the African Union:	Ms Hajer Gueldich, Legal Counsel, African Union,
	Mr Makane Moïse Mbengue, Professor of International Law, Director of the Department of International Law and International Organization, University of Geneva, associate member of the Institut de droit international;
for the United Mexican States:	HE Ms Carmen Moreno Toscano, Ambassador of the United Mexican States to the Kingdom of the Netherlands,
	Ms Alicia Patricia Perez Galeana, Counsellor, Head of Multilateral Legal Affairs, Embassy of the United Mexican States in the Kingdom of the Netherlands,
	Mr Alfonso Ascencio Herrera, Minister, Deputy Head of Mission, Embassy of the United Mexican States in the Kingdom of the Netherlands,
	Mr Pablo Adrian Arrocha Olabuenaga, Legal Adviser, Ministry of Foreign Affairs;
for the Federated States of Micronesia:	Mr Clement Yow Mulalap, Legal Adviser;
for the Republic of the Union of Myanmar:	HE U Soe Lynn Han, Ambassador of the Republic of the Union of Myanmar to the Kingdom of Belgium, the Kingdom of the Netherlands, the Grand Duchy of Luxembourg, the Republic of Croatia and the European Union;

for the Republic of Namibia:	HE Ms Mekondjo Kaapanda-Girnus, Ambassador of the Republic of Namibia to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg and Head of Mission to the European Union,
	Mr Ndjodi Ndeunyema, Counsel, Solicitor, England and Wales;
for Japan:	Mr Nakamura Kazuhiko, Director General for Global Issues, Ministry of Foreign Affairs,
	Ms Takamura Yukari, Professor, Institute for Future Initiatives, University of Tokyo,
	Ms Alina Miron, Professor of International Law, University of Angers, member of the Paris Bar, Founding Partner, FAR Avocats;
for the Republic of Nauru:	Hon. Lionel Rouwen Aingimea, Minister for Foreign Affairs and Trade,
	Mr Eirik Bjorge, Counsel, Professor of Law, University of Bristol;
for Nepal:	HE Ms Arzu Rana Deuba, PhD, Minister for Foreign Affairs,
	Mr Udaya Raj Sapkota, Secretary, Ministry of Law, Justice and Parliamentary Affairs,
	Mr Suvanga Parajuli, Under-Secretary, Ministry of Foreign Affairs;
for New Zealand:	Ms Victoria Hallum, Deputy Secretary, Multilateral Legal Affairs, Ministry of Foreign Affairs and Trade;
for the State of Palestine:	HE Mr Ammar Hijazi, Ambassador, Permanent Representative of the State of Palestine to International Organizations in the Netherlands,
	Ms Kate Mackintosh, Legal Counsel,
	Ms Nilufer Oral, Legal Counsel;
for the Islamic Republic of Pakistan:	Mr Mansoor Usman Awan, Office of the Attorney General for Pakistan;
for the Republic of Palau:	HE Mr Gustav Aitaro, Minister of State,
	Ms Ernestine Rengiil, Attorney General;
for the Republic of Panama:	Mr Fernando Gómez Arbeláez, Director of International Legal Affairs and Treaties, Ministry of Foreign Affairs;
for the Kingdom of the Netherlands:	Mr René Lefeber, Legal Adviser, Ministry of Foreign Affairs,
	Mr Mert Kumru, Youth Representative, World's Youth for Climate Justice;
for the Republic of Peru:	HE Ms Franca Deza Ferreccio, Ambassador of the Republic of Peru to the Kingdom of the Netherlands;

for the Democratic Republic of the Congo:	Mr Ivon Mingashang, Professor, University of Kinshasa, member of the International Law Commission, honorary member of the Brussels Bar and member of the Kinshasa/Gombe Bar,
	Ms Sandrine Maljean-Dubois, Director of Research at CNRS, Faculty of Law and Political Science, Aix-Marseille University,
	Mr Nicolas Angelet, Professor, Ghent University and the Université libre de Bruxelles, member of the Brussels Bar, Associate Tenant of Doughty Street Chambers, London;
for the Portuguese Republic:	Ms Patrícia Galvão Teles, Director of the Department of Legal Affairs, Ministry of Foreign Affairs;
for the Dominican Republic:	Mr Boni Guerrero Canto, Director of Legal Affairs, Ministry of Foreign Affairs of the Dominican Republic,
	Ms Alejandra Torres Camprubí, Adjunct Professor of International Environmental Law, Faculty of Laws of IE University, International Legal Counsel at Torres Iuris, member of the Bars of Madrid and Paris,
	Mr Julio Rojas Báez, Professor of International Law, Universidad Iberoamericana, Vice-President of the Inter-American Juridical Committee and Special Rapporteur on the Legal Implications of Sea-Level Rise in the Inter-American Regional Context, member of the Bar of the Dominican Republic;
for Romania:	Ms Alina Orosan, Director General for Legal Affairs;
for the United Kingdom of Great Britain and Northern Ireland:	The Rt Hon. Lord Richard Hermer, KC, HM Attorney General for England and Wales;
for Saint Lucia:	Mr Desmond Simon, Chargé d'affaires a.i., Embassies of the Eastern Caribbean States to the Kingdom of Belgium and Missions to the European Union,
	Ms Jan Yves Remy, External Counsel, Director, Shridath Ramphal Centre,
	Ms Kate Wilson, Legal Officer, Department of Sustainable Development,
	Ms Rochelle John-Charles, Crown Counsel IV, Office of the Attorney General;
for Saint Vincent and the Grenadines:	Mr Edmund Jackson, NDC Partnership In-Country Facilitator, Sustainable Development Unit,
	Ms Shernell Hadaway, Parliamentary Counsel III, Attorney General's Chambers, Ministry of Legal Affairs, Deputy Chair Prime Ministerial Advisory Council on Youth, Climate Change Sector,
	Mr Justin Sobion, Senior Tutor, Faculty of Law, University of Auckland, New Zealand;

for the Independent State of Samoa:	Ms Peseta Noumea Simi, Chief Executive Officer, Ministry of Foreign Affairs and Trade,
	Ms Su'a Hellene Wallwork, Attorney General, Office of the Attorney General;
for the Republic of Senegal:	HE Ms Ramatoulaye Ba Faye, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands;
for the Republic of Seychelles:	HE Mr Flavien Joubert, Minister for Agriculture, Climate Change and Environment,
	Mr Jean-Marc Thouvenin, Professor, University of Paris Nanterre, Secretary-General of The Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,
	Mr Andres Villegas Jaramillo, Associate of the Instituto Hispano-Luso-Americano de Derecho Internacional, former Judicial Fellow of the International Court of Justice, member of the Colombian Bar, Sygna Partners,
	HE Mr Anthony Derjacques, Minister for Transport;
for the Republic of The Gambia:	HE Mr Pa Musa Jobarteh, Ambassador of the Republic of The Gambia to the Kingdom of Belgium and Head of Mission of the Republic of The Gambia to the European Union,
	Mr Charles Chernor Jalloh, Professor of International Law and Richard A. Hausler Chair in Law, University of Miami Law School, member and Special Rapporteur of the International Law Commission, member of the Ontario Bar,
	Mr Andrew Loewenstein, Partner, Foley Hoag LLP,
	Ms Christina Hioureas, Partner, Foley Hoag LLP;
for the Republic of Singapore:	Ms Rena Lee, Ambassador for International Law, Chief Executive, Intellectual Property Office of Singapore;
for the Republic of Slovenia:	Mr Marko Rakovec, Director-General for International Law, Ministry of Foreign and European Affairs,
	Ms Vasilka Sancin, Professor of International Law, Faculty of Law, University of Ljubljana,
	Mr Daniel Müller, Partner, FAR Avocats, member of the Paris Bar;
for the Republic of the Sudan:	Mr Marwan Ahmed Mohamed Khier, Deputy Head of Mission, Legal Officer, Embassy of the Republic of the Sudan in the Kingdom of the Netherlands,
	Mr Fabián O. Raimondo, Associate Professor of Public International Law, Maastricht University, member of the Bar of the City of La Plata (Argentina);
for the Democratic Socialist Republic of Sri Lanka:	Hon. Parinda Ranasinghe Jnr., President's Counsel, Attorney General,
	Ms Avanti Perera, Deputy Solicitor General;

for the Swiss Confederation:	HE Mr Franz Perrez, Head of the Directorate of International Law, Federal Department of Foreign Affairs;
for the Republic of Serbia:	Mr Aleksandar Gajić, Chief Legal Adviser, Ministry of Foreign Affairs;
for the Kingdom of Thailand:	Ms Suphanvasa Chotikajan Tang, Director-General, Department of Treaties and Legal Affairs,
	Mr Songchai Chaipatiyut, Deputy Director-General, Department of Treaties and Legal Affairs;
for the Democratic Republic of Timor-Leste:	Ms Elizabeth Gouveia Leite Exposto, Chief of Staff to the Prime Minister, Chief Executive Officer, Land and Maritime Boundary Office,
	HE Mr Adão Soares Barbosa, Special Envoy and Ambassador-at-Large for Climate Affairs,
	Mr Eran Sthoeger, Legal Counsel, Litigator and Consultant in International Law, Adjunct Professor of Law, Brooklyn Law School; Lecturer in International Environmental Law, Columbia University School of Professional Studies;
for the Kingdom of Tonga:	Ms Linda Simiki Folaumoetu'i, Attorney General, Attorney General's Office,
	Ms Gitanjali Bajaj, Partner, Co-Head for International Arbitration Asia-Pacific, DLA Piper;
for Tuvalu:	HE Ms Eselealofa Apinelu, High Commissioner of Tuvalu to Fiji, Secretary General, Commission of Small Island States on Climate Change and International Law,
	Hon. Laingane Italeli Talia, Attorney General of Tuvalu,
	Ms Philippa Webb, Professor of Public International Law, Blavatnik School of Government, University of Oxford, member of the Bars of Belize, England and Wales, and the State of New York, Twenty Essex, London;
for the Union of the Comoros:	HE Mr Youssouf Mondoha Assoumani, Ambassador of the Union of the Comoros to the Federal Democratic Republic of Ethiopia and Permanent Representative to the African Union,
	Mr Guy-Fleury Ntwari, Doctor of Law, Consultant and former Legal Adviser to the African Union,
	Ms Kiara Neri, Professor of International Law, Director of the Centre for International Law, Jean Moulin Lyon 3 University;
for the Eastern Republic of Uruguay:	HE Mr Álvaro González Otero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,
	Ms Mariana Cabrera, Deputy Secretary of the President of the Eastern Republic of Uruguay,
	Mr Marcos Dotta Salgueiro, Director of International Law Affairs, Ministry of Foreign Affairs,

	Ms Yas Banifatemi, Founding Partner, Gaillard Banifatemi Shelbaya Disputes, Adjunct Professor of Law, Panthéon-Sorbonne University, Visiting Professor of Law, Harvard Law School;
for the Socialist Republic of Viet Nam:	Ms Nguyen Thi Lan Anh, Vice-President, Diplomatic Academy of Viet Nam,
	Mr Nguyen Dang Thang, Legal Adviser, Director General, Department of International Law and Treaties, Ministry of Foreign Affairs;
for the Republic of Zambia:	Mr Marshal Muchende, Solicitor General, Ministry of Justice,
	Ms Sambwa Simbyakula-Chilembo, Assistant Director, Ministry of Justice,
	Mr Christian Tams, Legal Counsel, International Law Chair and Director, Glasgow Centre for International Law and Security;
for the Forum Fisheries Agency:	Mr Pio Manoa, Deputy Director General, Acting Legal Counsel, Forum Fisheries Agency;
for the Alliance of Small Island States:	HE Mr Fatumanava-o-Upolu III Pa'olelei Luteru, Ambassador and Permanent Representative of the Independent State of Samoa to the United Nations, New York, Chair of the Alliance of Small Island States (AOSIS),
	Mr Richard Bryce Rudyk, Legal Adviser;
for the Commission of Small Island States on Climate Change and International Law:	HE Ms Eselealofa Apinelu, High Commissioner of Tuvalu to Fiji, Secretary General, Commission of Small Island States on Climate Change and International Law (COSIS),
	Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bars of the Supreme Court of the United States of America and the State of New York, Co-Representative of COSIS,
	Mr Payam Akhavan, LLM SJD (Harvard) OOnt FRSC, Professor of International Law, Chair in Human Rights, and Senior Fellow, Massey College, University of Toronto, member of the Permanent Court of Arbitration, associate member of the Institut de droit international, member of the Bar of the State of New York, member of the Law Society of Ontario, Co-Representative of COSIS;
for the Pacific Community:	Mr Stuart Minchin, Director-General,
	Ms Coral Pasisi, Director of Climate Change and Environmental Sustainability,
	Mr Vishal Prasad, Director, Pacific Island Students Fighting Climate Change;
for the Pacific Islands Forum:	Mr Esala Nayasi, Deputy Secretary General, Strategic Policy and Programming;

for the Organisation of African, Caribbean and Pacific States:	Ms Cristelle Pratt, Assistant Secretary-General,
	HE Ms Cheryl Eloise Bazard, KC, Chair of the Small Island Developing States Forum of the Organisation of African, Caribbean and Pacific States,
	Mr Pierre-Marie Dupuy, Professor Emeritus of International Law, University of Paris II, Panthéon-Assas, Graduate Institute of International and Development Studies, Geneva, member of the Institut de droit international,
	Ms Brenda Reson Sapuro, Youth Representative;
for the World Health Organization:	Mr Tedros Adhanom Ghebreyesus, Director-General,
	Mr Derek Walton, Legal Counsel;
for the European Union:	Mr André Bouquet, Legal Adviser, member of the Legal Service of the European Commission,
	Ms Josephine Norris, member of the Legal Service of the European Commission,
	Ms Margherita Bruti Liberati, member of the Legal Service of the European Commission,
	Mr Bernhard Hofstötter, member of the Legal Service of the European Commission;
for the International Union for Conservation of Nature:	Ms Grethel Aguilar, Director General,
	Ms Christina Voigt, Professor of Law, University of Oslo, Department of Public and International Law, Chair of the International Union for Conservation of Nature World Commission on Environmental Law,
	Mr Francesco Sindico, Professor of International Law, University of Strathclyde, Co-Chair of the International Union for Conservation of Nature World Commission on Environmental Law Climate Change Law Specialist Group.

36. Questions were put by four Members of the Court to participants at the close of the oral proceedings; sixty-seven replied in writing, as requested, within the prescribed time-limits.

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I. JURISDICTION AND DISCRETION

37. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and, if so, whether there is any reason why the Court should, in the exercise of its discretion, decline to answer the request (see *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 22; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 111, para. 54).

A. Jurisdiction

38. The Court's jurisdiction to give an advisory opinion is based on Article 65, paragraph 1, of its Statute, which provides that it "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court notes that, pursuant to Article 96, paragraph 1, of the Charter, the General Assembly "may request the International Court of Justice to give an advisory opinion on any legal question".

39. In accordance with the requirement in Article 96 of the Charter and Article 65 of its Statute, the Court must satisfy itself that the question on which it is requested to give its opinion is a "legal question".

40. The first question put to the Court concerns the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (hereinafter "GHGs") for States and for present and future generations. The second question concerns the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to States, and peoples and individuals of the present and future generations affected by the adverse effects of climate change. The Court considers that these questions are legal questions.

41. The Court further notes that

> "lack of clarity in the drafting of a question does not deprive [it] of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 153-154, para. 38; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 29.)

42. The Court will interpret the questions put to it where necessary (see paragraphs 98-111 below).

43. In light of the above, the Court concludes that the request meets the conditions set out under the provisions of the Charter and the Statute of the Court, and therefore that it has jurisdiction to render the requested opinion.

B. Discretion

44. The fact that the Court has jurisdiction to give an advisory opinion does not mean that it is under an obligation to exercise it. As the Court has repeatedly emphasized, Article 65, paragraph 1, of the Statute "should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met" (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 63; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 30).

45. This discretion exists to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 30; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 64). The Court is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 65; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 30).

46. Thus, only "compelling reasons" may lead the Court to decline to give its opinion in response to a request falling within its jurisdiction (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 31; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 113, para. 65).

47. The Court observes that resolution 77/276 was co-sponsored by 132 Member States of the United Nations and was adopted without a vote. This underscores the interest of Member States of the United Nations in the Court's consideration of their request.

48. The Court notes that, during the proceedings, one participant raised concerns as to whether, by responding to the questions put to it, the Court would exceed its judicial function and assume a legislative role. The Court, however, recalls that it

> "states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 18.)

49. In light of the above, the Court concludes that there is no compelling reason for it to decline to give the opinion requested by the General Assembly.

II. General context and scientific aspects

50. Having determined that it has jurisdiction and that there are no compelling reasons for it to decline to give the opinion requested by the General Assembly, the Court will now turn to the context in which resolution 77/276 was adopted, as well as to the relevant scientific background.

A. Context of the adoption of resolution 77/276

51. On 3 December 1968, the General Assembly, in its resolution 2398 (XXIII), noted, in particular, "the continuing and accelerating impairment of the quality of the human environment caused by such factors as air and water pollution, erosion and other forms of soil deterioration, waste, noise and the secondary effects of biocides", and expressed concern about "the consequent effects on the condition of man, his physical, mental and social well-being, his dignity and his enjoyment of basic human rights". Convinced of "the need for intensified action at the national, regional and international level in order to limit and, where possible, eliminate the impairment of the human environment", the General Assembly decided "to convene in 1972 a United Nations Conference on the Human Environment". The Court will mention some of the most relevant steps taken at the international level to identify risks in order to protect the climate system and other parts of the environment.

52. The United Nations Conference on the Human Environment was held in Stockholm in June 1972. It adopted the "Declaration of the United Nations Conference on the Human Environment" (hereinafter the "Stockholm Declaration"), which contains a series of principles aimed at preserving the human environment, the "Action Plan for the Human Environment", and several resolutions. The Conference called upon governments and peoples to "exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity".

53. In February 1979, the First World Climate Conference (a conference of "experts on climate and mankind"), sponsored by the World Meteorological Organization (hereinafter "WMO"), was held in Geneva. The Declaration adopted by the Conference states that

> "we can say with some confidence that the burning of fossil fuels, deforestation, and changes of land use have increased the amount of carbon dioxide in the atmosphere by about 15 per cent during the last century and it is at present increasing by about 0.4 per cent per year. It is likely that an increase will continue in the future. Carbon dioxide plays a fundamental role in determining the temperature of the earth's atmosphere, and it appears plausible that an increased amount of carbon dioxide in the atmosphere can contribute to a gradual warming of the lower atmosphere, especially at high latitudes."

54. On 10 December 1982, the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS") was opened for signature. It establishes a "legal order for the seas and oceans", and provides, *inter alia*, for the protection and preservation of the marine environment. This Convention entered into force on 16 November 1994 and currently has 170 parties.

55. In 1985, States adopted the Vienna Convention for the Protection of the Ozone Layer (hereinafter the "Ozone Layer Convention"), whose objective is to "protect human health and the environment against [the] adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer" (Article 2, paragraph 1). This Convention entered into force on 22 September 1988. It currently has 198 parties.

56. Also in 1985, the International Conference on the Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts was held jointly by the United Nations Environment Programme (hereinafter "UNEP"), the WMO and the International Council for Science in Villach, Austria, with scientists from 29 countries participating. In the statement adopted at the conference, participating scientists concluded that

> "[c]limate change and sea level rises due to greenhouse gases are closely linked with other major environmental issues, such as acid deposition and threats to the Earth's ozone shield, mostly due to changes in the composition of the atmosphere by man's activities" (Report of the International Conference on Assessment of the Role of Carbon Dioxide and of Other Greenhouse Gases in Climate Variations and Associated Impacts, Villach, Austria, 9-15 October 1985, WMO — No. 661, 1986, p. 1, para. 2).

It was further pointed out that "[r]eduction of coal and oil use and energy conservation undertaken to reduce acid deposition will also reduce emissions of greenhouse gases" and that "a reduction in the release of chloro-fluorocarbons (CFCs) will help protect the ozone layer and will also slow the rate of climate change" (*ibid.*). According to the statement, these conclusions were based on the "consensus of current basic scientific understanding" that, *inter alia*, "greenhouse gases are likely to be the most important cause of climate change over the next century" (*ibid.*, p. 2). The conference recommended that a programme on climate change be promoted by governments and the scientific community.

57. In 1987, the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter the "Montreal Protocol") was adopted by the parties to the Ozone Layer Convention. It addresses stratospheric ozone depletion by establishing progressive and time-bound phase-out obligations for the production and consumption of all the major ozone-depleting substances. This Protocol entered into force on 1 January 1989. It currently has 198 parties.

58. On 6 December 1988, the General Assembly adopted resolution 43/53, which noted with concern that the emerging evidence indicated that continued growth in atmospheric concentrations of GHGs could produce global warming. The General Assembly recognized for the first time that

"climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth", adding that climate change "affects humanity as a whole and should be confronted within a global framework so as to take into account the vital interests of all mankind".

59. In the same resolution, the General Assembly endorsed the decision of the WMO and UNEP to jointly establish

> "an Intergovernmental Panel on Climate Change to provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies".

60. The IPCC was created in 1988 and currently comprises 195 "Member Countries". The task of its experts is to provide guidance to governments by producing regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation. The IPCC conducts assessments every five to seven years, during which it reviews thousands of scientific papers (including the reports of the WMO, the World Health Organization (hereinafter "WHO"), the International Maritime Organization (hereinafter "IMO"), UNEP and other international organizations) to provide a comprehensive summary of the state of knowledge on climate change. Through its assessments, the IPCC identifies the strength of scientific agreement in different areas and indicates where further research is needed. The IPCC experts producing the reports are currently divided into three working groups: Working Group I deals with the physical science basis of climate change; Working Group II with climate change impacts, adaptation and vulnerability; and Working Group III with mitigation of climate change. Assessment Reports undergo extensive review by experts and governments before being accepted or adopted by the relevant Working Group or IPCC plenary session. The IPCC's findings are either formulated as statements of fact or associated with an assessed level of confidence. Each IPCC report includes a Summary for Policymakers, which is subject to line-by-line review by representatives of the IPCC's "Member Countries" at plenary sessions.

61. The First Assessment Report of the IPCC was published in 1990. The major scientific findings endorsed in that report include the following: "[e]missions resulting from human activities are substantially increasing the atmospheric concentrations of the greenhouse gases"; "[c]arbon dioxide has been responsible for over half of the enhanced greenhouse effect in the past, and is likely to remain so in the future"; and "[i]ndustrialized and developing countries have a common but varied responsibility in dealing with the problem of climate change and its adverse effects". The IPCC noted in its First Assessment Report that industrialized countries "should take the lead" because "[a] major part of emissions affecting the atmosphere at present originates in industrialized countries where the scope for change is greatest". It further noted that "[e]missions from developing countries are growing in order to meet their development requirements and thus, over time, are likely

to represent an increasingly significant percentage of global emissions". These findings were subsequently reflected to a large extent in the preamble and provisions of the United Nations Framework Convention on Climate Change (hereinafter the "UNFCCC" or "Framework Convention").

62. In June 1992, the United Nations Conference on Environment and Development, also known as the "Earth Summit", was held in Rio de Janeiro. During this Conference, two conventions were opened for signature, namely the UNFCCC and the Convention on Biological Diversity (hereinafter the "Biodiversity Convention").

63. The UNFCCC entered into force on 21 March 1994 and currently has 198 parties. This Convention sets an overall framework for intergovernmental efforts to tackle the adverse effects of climate change and acknowledges that

> "the global nature of climate change calls for the widest possible co-operation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions" (sixth preambular paragraph).

Its objective is to "stabiliz[e] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system . . . within a time-frame sufficient to allow ecosystems to adapt naturally to climate change" (Article 2). The Conference of the Parties (hereinafter the "COP") is the "supreme body" set up by the Framework Convention to "keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention" (Article 7, paragraph 2).

64. The Biodiversity Convention entered into force on 29 December 1993 and currently has 196 parties. This Convention provides for "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources".

65. In June 1994, the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereinafter the "Desertification Convention") was adopted. This Convention aims at protecting the climate system and other parts of the environment by preventing desertification and land degradation, and encouraging reforestation and the replenishment of GHG sinks and reservoirs. It entered into force on 26 December 1996 and currently has 197 parties.

66. On 11 December 1997, the Kyoto Protocol was adopted in order to operationalize the UNFCCC by committing developed country parties and other developed parties included in Annex I to the Framework Convention to limit and reduce GHG emissions (see paragraph 81 below) in accordance with agreed individual targets. It entered into force on 16 February 2005 and currently

has 192 parties. The Protocol provides for, *inter alia*, binding emission reduction targets to be achieved during "commitment periods", the last of which expired in 2020 (see paragraph 118 below).

67. On 3 June 2009, the General Assembly adopted resolution 63/281, in which it noted with concern that "the adverse impacts of climate change, including sea-level rise, could have possible security implications". It invited the relevant organs of the United Nations to "intensify their efforts in considering and addressing climate change, including its possible security implications". It also requested the Secretary-General to submit a comprehensive report to the General Assembly on the possible security implications of climate change. In his report dated 11 September 2009, the Secretary-General emphasized, *inter alia*, that climate change threatens food security and human health, and increases human exposure to extreme events. He noted that migration, competition over natural resources, and other coping responses of households and communities faced with climate-related threats could increase the risk of internal conflict, as well as have international repercussions. He also observed that there were implications for the rights, security and sovereignty of States due to the disappearance of territory. He further observed that the impact of climate change on shared or undemarcated international resources could have implications for international co-operation (Report of the Secretary-General on climate change and its possible security implications, 11 September 2009, UN doc. A/64/350).

68. In 2010, the COP to the UNFCCC, at its sixteenth session (COP 16), adopted the Cancun Agreements, which, among other things, discussed temperature goals, recognizing that

> "deep cuts in global greenhouse gas emissions are required according to science, and as documented in the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, with a view to reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C above pre-industrial levels, and that Parties should take urgent action to meet this long-term goal, consistent with science and on the basis of equity" (decision 1/CP.16, 10-11 December 2010, UN doc. FCCC/CP/2010/7/Add.1, p. 3, para. 4).

The Conference also decided that a periodic review of the adequacy of the long-term global goal described above should be

> "guided by the principles of equity, and common but differentiated responsibilities and respective capabilities and take into account, inter alia:
>
> . . . . . .
>
> [c]onsideration of strengthening the long-term global goal, referencing various matters presented by the science, including in relation to temperature rises of 1.5°C" (*ibid.*, p. 23, para. 139).

69. In 2011, the COP to the UNFCCC, at its seventeenth session (COP 17), adopted the decision to establish an Ad Hoc Working Group on the Durban Platform for Enhanced Action, which also addressed temperature goals in its preamble, noting with grave concern

> "the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels" (decision 1/CP.17, 11 December 2011, UN doc. FCCC/CP/2011/9/Add.1, second preambular paragraph).

70. On 12 December 2015, the COP to the UNFCCC, at its twenty-first session (COP 21), adopted the Paris Agreement, which entered into force on 4 November 2016. As of today, the Paris Agreement has 195 parties. Guided by, *inter alia*, "the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances", this instrument "aims to strengthen the global response to the threat of climate change", including through measures designed to limit the increase in global average temperature.

71. On 29 March 2023, the General Assembly adopted resolution 77/276.

B. Relevant scientific background

72. Many participants emphasized the significant and devastating consequences they face as a result of climate change, stressing the urgent nature of the problem and the imminence of the threat it poses to their populations, territories, economies, cultural traditions and, for some, the very existence of their State. As explained further in this section, it is scientifically established that the climate system has undergone widespread and rapid changes, including, in particular, an increase in global surface temperatures, or global warming. Climate change is caused by the accumulation of certain gases in the atmosphere that trap the sun's radiation around the Earth, leading to a greenhouse warming effect. While certain GHGs occur naturally, it is scientifically established that the increase in concentration of GHGs in the atmosphere is primarily due to human activities, whether as a result of GHG emissions, including by the burning of fossil fuels, or as a result of the weakening or destruction of carbon reservoirs and sinks, such as forests and the ocean, which store or remove GHGs from the atmosphere.

73. The consequences of climate change are severe and far-reaching; they affect both natural ecosystems and human populations. Rising temperatures are causing the melting of ice sheets and glaciers, leading to sea level rise and threatening coastal communities with unprecedented flooding. Extreme weather events, such as hurricanes, droughts and heatwaves, are becoming more frequent and intense, devastating agriculture, displacing populations and exacerbating water shortages. Furthermore, the disruption of natural habitats is pushing certain species toward extinction and leading to irreversible loss of biodiversity. Human life and health are also at risk, with an increased

incidence of heat-related illnesses and the spread of climate-related diseases. These consequences underscore the urgent and existential threat posed by climate change.

74. The Court will consider these issues in more detail. In so doing, it will rely primarily on the IPCC reports, which participants agree constitute the best available science on the causes, nature and consequences of climate change. It further observes that the adverse effects of climate change on the climate system have been acknowledged by the United Nations, including UNEP, and its specialized agencies, such as the WMO, WHO and the IMO.

75. The IPCC defines the climate system as "[t]he global system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them" (IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (hereinafter "IPCC, *Climate Change 2023: Synthesis Report*"), Annex I, Glossary (hereinafter "IPCC 2023 Glossary"), p. 122). For the purposes of this Advisory Opinion, the Court notes that this definition is substantially equivalent to that of Article 1, paragraph 3, of the UNFCCC, which defines the "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions".

76. According to the IPCC, climate change refers to

> "[a] change in the state of the climate that . . . may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthropogenic changes in the composition of the atmosphere or in land use" (IPCC 2023 Glossary, p. 122).

For the purposes of this Advisory Opinion, the Court notes that this definition is consistent with that of Article 1, paragraph 2, of the UNFCCC, which characterizes climate change as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".

77. The IPCC's most recent reports were produced during the sixth assessment cycle, which was completed in March 2023 with the publication of *Climate Change 2023: Synthesis Report*. The Court observes that, in those reports, the IPCC found that widespread and rapid changes have occurred in the atmosphere, ocean, cryosphere and biosphere, and that "[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe". The IPCC stated that this has led to "widespread adverse impacts and related losses and damages to nature and people", with vulnerable communities which have historically contributed the least to climate change being "disproportionately affected" (*Climate Change 2023: Synthesis Report*, pp. 42-51, section 2). In particular, the IPCC concluded that "[h]uman influence [is] very likely the main driver" of sea level rise since 1971 and has likely increased the chance of extreme events such as "heatwaves, heavy precipitation, droughts, and tropical cyclones" (IPCC, 2023, Summary for

Policymakers, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (hereinafter "IPCC, 2023 Summary for Policymakers"), p. 5, Statements A.2-A.2.1). The IPCC also concluded with high confidence that climate change has caused substantial damage and increasingly irreversible losses in ecosystems, including the loss of species and biodiversity.

78. The IPCC has determined that approximately 3.3 to 3.6 billion people are highly vulnerable to climate change. It has concluded with high to very high confidence that, in all regions, increases in extreme heat events have resulted in human mortality and morbidity, and that there is an increased incidence of climate-related diseases. Moreover, increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security. Individuals' livelihoods have been affected through the destruction of homes and infrastructure, and the loss of property, income and human health.

79. The Court further notes that, according to the IPCC,

> "[h]uman activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850-1900 in 2011-2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals" (IPCC, 2023 Summary for Policymakers, p. 4, Statement A.1).

80. More specifically, the IPCC has emphasized that the global surface temperature has increased faster since 1970 than in any other 50-year period over at least the last 2,000 years, that the increases in GHG concentrations in the atmosphere since around 1750 are unequivocally caused by GHG emissions from human activities (stating with high confidence that about 42 per cent of these cumulative emissions have occurred between 1990 and 2019), and that the concentrations of the three main GHGs (carbon dioxide (CO_2), methane (CH_4) and nitrous oxide (N_2O)) are now higher than at any time in at least 800,000 years (very high confidence). It has noted that the average annual GHG emissions during 2010-2019 were higher than in any previous decade on record, and that emission reductions have been less than emission increases from rising global activity levels. The IPCC also underlined that historical contributions of GHG emissions vary substantially across regions, and that differences remain today, with the least developed countries and small island developing States having much lower per capita emissions of GHGs than the global average (IPCC, 2023 Summary for Policymakers, pp. 4-5, subsection A.1). Working Group III of the IPCC has reported specifically with respect to CO_2 emissions that "the three developing regions together contributed

28% to cumulative CO_2 FFI emissions between 1850 and 2019, whereas Developed Countries contributed 57% and Least-Developed Countries contributed 0.4%" (IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (hereinafter "IPCC, 2022 contribution of Working Group III"), p. 218).

81. The IPCC defines GHGs as being

> "[g]aseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's surface, by the atmosphere itself, and by clouds. This property causes the greenhouse effect." (IPCC 2023 Glossary, p. 124.)

According to the Panel, water vapour (H_2O), CO_2, N_2O, CH_4 and ozone (O_3) are the primary GHGs in the Earth's atmosphere. GHGs generated exclusively by human activities include sulphur hexafluoride (SF_6), hydrofluorocarbons (HFCs), chlorofluorocarbons (CFCs) and perfluorocarbons (PFCs). Several of these are also ozone-depleting. Different combinations of gases are emitted from different activities. The IPCC adds that the largest source of CO_2 is combustion of fossil fuels in energy conversion systems such as boilers in electric power plants, engines in aircraft and automobiles, and in cooking and heating within homes and businesses (approximately 64 per cent of emissions). It further observes that fossil fuels are a major source of CH_4, the second biggest contributor to global warming. Finally, the Panel states that, while most GHGs come from fossil fuel combustion, about a quarter comes from land-related activities such as agriculture (mainly CH_4 and N_2O) and deforestation (mainly CO_2), with additional emissions from industrial processes (mainly CO_2, N_2O and fluorinated gases), and municipal waste and wastewater (mainly CH_4) (IPCC, 2022 contribution of Working Group III, p. 194).

82. Furthermore, according to the IPCC,

> "[c]ontinued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term [i.e. 2021-2040] in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards . . . Deep, rapid, and sustained reductions in greenhouse gas emissions would lead to a discernible slowdown in global warming within around two decades, and also to discernible changes in atmospheric composition within a few years" (IPCC, 2023 Summary for Policymakers, p. 12, Statement B.1).

83. The IPCC has also concluded with "very high confidence" that risks and projected adverse impacts and related loss and damage from climate change will escalate with every increment of global warming. It added that these risks, projected adverse impacts and related loss and damage are "higher for global warming of 1.5°C than at present, and even higher at 2°C" (IPCC, 2023

Summary for Policymakers, p. 15, Statement B.2.2). Indeed, in 2018, the IPCC concluded with high confidence that "[w]arming of 1.5°C is not considered 'safe' for most nations, communities, ecosystems and sectors and poses significant risks to natural and human systems" (IPCC, 2018, *Global Warming of 1.5°C: an IPCC special report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, Chap. 5, p. 447).

84. As mentioned above (see paragraphs 51-70), over the years, States have adopted instruments in order to protect the climate system and other parts of the environment from the adverse effects of climate change. They have, in particular, committed to take measures to mitigate and facilitate adequate adaptation to climate change (see, for example, UNFCCC, Article 4).

85. The IPCC defines mitigation as a "human intervention to reduce emissions or enhance the sinks of greenhouse gases" (IPCC 2023 Glossary, p. 126). Mitigation includes both reducing GHG emissions through measures such as transitioning away from fossil fuels and improving energy efficiency, and enhancing sinks through measures such as reforestation and reduced deforestation. The IPCC explains that global warming is more likely than not to reach 1.5°C before 2040 even under a very low GHG emissions scenario. The best estimate for global warming by 2081-2100 ranges from 1.4°C for a very low GHG emissions scenario to 4.4°C for a very high GHG emissions scenario (IPCC, 2023 Summary for Policymakers, p. 12, Statement B.1.1).

86. The IPCC defines adaptation as "the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities" (IPCC 2023 Glossary, p. 120). The IPCC noted in 2023 that adaptation options exist that are effective in reducing climate risks in certain contexts, such as the restoration of ecosystems, the creation of early warning systems, and resilience-enhancing infrastructure (IPCC, *Climate Change 2023: Synthesis Report*, pp. 55-56, section 2.2.3).

87. The IPCC notes that adaptation measures are still insufficient, that limits to adaptation have been reached in some ecosystems and regions, and that maladaptation — i.e. actions that may lead to an increased risk of adverse climate-related outcomes, increased or shifted vulnerability to climate change, more inequitable outcomes, or diminished welfare, now or in the future — is happening in some sectors and regions. The Panel adds that current global financial flows for adaptation are insufficient and constrain implementation of adaptation options, especially in developing countries (IPCC, 2023 Summary for Policymakers, pp. 8-9, subsection A.3). The IPCC further observes that adaptation options that are feasible and effective today will become constrained and less effective with increasing global warming. It adds that loss and damage will increase and that additional human and natural systems will reach adaptation limits (high confidence) (*ibid.*, p. 19,

subsection B.4). According to the Panel, climate change is a threat to "human well-being and planetary health" and there is a "rapidly closing window of opportunity to secure a liveable and sustainable future for all" (very high confidence). It adds that the choices and actions implemented between 2020 and 2030 "will have impacts now and for thousands of years" (high confidence) (*ibid.*, p. 24, Statement C.1).

III. Scope and meaning of the questions posed by the General Assembly

88. The Court now turns to the scope and meaning of the two questions posed by the General Assembly, and recalls that they are formulated as follows:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
>
> *(a)* What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
>
> *(b)* What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?"

89. As the Court has previously stated, it has the power to interpret the questions put to it for an advisory opinion (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 49). It is for the Court "to appreciate and assess the appropriateness of the formulation of the questions" (*ibid.*). If questions put to the Court are ambiguous or vague, the Court may clarify them before giving an opinion (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 35).

90. In the present instance, the Court considers that there is no need for it to reformulate the questions submitted to it.

91. Even in cases where the questions posed do not require reformulation, the Court observes that it may "interpret the questions put to it wherever clarification may be necessary" (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 29). In this regard, the Court may, "where necessary, determine for itself the scope and the meaning of the questions put to it" (*ibid.*, para. 49).

92. In the present instance, since diverging views have been expressed as to the scope and meaning of the questions, the Court will examine the questions put to it in order to ascertain the precise meaning and scope to be attached to the words and expressions used therein.

A. Scope of the General Assembly's request

93. In formulating its reply to the questions, the Court must frame the material, territorial and temporal scope of its inquiry (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 284).

94. With regard to its material scope, the Court observes that question *(a)* posed by the General Assembly asks the Court to set forth the legal obligations of States under international law to "ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases". Question *(b)* asks the Court to address the legal consequences under these obligations for the "acts and omissions" of States where they have caused significant harm to the climate system and other parts of the environment. In the Court's view, the two questions are interrelated and require the Court to identify the obligations of States in respect of activities that adversely affect the climate system, as well as the legal consequences arising from the breach of these obligations. In this regard, the Court is further of the view that the relevant conduct for the purposes of these advisory proceedings is not limited to conduct that, itself, directly results in GHG emissions, but rather comprises all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions. The Court considers that the material scope of its inquiry encompasses the full range of human activities that contribute to climate change as a result of the emission of GHGs, including both consumption and production activities. This interpretation is confirmed by the understanding of most of the participants that replied to the question posed by a Member of the Court concerning "the specific obligations under international law of States within whose jurisdiction fossil fuels are produced". These participants submitted that obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels.

95. The Court's conclusion as to the relevant conduct that falls within the material scope of the questions is further confirmed by the use of the terms "climate system" and "climate change" in the request submitted by the General Assembly. As the Court has observed above (see paragraphs 74-76), the climate system — the protection of which is the object of the obligations to be identified by the Court — and climate change have also been defined in broad terms in the reports

of the IPCC, which are referenced in the request (see General Assembly resolution 77/276, ninth preambular paragraph). The Court's inquiry must therefore have a broad material scope encompassing States' obligations concerning all actions or omissions of States, and of non-State actors within their jurisdiction or effective control, that result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions. In the Court's view, such a broad material scope is particularly apt when addressing legal issues pertaining to a problem of the magnitude of climate change, which the General Assembly has characterized as the "common concern of mankind" (see General Assembly resolution 43/53, 6 December 1988) and an "unprecedented challenge of civilizational proportions" (see General Assembly resolution 77/276).

96. Turning to the territorial scope of the request, it follows from the Court's conclusions on the material scope of the questions put to it that the General Assembly did not intend to impose any territorial limits to the Court's inquiry. The references in the preamble to the request to the "protection of the global climate" lead the Court to conclude that it is requested by the General Assembly to formulate its reply not in respect of any particular territory or regions, but in global terms, especially since GHG emissions are "unequivocally caused by . . . human activities" (IPCC, *Climate Change 2023: Synthesis Report*, p. 42, section 2.1), which are not territorially limited. This is to be done by determining the obligations of all States pertaining to the protection of the climate system as a whole, as well as determining the legal consequences for all States that fail to comply with these obligations.

97. With regard to the temporal scope of the request, the Court observes that diverging submissions were made by participants in connection with both questions. Participants noted that the issue of temporality pertains to question *(a)*, in so far as it concerns the crystallization and identification of obligations for States regarding the protection of the climate system from anthropogenic GHG emissions, and also to question *(b)*, since the law of State responsibility requires a determination of whether a State was bound by an international obligation "in force" when the conduct allegedly leading to the breach occurred (International Law Commission (hereinafter "ILC"), Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two (hereinafter "Articles on State Responsibility"), Article 13). The determination of when obligations arose, in the case of customary obligations, or entered into force, in the case of treaty obligations, may also be affected by other legal rules and factual questions, such as the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 1969 in respect of treaty obligations, the emergence of the relevant rules of customary international law, and questions of sufficient scientific understanding of the causes of climate change and its adverse effects in respect of obligations under general international law. The Court observes that while these temporal issues may be particularly relevant for an *in concreto* assessment of the responsibility of States for breaches of obligations pertaining to the protection of the climate system, the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of States (see further consideration below at paragraphs 423-424). Rather, the present opinion considers the legal obligations of all States under question *(a)* and identifies the relevant legal régime applicable to legal consequences arising under those legal obligations in reply to question *(b)*.

B. Meaning and scope of question *(a)*

98. Turning now to the scope of question *(a)*, the Court observes that it is requested by the General Assembly to identify "the obligations of States under international law to ensure the protection of the climate system and other parts of the environment". In the Court's view, the unqualified reference to obligations "under international law" indicates the intention of the General Assembly to seek the Court's opinion on the obligations incumbent upon States under the entire corpus of international law, and not to limit the Court's reply to any particular source or area of international law. Accordingly, it falls to the Court "to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion" (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 129, para. 137) and to consider all available rules of international law, in order to identify the relevant applicable law (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 239, para. 23).

99. The above interpretation of the scope of the first question is confirmed by the *chapeau* to the questions, which requests the Court, when formulating its reply, to have "particular regard" to certain legal instruments, and rules and principles of international law. These legal instruments, rules and principles cover different areas of international law and are to be found in different sources. The Court must therefore pronounce on a range of legal obligations of States to protect the climate system and other parts of the environment from anthropogenic GHG emissions.

100. The Court observes that its response to question *(a)* is limited to identifying the existing obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, thereby elucidating the content of these obligations, and clarifying the relationship between obligations arising from various sources of international law. This limit is inherent in the Court's judicial function because "the Court, as a court of law, cannot render judgments *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, pp. 23-24, para. 53).

C. Meaning and scope of question *(b)*

101. The Court now turns to question *(b)*, and considers that the meaning and scope of the question rests on the interpretation of the following terms: "under these obligations"; "legal consequences"; legal consequences "for States" and with respect to States that are "specially affected"; and legal consequences with respect to "peoples and individuals".

1. "Under these obligations"

102. At the outset, the Court observes that question *(b)* is connected with question *(a)*. While in the first question the General Assembly asks the Court about "the obligations of States under international law to ensure the protection of the climate system and other parts of the environment", the second question refers back to the obligations enumerated in question *(a)*, enquiring specifically about "the legal consequences *under these obligations* for States" (emphasis added).

103. The Court considers that the use of the phrase "under these obligations" means that the legal consequences to be determined by the Court are those arising from the various obligations under international law which the Court is called upon to identify under question *(a)*.

2. "Legal consequences"

104. With regard to the term "legal consequences" contained in question *(b)*, the Court observes that, in general, legal consequences are identified and addressed through the application of the secondary rules of international law concerning the responsibility of States for internationally wrongful acts (see paragraph 3 of the general commentary, ILC Articles on State Responsibility, p. 31; see also paragraphs 407-420 below). In these proceedings, some participants argued that question *(b)* requests the Court to determine the legal consequences arising not only from internationally wrongful acts, but also from acts not prohibited by international law when such acts have caused significant damage to the climate system.

105. In the Court's view, nothing in the question indicates that the General Assembly intended to request the Court to opine on the legal consequences, if any, for injuries arising out of acts not prohibited by international law. Indeed, under the law of State responsibility, the term "legal consequences" attaches to, and flows from, the commission "of an internationally wrongful act" (see ILC Articles on State Responsibility, Article 28), and the General Assembly's request to the Court to state the "legal consequences" arising under States' "obligations" must therefore be understood to pertain to legal consequences arising from a breach of States' obligations identified under question *(a)*.

106. In this context, the Court considers that it has been requested to address legal consequences in a general manner, and that it is not called upon to identify the legal responsibility of any particular State or group of States. It also bears noting in this context that the responsibility of individual States or groups of States requires an *in concreto* assessment that must be undertaken on a case-by-case basis. In its view, the Court, in relation to question *(b)*, is only called upon, first, to establish the applicable legal framework of State responsibility in respect of States that have breached their obligations to protect the climate system, and, second, to outline in general terms the legal consequences flowing therefrom. In doing so, the Court does not prejudge the merits of any future claims that may be brought in relation to the subject-matter of the present proceedings before courts or tribunals.

3. Legal consequences "for States" and with respect to States that are "specially affected" or "are particularly vulnerable"

107. Question *(b)* (i) asks the Court to opine on the legal consequences under the identified obligations

> "for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to . . . States, including . . . small island developing States, which due to their geographical

circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change".

108. The term "for States" in this context refers to States that, by their actions or omissions, may have adversely affected the climate system and other parts of the environment through GHG emissions. While some participants submitted in these proceedings that the Court may determine specific breaches of obligations by a particular State or group of States, the Court recalls that it is not called upon to determine the responsibility of any State or group of States under international law, generally or in any specific instance. Such a determination may involve complex questions regarding, *inter alia*, causation and apportionment of responsibility for harm, and can be made only by an *in concreto* assessment that is beyond the scope of these proceedings.

109. As for legal consequences with respect to certain categories of States that are "specially affected" or "are particularly vulnerable", the Court notes that the application of the rules on State responsibility under customary international law does not differ depending on the category or status of an injured State. Thus, "specially affected" States or States that are "particularly vulnerable" are in principle entitled to the same remedies as other injured States. Moreover, since, in these proceedings, the Court is not called upon to identify particular States that may have breached their relevant obligations, it follows that it is also not called upon to determine any specific legal consequences with respect to particular injured States or groups of States.

110. The Court recognizes, however, that certain States, in particular small island developing States, have faced and are likely to face greater levels of climate change-related harm owing to their geographical circumstances and level of development. As explained by the IPCC, areas at a disproportionately higher risk of harms associated with climate change include Arctic ecosystems and dryland regions, as well as small island developing States and least developed countries (IPCC, *Climate Change 2023: Synthesis Report*, p. 71, section 3.1.2). A unique situation faced by small island States and low-lying coastal States was addressed by many participants that raised concerns over issues of sea level rise, which causes the coasts of such States to recede, thereby potentially affecting the outer limits of their maritime zones or even threatening their very existence. However, in the Court's view, these matters do not fall within the scope of question *(b)*. Rather, they are governed by the relevant primary rules of international law, in particular rules concerning maritime zones and entitlements and statehood. Accordingly, these matters will be addressed in the Court's consideration of the relevant obligations of States under question *(a)* (see Part IV.E below).

4. Legal consequences with respect to "peoples and individuals"

111. The Court observes that question *(b)* (ii) enquires about the legal consequences "with respect to . . . [p]eoples and individuals of the present and future generations affected by the adverse effects of climate change". The Court considers that whether or not individuals have any entitlement to invoke the legal responsibility of States, or to make a claim in a particular circumstance involving

injury or harm arising from climate change, is dependent on the relevant primary obligations of States (see Article 33, paragraph 4 of the commentary, ILC Articles on State Responsibility, p. 95). The Court notes in this regard that certain treaties enable actors other than States, such as individuals or other private actors, to bring claims against States on the international plane. Thus, whether individuals are entitled to invoke a State's responsibility for failure to comply with obligations identified under question *(a)* depends not on the general rules on State responsibility, but on the specific treaties and other legal instruments that create procedural and substantive rights and obligations governing the relationship between the States and individuals concerned.

IV. QUESTION *(A)* PUT TO THE COURT: OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

112. Having defined the scope and meaning of the questions posed by the General Assembly, the Court will now address question *(a)*. The Court will begin by considering the law applicable to question *(a)* (Section A). It will then examine obligations of States under the climate change treaty framework (Section B), before analysing obligations of States under customary international law (Section C). The Court will then assess obligations of States under other relevant international environmental treaties (Section D), under the law of the sea (Section E), and under international human rights law (Section F).

A. Applicable law

113. In its request, the General Assembly invites the Court to have "particular regard to"

> "the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment".

114. As noted above (see paragraph 99), the phrase "particular regard to", while indicating that a wide range of international legal rules and principles are potentially relevant, does not mean that the General Assembly requests the Court to address every rule of international law, including the obligations contained therein, in respect of climate change. The Court will therefore identify "the most directly relevant applicable law governing the question[s] of which it [has been] seised" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 243, para. 34). It will first identify those rules which are most directly relevant (see subsections 1-7, paragraphs 115-161, below), and thereafter determine whether any of those rules are excluded by virtue of the interpretative principle of *lex specialis* (see subsection 8, paragraphs 162-171, below).

1. Charter of the United Nations

115. The Charter of the United Nations is a pillar of contemporary international law. Its purposes include achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character (Article 1). Climate change is a global problem which manifests itself in all these and other fields of concern for the United Nations. The Charter also provides that Member States "shall act in accordance with" certain principles (Article 2), including when addressing problems of common concern, such as climate change. These principles include the fulfilment in good faith of the obligations assumed by States under the Charter. Accordingly, the Charter forms part of the most directly relevant applicable law.

2. Climate change treaties

116. The UNFCCC, the Kyoto Protocol and the Paris Agreement are the principal legal instruments regulating the international response to the global problem of climate change.

117. The UNFCCC serves a foundational and co-ordinating purpose for related legal instruments on climate change. Its "ultimate objective . . . and [that of] any related legal instruments . . . is to achieve [the] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (Article 2).

118. The Kyoto Protocol of 1997 is a "related legal instrument" within the meaning of Article 2 of the UNFCCC. It pursues the object and purpose of the UNFCCC by envisaging "quantified emissions limitation and reduction commitments", the attainment of which is to be pursued by certain States (listed in Annex B) within specified "commitment periods" (Article 3). The Parties have agreed on two commitment periods (2008-2012 and 2013-2020). No further commitment period after 2020 has been agreed upon.

119. The Paris Agreement was adopted in 2015 by the COP of the UNFCCC, at its twenty-first session (COP 21), "[i]n pursuit of the objective of the Convention" (third preambular paragraph). Thus, the Paris Agreement is also a "related legal instrument" to the UNFCCC. According to its Article 2, the Paris Agreement "aims to strengthen the global response to the threat of climate change" by "enhancing the implementation of the [Framework] Convention, including its objective". Unlike the Kyoto Protocol, the Paris Agreement does not include quantified emission limitation and reduction commitments for certain States but provides for "nationally determined contributions" (hereinafter "NDCs") to the global response to climate change by all States (Article 3).

120. The UNFCCC, the Kyoto Protocol and the Paris Agreement complement each other. The Framework Convention establishes the ultimate objective as well as the basic principles and general obligations of States in respect of climate change, whereas the Kyoto Protocol and the Paris Agreement respectively translate these basic principles and general obligations into a set of more specific interrelated obligations, each of which gives expression to a broad practical approach of the

community of States parties to the problem of climate change. The Court considers that the lack of agreement on a further commitment period under the Kyoto Protocol after the adoption of the Paris Agreement does not mean that the Kyoto Protocol has been terminated. The Kyoto Protocol therefore remains part of the applicable law. The Court will return to this issue and to the relationship between the three climate change treaties more generally below (see paragraphs 187-195).

121. The Court thus concludes that the three climate change treaties, namely the UNFCCC, the Kyoto Protocol and the Paris Agreement, form part of the most directly relevant applicable law.

3. United Nations Convention on the Law of the Sea

122. The request from the General Assembly includes UNCLOS among the sources to which the Court is asked to have "particular regard".

123. The Court notes that the International Tribunal for the Law of the Sea (hereinafter "ITLOS" or the "Tribunal") rendered an advisory opinion on climate change and international law on 21 May 2024 (*Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*; hereinafter "*Climate Change, Advisory Opinion, ITLOS Reports 2024*") which addresses the relationship between UNCLOS and climate change. The Tribunal held therein that many provisions of UNCLOS constitute obligations of States in respect of climate change (see paragraphs 337-338 below).

124. In the view of the Court, UNCLOS also forms part of the most directly relevant applicable law.

4. Other environmental treaties

125. The Court must also determine which other environmental treaties form part of the most directly relevant applicable law. Several treaties received particular attention during the proceedings and are referred to in the *chapeau* to the questions asked by the General Assembly. First among these are the ozone layer treaties, namely the Ozone Layer Convention and the Montreal Protocol. Other treaties which have been referred to are the Biodiversity Convention and the Desertification Convention.

126. The ozone layer treaties regulate an issue of common concern that is related to climate change: the protection of the atmosphere against degradation by certain anthropogenic substances. While their primary object and purpose is the protection of human health and the environment, the ozone layer treaties are closely related to the issue of climate change, particularly the Kigali amendment to the Montreal Protocol adopted on 15 October 2016 (see paragraph 324 below).

127. Article 2 of the Biodiversity Convention defines "biodiversity" as comprising not only "the variability among living organisms from all sources", but also "the ecological complexes of which they are part", meaning their ecosystems. The Court observes that, in certain instances, ecosystem protection measures may simultaneously operate as climate change mitigation or adaptation measures.

128. The preamble to the Desertification Convention refers to the UNFCCC and affirms that combating desertification has the potential to assist States in achieving the UNFCCC's objective. Article 8 addresses the Convention's interaction with the UNFCCC and the Biodiversity Convention.

129. Given their close connection with the issue of climate change and their complementary relationship, the Court considers that the ozone layer treaties, the Biodiversity Convention and the Desertification Convention form part of the most directly relevant applicable law.

130. The Court is aware that there are many other treaties which are relevant for the efforts of the international community of States to address the global problem of climate change. Such treaties have been concluded for specific sectors or within regional frameworks, and they also concern general matters such as access to information and public participation. However, the Court confines itself to examining the most directly relevant applicable law regarding climate change (see paragraph 114 above).

5. Customary international law

131. The Court turns now to consider the applicability and relevance of customary international law. In the context of climate change, *(a)* the duty to prevent significant harm to the environment requires particular attention, as does *(b)* the duty to co-operate for the protection of the environment.

(a) ***Duty to prevent significant harm to the environment***

132. Participants generally agree that States have a duty under customary international law to prevent significant harm to the environment. Indeed, the Court has recognized that "[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101).

133. As concerns the applicability of the duty to prevent significant harm to the environment in the context of climate change, participants expressed two positions. Most participants affirmed that this duty is applicable to climate change, relying, *inter alia*, on the general nature of the no harm principle from which the Court derived the duty to prevent significant harm to the environment

(see *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). Other participants argued that this duty does not apply in the climate change context. They maintained, *inter alia*, that it is confined to instances of direct cross-border harm, as addressed by the Court in the past, and that climate change is a process which, by its cumulative and global nature, is distinct from more specific processes resulting in transboundary harm.

134. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that

> "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29).

This jurisprudence affirms that the duty to prevent significant harm to the environment is not confined to instances of direct cross-border harm and that it applies to global environmental concerns. Therefore, the customary duty to prevent significant harm to the environment also applies with respect to the climate system and other parts of the environment.

135. The duty to prevent significant harm to the environment is an obligation to act with due diligence (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101, and p. 79, para. 197). As the Court has held, while an obligation to prevent "is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing" harm, "the obligation of [States] is rather to employ all means reasonably available to them, so as to prevent [harm] so far as possible" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430).

136. The conduct required by due diligence has several elements. These elements include States taking, to the best of their ability, appropriate and, if necessary, precautionary measures, which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities. Other elements of the required conduct include undertaking risk assessments and notifying and consulting other States, as appropriate. The Court will address these elements more specifically below (see paragraphs 280-300).

137. The determination of what is required by due diligence ultimately "calls for an assessment *in concreto*" of what is reasonable under the specific circumstances in which a State finds itself (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430). This does not exclude the identification of a required standard of conduct at a general level, depending on the overall character of the risk to the part of the environment in question.

This is particularly apposite with respect to climate change because the specific character of the risk of significant harm to the climate system is indisputably established. The best available science, as presented by the IPCC, confirms that cumulative GHG emissions are the primary source of risks arising from anthropogenic climate change (see paragraphs 72-87 above). All States contribute to that risk, albeit to significantly differing degrees, and all States are affected by the cumulative effects of GHG emissions, depending on their respective situations. Climate change therefore poses a quintessentially universal risk to all States. This risk is of a general and urgent character, requiring the identification of a corresponding general standard of conduct, to be applied subject to the principle of common but differentiated responsibilities and respective capabilities.

138. Under these circumstances, the Court recognizes that the standard of due diligence for preventing significant harm to the climate system is stringent (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 91-92, para. 241, pp. 92-93, para. 243, p. 94, para. 248, pp. 137-138, paras. 398-400, and pp. 152-158, para. 441). Moreover, as the Court has explained, due diligence "entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 79, para. 197). As concerns climate change, a heightened degree of vigilance and prevention is required.

139. The Court concludes that the duty of States to prevent significant environmental harm applies in the context of climate change and that this duty forms part of the most directly relevant applicable law.

(b) ***Duty to co-operate for the protection of the environment***

140. The duty to co-operate lies at the core of the Charter of the United Nations. Article 1 of the Charter commits States "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character". This obligation has been spelled out in the foundational "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" (General Assembly resolution 2625 (XXV) of 24 October 1970) (hereinafter the "Declaration on Friendly Relations"). The Court has held that "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 101, para. 191). That observation also applies to the duty to co-operate in so far as it finds expression in many binding and non-binding instruments relating specifically to the environment. The duty to co-operate is a central obligation under the climate change treaties and other environmental treaties, as discussed below (see paragraphs 214-218 and 260-267). Other examples include Principle 24 of the Stockholm Declaration and Principle 7 of the Rio Declaration on Environment and Development (hereinafter the "Rio Declaration"), which both recognize co-operation as an essential element in the protection of the environment. In view of the related practice of States, the Court considers that the duty of States to co-operate for the protection of the environment is a rule whose customary character has been established (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 110, para. 296; *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 110, para. 82).

141. This duty to co-operate is intrinsically linked to the duty to prevent significant harm to the environment, because unco-ordinated individual efforts by States may not lead to a meaningful result. It also derives from the principle that the conservation and management of shared resources and the environment are based on shared interests and governed by the principle of good faith (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C.J. Reports 1996 (I)*, p. 264, para. 102; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46).

142. For these reasons, the Court considers that the duty to co-operate for the protection of the environment forms part of customary international law and can also serve as a guiding principle for the interpretation of other rules. It forms part of the most directly relevant applicable law.

6. International human rights law

143. Participants expressed different views regarding the applicability and relevance of international human rights law for the questions posed. The Court must therefore determine whether international human rights law forms part of the most directly relevant applicable law.

144. The protection of the environment and the protection of human rights have been generally recognized as interdependent since at least the Stockholm Declaration of 1972 (see paragraphs 51-52 above and paragraph 388 below). The preamble to the Paris Agreement calls upon States, "when taking action to address climate change, . . . [to] consider their respective obligations on human rights". Regional human rights courts have also recognized the interrelationship between human rights obligations and rules concerning the protection of the natural environment (see African Court on Human and Peoples' Rights, *La LIDHO, Le MIDH, La FIDH & others* v. *Republic of Côte d'Ivoire, application 041/2016, judgment of 5 September 2023*, paras. 175-186; European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland, Grand Chamber, judgment of 9 April 2024, application No. 53600/20*, paras. 436 and 542; Inter-American Court of Human Rights, *Case of La Oroya Population* v. *Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 27 November 2023, Series C No. 511*, p. 54, para. 143), as have United Nations treaty bodies (see e.g. *Daniel Billy and others* v. *Australia (Torres Strait Islanders Petition)*, 21 July 2022, UN doc. CCPR/C/135/D/3624/2019).

145. In light of the above, the Court considers that the core human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR") of 16 December 1966 and the International Covenant on Civil and Political Rights

(hereinafter "ICCPR") of 16 December 1966, and the human rights recognized under customary international law form part of the most directly relevant applicable law.

7. Other principles

146. The Court must also determine whether certain other principles are part of the applicable law for the purposes of the present Advisory Opinion. Participants variously considered that the Court should address the principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, the precautionary approach or principle, and the "polluter pays" principle. Most of these principles are referred to in the UNFCCC as guiding the interpretation and implementation of the Convention and related instruments (preamble and Article 3).

(a) *Sustainable development*

147. The principle of sustainable development concerns the "need to reconcile economic development with protection of the environment" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). The climate change treaties describe sustainable development as a "principle" by which "the Parties shall be guided" in their actions to achieve the objective of the Convention and to implement its provisions (UNFCCC, Article 3, paragraph 4; Kyoto Protocol, Article 2, paragraph 1; and Paris Agreement, Article 2, paragraph 1). This principle has also been developed independently of treaties. For example, it plays a prominent role in the Rio Declaration (Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27) and is the focus of the Sustainable Development Goals which were adopted by the General Assembly in 2015 (General Assembly resolution 70/1 of 25 September 2015). Given its continuous and uncontested universal recognition, the Court considers that the principle of sustainable development guides the interpretation of certain treaties and the determination of rules of customary international law, including the duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment.

(b) *Common but differentiated responsibilities and respective capabilities*

148. The principle of common but differentiated responsibilities and respective capabilities is a core guiding principle for the implementation of the climate change treaties (see UNFCCC, Article 3, paragraph 1; Kyoto Protocol, Article 10; Paris Agreement, Article 2, paragraph 2, and Article 4, paragraph 3). In the view of the Court, the principle of common but differentiated responsibilities and respective capabilities reflects the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, *inter alia,* States' historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development. The principle of common but differentiated responsibilities and respective capabilities thus acknowledges, on the one hand, the historical responsibility of certain States and, on the other, that the measures which can be expected from all States with respect to addressing climate change are not the same.

149. The principle of common but differentiated responsibilities and respective capabilities has been affirmed by States in light of scientific findings on climate change. The IPCC recognized in its 1990 First Assessment Report that "[a] major part of emissions affecting the atmosphere at present originates in industrialized countries". This finding was endorsed in 1992 in the UNFCCC, whose preamble reads:

> "Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs" (third preambular paragraph; see also Rio Declaration, Principle 7).

More recently, the IPCC has found that, as of 2019, approximately 58 per cent of the total amount of anthropogenic GHG emissions since the beginning of industrialization were emitted prior to 1990, whereas the remaining 42 per cent of such emissions were emitted between 1990 and 2019 (IPCC, 2023 Summary for Policymakers, p. 4, Statement A.1.3).

150. The Court thus notes that on one end of the spectrum are the most developed States which have contributed significantly to the overall amount of GHG emissions since the Industrial Revolution, and which have resources and the technical capacity to implement wide-ranging emission reductions. On the other end are those least developed States that have contributed only minimally to historical emissions and have only a limited capacity to transform their economies. In between are States that have progressed considerably in their development since the conclusion of the UNFCCC in 1992, in line with that instrument's expectation that "the share of global emissions originating in developing countries will grow to meet their social and development needs" (UNFCCC, third preambular paragraph), and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and adaptation efforts, as well as other States with significant resources and technical capabilities to contribute to addressing global climate change.

151. The principle of common but differentiated responsibilities and respective capabilities is a manifestation of the principle of equity (see paragraphs 152-154 below) and guides the interpretation of obligations under international environmental law beyond its express articulation in different treaties (see paragraphs 290-292 below; Rio Declaration, Principle 7). The principle of common but differentiated responsibilities and respective capabilities does not establish new obligations but is relevant for the interpretation of treaties and the determination of rules of customary law relating to the environment.

(c) ***Equity***

152. Many participants referred to equity, displaying different understandings of this concept. In the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, in which the relevant special agreement relating to maritime delimitation called on the Court to take account of equitable principles, the Court affirmed that "[e]quity as a legal concept is a direct emanation of the idea of justice" and "the legal concept of equity is a general principle directly applicable as law" (*Judgment, I.C.J. Reports 1982*, p. 60, para. 71). At the same time, the Court held that the "[a]pplication of

equitable principles is to be distinguished from a decision *ex aequo et bono*" and noted that "when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice" (*ibid.*).

153. The function of equity as a legal principle is not to displace the law or to exceed its limits (equity *contra legem* and *extra legem*) but to derive an equitable solution as appropriate from the applicable law (equity *infra legem*). For example, as the Court observed in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, in the context of a dispute under the law of the sea,

> "[i]t is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law. As the Court stated in the *North Sea Continental Shelf* cases: '. . . 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' (*I.C.J. Reports 1969*, p. 47, para. 85)." (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 33, para. 78; see also *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 633, para. 149.)

154. Equity in this sense is referred to in many treaties, and the Court has on several occasions taken equitable considerations into account (see e.g. *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 51, para. 71; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 514, para. 262; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 27, para. 35; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 52, paras. 106-107). Equity has the same function in the context of the obligations in respect of climate change, including those contained in the UNFCCC and the Paris Agreement.

(d) ***Intergenerational equity***

155. Many participants also invoked intergenerational equity. Although participants expressed different understandings of the concept, its relevance for the obligations in respect of climate change is undisputable. Article 3, paragraph 1, of the UNFCCC stipulates that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity". For its part, the preamble to the Paris Agreement states that because

> "climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on . . . intergenerational equity".

These and other provisions echo the Court's recognition that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29).

156. Intergenerational equity is an expression of the idea that present generations are trustees of humanity tasked with preserving dignified living conditions and transmitting them to future generations. The IPCC has underscored that the effects of global warming will cut across generations by noting that

> "[c]ontinued emissions will further affect all major climate system components, and many changes will be irreversible on centennial to millennial time scales and become larger with increasing global warming. Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and well-being of current and future generations (high confidence)" (IPCC, 2023 Summary for Policymakers, p. 24, Statement C.1.3).

157. In the Court's view, intergenerational equity is a manifestation of equity in the general sense and thus shares its legal significance as a guide for the interpretation of applicable rules. Accordingly, considerations of intergenerational equity must play a role *infra legem*, without displacing or exceeding the limits of the applicable law. Due regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations under the relevant treaties and customary international law.

(e) ***Precautionary approach or principle***

158. Many participants addressed the question of whether States are required to exercise precaution in their policies and measures regarding climate change. Principle 15 of the Rio Declaration provides that

> "[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The Court notes that, by virtue of Article 2 and Article 3, paragraph 3, of the UNFCCC, such measures should also be taken under the related climate change treaties.

(f) ***"Polluter pays" principle***

159. Some participants suggested that the principle referred to as "polluter pays" is part of the applicable law. This principle is not mentioned in the climate change treaties but is expressed in Principle 16 of the Rio Declaration, according to which

> "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".

160. That recommendation has been followed by States in certain sector-specific treaties and various types of national legislation, mostly in the form of strict liability of private actors for specific hazardous activities. However, the principle "that the polluter should, in principle, bear the cost of pollution" is not envisaged or reflected in any of the climate change treaties. Nor has it been accepted that this principle applies directly in the relations between States without having been specified in a treaty (see *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976, Decision of 12 March 2004*, United Nations, *Reports of International Arbitral Awards*, Vol. XXV, p. 312, paras. 102-103; see also ILC Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, pp. 74-75, paras. 11-15). Accordingly, the Court does not consider that the "polluter pays" principle is part of the applicable law for the purposes of this Advisory Opinion. This does not preclude the possibility that forms of strict liability for hazardous acts and other kinds of acts that are not wrongful under international law are developing.

(g) *Conclusion*

161. For these reasons the Court concludes that the principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity and the precautionary approach or principle are applicable as guiding principles for the interpretation and application of the most directly relevant legal rules.

8. Question of *lex specialis*

162. The Court now turns to the question of whether any of the rules identified above (see subsections 1-7, paragraphs 115-161) are excluded by virtue of the interpretative principle of *lex specialis* (see paragraph 114 above). This question concerns the relationship between the climate change treaties and other rules of international law.

163. Most participants expressed the view that while the climate change treaties may be the principal instruments relevant to answering the General Assembly's request, they form part of a broader set of rules that needs to be addressed by the Court. According to those participants, the climate change treaties do not constitute *lex specialis* in relation to other rules with respect to climate change. They refer, *inter alia*, to the preamble to General Assembly resolution 77/276 which clearly indicated that the list of instruments and rules contained in the preamble is not exhaustive. Other participants considered that the Court must focus exclusively on the climate change treaties, which constitute *lex specialis* in respect of other rules and principles, including those that are referred

to in the preamble to General Assembly resolution 77/276. In their view, the climate change treaties displace any other rules, as those treaties reflect a series of careful compromises which strike a balance among the main sets of competing considerations. According to these participants, the climate change treaties have priority over any other rule of a conventional or customary nature and cannot be superseded or altered by other sources of law.

164. When discussing the question whether the climate change treaties constitute *lex specialis*, many participants also focused on the related aspects of the relationship between the climate change treaties and other rules of international law. In that respect, various participants emphasized that, although climate change treaties are the primary source of State obligations, obligations arising from climate change treaties and obligations from other treaties and customary international law inform or support each other, or they invoked the principles of harmonious interpretation and systemic integration to that effect.

165. The Court notes at the outset that it is a generally recognized principle that, when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations (Conclusions of the work of the ILC Study Group on the Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law, *Yearbook of the International Law Commission*, 2006, Vol. II, Part Two, Conclusion 4).

166. The principle of *lex specialis* is a maxim of interpretation that is used for determining which of several potentially applicable rules is to prevail or whether the rules simply coexist. It is generally accepted that, in some cases, a specific rule, or a specific set of rules, takes precedence over more general or less focused rules, while in other cases the specific rule should be seen as an elaboration of one or more general rules, the latter continuing to play an interpretative role in the background. The application of the *lex specialis* principle depends on the circumstances of each case. In the present proceedings, the different positions of participants mainly concern the question whether the set of rules contained in the climate change treaties generally takes precedence over other rules of international law.

167. The International Law Commission has explained that

> "[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation." (Article 55, paragraph 4 of the commentary, ILC Articles on State Responsibility, p. 140.)

168. The Court cannot find any actual inconsistency between the provisions of the climate change treaties and other rules and principles of international law that may be relevant for the response to question *(a)*. On the contrary, the preambles of the UNFCCC and the Paris Agreement

themselves contain references to other rules and principles. The States parties to these treaties have thereby recognized that climate change constitutes a problem for whose solution other rules and principles also play a role.

169. Nor can the Court identify a discernible intention of the parties to the climate change treaties generally to displace other possibly applicable rules or principles. Such an intention may be established by the object and purpose of a treaty. However, the object and purpose of the climate change treaties does not contradict other rules or principles of international law or suggest that these treaties are intended generally to replace such other rules or principles. Even though the climate change treaties are the principal instruments addressing the global problem of climate change, it does not follow that they generally displace other rules and principles of international law.

170. There is, in particular, no indication that the climate change treaties are meant to apply while simultaneously excluding general customary international law or other treaty rules on the protection of the environment. The fact that the climate change treaties have been carefully negotiated and represent a calibrated set of interrelated rules does not, in and of itself, provide such an indication. States parties to the climate change treaties were aware of their normative context and could have expressed a possible intention to displace other rules and principles had they so wished.

171. For these reasons, the Court considers that the argument according to which the climate change treaties constitute the only relevant applicable law cannot be upheld and finds that the principle of *lex specialis* does not lead to a general exclusion by the climate change treaties of other rules of international law.

9. Conclusion

172. For the reasons given above (see paragraphs 113-171), the Court is of the view that the most directly relevant applicable law consists of the Charter of the United Nations, the UNFCCC, the Kyoto Protocol, the Paris Agreement, UNCLOS, the ozone layer treaties, the Biodiversity Convention, the Desertification Convention, the customary duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment, and international human rights law, as well as certain guiding principles for the interpretation of various applicable rules and principles (sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary approach or principle).

173. The Court emphasizes that this list serves to determine only the applicable law which is most directly relevant for answering question *(a)* put to it by the General Assembly. It is without prejudice to other rules of international law that may also be relevant under various circumstances in the context of climate change. Such rules may be found, for example, in international trade law, international investment law, and international humanitarian law.

B. Obligations of States under the climate change treaty framework

1. General overview of the climate change treaties

174. The Court now turns to the obligations of States under the climate change treaty framework. As observed earlier (see paragraphs 116-121), the climate change treaty framework comprises three legally binding instruments concluded by States to address the problem of climate change caused by anthropogenic GHG emissions, namely the UNFCCC, the Kyoto Protocol and the Paris Agreement. In this section, the Court will examine the climate change treaties and certain relevant decisions of governing bodies thereunder, in order to identify and clarify the main obligations of States concerning the protection of the climate system and other parts of the environment from anthropogenic GHG emissions.

175. The Court recalls that participants made diverging submissions on the nature and scope of the legal obligations under the climate change treaty framework. At a general level, the Court observes that some participants argued that the climate change treaties establish "binding and onerous obligations on States to mitigate GHG emissions and adapt to their harmful effects", whereas others argued that the treaties were designed so as not to be onerous, or even, in some cases, binding. Another general point of disagreement between participants concerns whether certain obligations under the climate change treaties, in particular those under the Paris Agreement, are "obligations of conduct" or "obligations of result". The Court recalls that the distinction between obligations of conduct and obligations of result is a useful one which the Court has employed in the past (see *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 644, para. 83; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 77, para. 187; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430; see also paragraph 204). At the same time, the Court observes that the distinction is not necessarily an impermeable one, and that some obligations may exhibit characteristics of both obligations of conduct and obligations of result. Nor can it be maintained that one type of obligation is, *ipso facto*, more onerous than the other; the two types of obligations often coexist and seek to achieve the same objectives through different means. In this respect, the Court notes that not all provisions of a treaty readily lend themselves to classification as containing obligations of result or conduct, and each provision must be examined on its own terms in light of specific circumstances. The Court recalls that obligations of conduct in international environmental law entail an obligation to act with due diligence, requiring States parties "to use all the means at [their] disposal" with a view to fulfilling their international obligations (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101; see paragraphs 132-139).

176. In identifying and clarifying the obligations under these treaties, the Court will apply the rules of interpretation to be found in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, which also reflect customary international law (see e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary*

Objections, Judgment, I.C.J. Reports 2022 (II), p. 510, para. 87; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33).

177. To recall, Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted 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". Article 31, paragraph 2, sets out what is to be regarded as context. Article 31, paragraph 3, provides that there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation or application of the treaty, any subsequent practice which establishes such an agreement, and any relevant rules of international law applicable in the relations between the parties (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64). These means of interpretation are to be considered by way of a single combined operation (see Articles 27 and 28, paragraph 8 of the commentary, ILC Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 219-220).

178. In the process of interpretation, the Court will take into consideration the rules, principles, mechanisms and institutions established under the climate change treaties in order to identify and clarify the obligations of the parties. In this context, the key principles that permeate all three climate change treaties are those contained in Article 3 of the UNFCCC. These guiding principles are common but differentiated responsibilities and respective capabilities, the precautionary approach or principle, sustainable development, equity and intergenerational equity. The Court considered these principles in paragraphs 147 to 158 above. The Court recalls that, while these principles do not constitute standalone obligations within the climate change treaty framework, they guide the interpretation of the treaty obligations. In addition to these principles, the Court notes that under the climate change treaties, the duty to co-operate, identified above as an obligation under customary international law (see paragraphs 140-142 above), also serves as a guiding principle. Below, the Court addresses the specific manner in which these principles are incorporated in the climate change treaties.

179. The principle of common but differentiated responsibilities and respective capabilities is a cardinal principle of the climate change treaty framework, which is incorporated in several provisions of the climate change treaties (see UNFCCC, preamble, Article 3, paragraphs 1 and 2, and Article 4; Kyoto Protocol, Article 10; Paris Agreement, Article 2, paragraph 2, and Article 4, paragraphs 3, 4 and 19; see also paragraphs 148-151 above). While the UNFCCC and the Paris Agreement establish obligations on all parties, they recognize that such obligations may differ depending on parties' economic situations, their historic contribution to anthropogenic GHG emissions and their capabilities to adapt to and mitigate the adverse impacts of climate change. For instance, Article 3, paragraph 1, of the UNFCCC states that "developed country Parties should take the lead in combating climate change and the adverse effects thereof", and Article 3, paragraph 2, of the UNFCCC states that full consideration should be given to "[t]he specific needs and special circumstances of developing country Parties". Likewise, Article 4, paragraph 3, of the Paris Agreement provides that each party's NDCs must reflect its differing national circumstances and capabilities. The Kyoto Protocol's approach of requiring quantified emission limitation and reduction

commitments from developed country parties and other parties undergoing the process of transition to a market economy, but not from developing countries, is an application of the principle of common but differentiated responsibilities and respective capabilities.

180. The Court observes that the climate change treaties also incorporate the precautionary approach or principle (see paragraph 158 above). Article 3, paragraph 3, of the UNFCCC, provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures". The principle is incorporated into the Kyoto Protocol and Paris Agreement by reference (see Paris Agreement, third preambular paragraph; Kyoto Protocol, fourth preambular paragraph ("Being guided by Article 3 of the [UNFCCC]")). The Court has previously had occasion to acknowledge the possible relevance of the precautionary approach or principle in international environmental law and in the interpretation and application of treaties pertaining to environmental protection (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 164), and will take into account this approach or principle in interpreting and applying parties' obligations under the climate change treaties.

181. The principle of sustainable development is also incorporated in the climate change treaties as a guiding principle (Article 3, paragraph 4, of the UNFCCC; see also Article 10 of the Kyoto Protocol, Article 3 of the Paris Agreement and paragraph 147 above). As with the other principles, the Court observes that the principle of sustainable development does not in itself create specific rights and obligations for States, but informs the interpretation of the obligations under the climate change treaties.

182. Furthermore, the climate change treaties incorporate the concepts of equity and intergenerational equity. Article 3, paragraph 1, of the UNFCCC stipulates that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity". Both the Kyoto Protocol and the Paris Agreement are guided by these principles (see Paris Agreement, third preambular paragraph; Kyoto Protocol, fourth preambular paragraph). Additionally, these treaties contain further provisions concerning equity, such as Article 2, paragraph 2, of the Paris Agreement which states that the Agreement "will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances". In the context of obligations under the climate change treaty framework, the Court considers that equity and intergenerational equity are thus to be taken into account in the interpretation of the relevant treaties (see paragraphs 152-157 above).

183. The Court observes that the duty to co-operate is also identified as a principle within the climate change treaty framework and that several provisions of the UNFCCC, the Kyoto Protocol and the Paris Agreement implement this principle in different ways (UNFCCC, preamble, Article 3, paragraph 5, Article 4, paragraph 7, and Articles 5, 6 and 9; Kyoto Protocol, Articles 10, 11 and 12; Paris Agreement, Articles 5, 6, 7 and 8, Article 9, paragraph 1, Article 10, paragraphs 2 and 6, Articles 11 and 12, and Article 13, paragraphs 9 and 10). The content of the duty to co-operate under each treaty is considered below.

184. In interpreting their obligations under the climate change treaties, States also need to have recourse to the relevant decisions of the governing bodies of these treaties, which are the COP of the UNFCCC, the COP serving as the meeting of the Parties (hereinafter the "CMA") to the Kyoto Protocol and the CMA to the Paris Agreement. The Court observes that in certain circumstances the decisions of these bodies have certain legal effects. First, when the treaty so provides, the decisions of COPs may create legally binding obligations for the parties. This is the case with Article 4, paragraph 8, of the Paris Agreement which stipulates that,

> "[i]n communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement".

Second, decisions of these bodies may constitute subsequent agreements under Article 31, paragraph 3 *(a)*, of the Vienna Convention on the Law of Treaties, in so far as such decisions express agreement in substance between the parties regarding the interpretation of the relevant treaty, and thus are to be taken into account as means of interpreting the climate change treaties (see Conclusion 11, paragraph 38 of the commentary, ILC Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, pp. 73-74).

185. Thus, as indicated above (see paragraph 174), and in accordance with the meaning and scope of the questions (see paragraphs 98-100), the Court will identify the obligations of States under each treaty, in so far as they relate directly to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. In this regard, the Court observes that it is not required to address each and every obligation of the parties under the climate change treaties. Indeed, an exercise which mechanically lists the various obligations, procedural and substantive, would not assist the General Assembly, whose request in question *(a)* focuses on the obligations of States "under international law" generally. Therefore, the Court will focus its inquiry on the main obligations of States under each treaty pertaining to the obligation to protect the climate system from anthropogenic GHG emissions, which it considers may be grouped broadly into obligations of mitigation, adaptation and co-operation.

186. Accordingly, the Court is of the view that it need not address in detail provisions that exclusively deal with the institutional, methodological or procedural framework within which parties perform their treaty obligations, such as provisions addressing voting procedures, the composition of bodies established under the treaties, or participatory rights relating to those bodies. The Court is nevertheless aware of the important role of the institutional and procedural framework of the climate change treaties in the effective realization of the object and purpose of these treaties.

2. Relationship between the UNFCCC, the Kyoto Protocol and the Paris Agreement

187. Participants expressed divergent views on the relationship between the three treaties that comprise the United Nations climate change treaty framework. On this issue, the Court observes that some participants expressed the view that the *lex posterior* rule, reflected in Article 30 of the Vienna

Convention on the Law of Treaties, governs the relationship between the three climate change treaties. In this regard, it was argued that States' obligations under the Paris Agreement have replaced their obligations under the UNFCCC and the Kyoto Protocol, and that under the *lex posterior* and *lex specialis* maxims, there is a general presumption that the Paris Agreement should prevail over the other instruments in the United Nations climate change framework in the case of norm conflict.

188. The Court recalls that Article 30 of the Vienna Convention on the Law of Treaties, which governs the rights and obligations of States parties to successive treaties relating to the same subject-matter, provides in relevant part as follows:

> "2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

189. The Court observes that paragraphs 2 and 3 of Article 30 do not apply to the situation at hand. Paragraph 2 concerns situations where a later treaty specifies that it is "subject to" or "is not to be considered as incompatible with" an earlier or later treaty. Paragraph 3 concerns situations where "all the parties to the earlier treaty are parties also to the later treaty", which is not the situation that exists, since not all parties to the UNFCCC are also parties to the Kyoto Protocol and Paris Agreement. Moreover, with respect to the applicability of the *lex posterior* rule under customary international law, the Court observes that it is only where the treaties are incompatible, i.e. their obligations cannot be complied with simultaneously, that the later-in-time obligation will supersede the earlier obligation. The mere fact that the treaties regulate the same subject-matter does not necessarily constitute a conflict or result in one superseding the other.

190. The Court will ascertain the relationship between the treaties comprising the climate change treaty framework by assessing the compatibility of their obligations. This determination involves an interpretation of the three treaties to be carried out by applying the rules of treaty interpretation codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

191. Commencing its assessment with the UNFCCC, the foundational treaty to address climate change, the Court observes that the treaty itself contains provisions relevant to its relationship with the Kyoto Protocol and the Paris Agreement. Article 2 of the UNFCCC recognizes the authority of the COP of the UNFCCC to adopt "related legal instruments" in order to achieve its purposes. Article 2 further provides that the related legal instruments shall operate "in accordance with the relevant provisions of the [UNFCCC]". Additionally, Article 17 of the UNFCCC provides that "[t]he Conference of the Parties may, at any ordinary session, adopt protocols to the Convention".

192. As regards the Kyoto Protocol, the Court notes that the preamble states that the Protocol is "[i]n pursuit of the ultimate objective of the [UNFCCC] as stated in its Article 2". In addition to this recognition of its relationship to the UNFCCC, the Court observes that the Kyoto Protocol strengthened the commitments for developed countries contained in Article 4, paragraph (2) *(a)* and *(b)*, of the UNFCCC, and for other parties included in UNFCCC's Annex I, by stipulating quantified emission reduction and limitation obligations (Article 3). The Kyoto Protocol is a legally binding international agreement which operationalizes obligations under the Framework Convention by committing certain developed country parties to limit and reduce GHG emissions in accordance with agreed individual targets. The Kyoto Protocol contains its own entry into force clause and has its own participation criteria, although all parties to the Protocol are required to be parties to the UNFCCC.

193. Unlike the Kyoto Protocol, the Paris Agreement is not a protocol to the UNFCCC under Article 17 of the Framework Convention. Rather, the Paris Agreement is the outcome of a process established by decision 1/CP.17 dated 11 December 2011 of the COP to the UNFCCC (see decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, 11 December 2011, UN doc. FCCC/CP/2011/9/Add.1). This decision, referred to as the Durban mandate for the Paris Agreement, called for the development of "a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties" (*ibid.*, p. 2, para. 2).

194. The preamble to the Paris Agreement states that the Agreement is adopted "[i]n pursuit of the objective of the [UNFCCC], and being guided by its principles". Articles 2 and 4 of the Paris Agreement are key to determining its relationship with the UNFCCC. Article 2, paragraph 1, states that "[t]his Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change", and goes on to establish a temperature goal for the States parties to achieve. Article 4, paragraph 1, requires the States parties to aim to reach global peaking of GHG emissions "as soon as possible". These commitments and objectives, in the Court's view, are in furtherance of the UNFCCC's "ultimate objective" of "stabilization of the greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (UNFCCC, Article 2).

195. In the view of the Court, there is no incompatibility between the three climate change treaties. On the contrary, they are mutually supportive, with the Kyoto Protocol and Paris Agreement providing greater specification to the general obligations contained in the UNFCCC. Indeed, the UNFCCC being a "framework convention", and in view of the general character of the obligations contained therein, the subsequent decisions by the parties — including decisions adopting protocols and agreements under the UNFCCC — are intended to interpret or give substance to obligations in the UNFCCC, and not to abrogate or to modify them. Notwithstanding these observations, should there appear to be conflicts between the treaties, the Court is of the view that these should be resolved by applying the rules of treaty interpretation (see also paragraphs 310-311 below).

3. Obligations of States under the UNFCCC

196. The Court now turns to the obligations of parties under the UNFCCC and observes that the UNFCCC provides a general framework for addressing the problem of climate change caused by anthropogenic GHG emissions. In this connection, the UNFCCC addresses the full range of GHGs, with the exception of those already controlled by the Montreal Protocol (see UNFCCC, Article 4).

197. The "ultimate objective" of the UNFCCC, as set out in Article 2, is to achieve "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", and to ensure that "[s]uch a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". In the Court's view, this provision sets the objective "in the light of which the other [t]reaty provisions are to be interpreted and applied" (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 814, para. 28).

198. In pursuit of its "ultimate objective", Article 3 of the UNFCCC calls on the parties to take into account principles such as common but differentiated responsibilities and respective capabilities, the specific needs and special circumstances of developing country parties, sustainable development and co-operation, and precautionary measures in their implementation of the Framework Convention.

199. A key feature of the Framework Convention is the distinction it draws between "developed country Parties" and "developing country Parties", which are subject to differing obligations. The Framework Convention accomplishes this by providing for specific additional obligations on certain developed country parties and other parties listed in Annex I (hereinafter "Annex I parties"). While Article 4, paragraph 1, contains "commitments" for all parties, based on their "common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances", Article 4, paragraph 2, requires Annex I parties to take the lead in combating climate change by adopting policies and measures to mitigate climate change by limiting their GHG emissions and enhancing their GHG sinks and reservoirs. Furthermore, Article 4, paragraph 3, requires developed country parties and other parties included in Annex II (hereinafter "Annex II parties") — which comprise a subset of parties contained in Annex I — to provide financial assistance and technology transfers to developing country parties. The Court will analyse these "commitments" applicable to the various categories of parties in order to determine whether they constitute "obligations of States under international law" within the meaning of question *(a)*, and, if so, the nature and scope of such obligations.

(a) ***Mitigation obligations under the UNFCCC***

200. The Court considers that mitigation lies at the heart of the UNFCCC's objective, which is to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The Framework Convention seeks to achieve its mitigation objective in two ways: first, by limiting anthropogenic GHG emissions by sources,

and second, by preserving and enhancing sinks and reservoirs of GHGs (Article 4, paragraph 2 *(a)*). In this regard, the Court notes that a source is "any process or activity which releases a greenhouse gas, an aerosol or a precursor of a greenhouse gas into the atmosphere"; a sink is a process, activity or mechanism that removes GHGs from the atmosphere; and a reservoir is part of the climate system that enables GHGs to be stored (Article 1).

201. The main obligations under the Framework Convention concerning mitigation are to be found in Article 4, which reads in relevant part as follows:

> "1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:
>
> *(a)* Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;
>
> *(b)* Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;
>
> . . . . . .
>
> *(j)* Communicate to the Conference of the Parties information related to implementation, in accordance with Article 12."

202. The Court considers that Article 4, paragraph 1, contains legally binding obligations. The ordinary meaning of the terms of the provision, including the use of the word "shall", indicates the intention of the parties to establish legally binding obligations. The context, including the establishment of a procedure for the implementation of the commitments in Article 10, paragraph 2, read with Article 12, paragraph 1, also serves to indicate that the commitments are legally binding. This interpretation is, moreover, consistent with the object and purpose of the UNFCCC as reflected in Article 2. The practice of the parties subsequent to the adoption of the UNFCCC also establishes their agreement as to this interpretation. For instance, non-Annex I parties submit biennial reports containing updates of their national inventories of GHG emissions, and Annex I parties make annual submissions of national inventory reports which contain detailed information and updates on all GHG emissions and removals.

203. The Court observes that certain obligations under Article 4, paragraph 1, such as those to develop, update, publish and make available national inventories of anthropogenic GHG emissions and removals by sinks, as set out in Article 4, paragraph 1 *(a),* and to formulate and publish national programmes, as prescribed by Article 4, paragraph 1 *(b)*, and the obligation to communicate information to the COP, as required by Article 4, paragraph 1 *(j)*, are obligations of result. These obligations require the parties to bring about a particular result and, in this instance, they also prescribe certain actions, conduct or means specifically determined by the obligation to bring about the result. Other obligations under Article 4, paragraph 1, are obligations of conduct because they do not require parties to bring about a particular result but rather require parties to use their best efforts to achieve certain results relating to mitigation. The obligation to co-operate in the development and diffusion of technologies and practices "that control, reduce or prevent anthropogenic emissions of greenhouse gases" (Article 4, paragraph 1 *(c)*) is an example of such an obligation.

204. As the Court observed in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, parties to a treaty may accept "obligations of conduct, obligations of performance, and obligations of result" under the same instrument (*Judgment, I.C.J. Reports 1997*, p. 77, para. 135). In the Court's view, the legal obligations under Article 4, paragraph 1, are interconnected obligations of conduct and result.

205. The Court now turns to Article 4, paragraph 2, of the Framework Convention, which reads in relevant part as follows:

> "2. The developed country Parties and other Parties included in annex I commit themselves specifically as provided for in the following:
>
> *(a)* Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs . . .
>
> *(b)* [E]ach of these Parties shall communicate . . . detailed information on its policies and measures referred to in subparagraph *(a)* above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases . . ., with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases[.]
>
> . . . . . .
>
> *(e)* Each of these Parties shall:
>
> (i) coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention; and

> (ii) identify and periodically review its own policies and practices which encourage activities that lead to greater levels of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol than would otherwise occur[.]"

For the same reasons outlined in respect of commitments under Article 4, paragraph 1, the Court is of the view that the commitments in Article 4, paragraph 2, establish legally binding obligations for Annex I parties.

206. The Court observes that Article 4, paragraph 2, sets forth a number of distinct but interrelated obligations. First, it provides that each Annex I party "shall adopt" national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic GHG emissions and protecting and enhancing its GHG sinks and reservoirs (Article 4, paragraph 2 *(a)*). Second, Annex I parties are obliged to periodically communicate detailed information on such policies and measures, as well as on their resulting projected anthropogenic emissions by sources and removals by sinks of GHGs with the aim of returning individually or jointly to their 1990 levels (Article 4, paragraph 2 *(b)*). Third, there is an obligation on Annex I parties to co-ordinate as appropriate with other such parties, relevant economic and administrative instruments developed to achieve the objective of the Convention (Article 4, paragraph 2 *(e)* (i)). Finally, the Annex I parties are obliged to identify and periodically review their own policies and practices which lead to greater levels of anthropogenic GHG emissions (Article 4, paragraph 2 *(e)* (ii)).

207. Having identified the mitigation obligations of all parties (see Article 4, paragraph 1) and the mitigation obligations of Annex I parties (see Article 4, paragraph 2), the Court finds it necessary to recall that all obligations identified above are legally binding upon the parties to which they pertain, regardless of whether the obligation in question is one of result or one of conduct. As the Court has observed (see paragraph 175 above), the distinction between obligations of conduct and obligations of result is not necessarily a strict one.

208. It must be stressed that both types of obligations may result in the responsibility of a State for breach of the relevant obligation. While the issue of responsibility is addressed further under question *(b)* (see Part V below), the Court finds it useful here to note that, in the case of an obligation of conduct, a State acts wrongfully if it fails to use all means at its disposal to bring about the objective envisaged under the obligation, but will not act wrongfully if it takes all measures at its disposal with a view to fulfilling the obligation even if the desired objective is ultimately not achieved. In the case of an obligation of result, a State acts wrongfully if it fails to bring about the result required under the obligation. At the same time, it cannot be said that an obligation of result, such as an obligation to "adopt national policies and take corresponding measures on the mitigation of climate change", will be met merely by the adoption of any policies and the taking of corresponding measures. To comply with this obligation of result, the policies so adopted and the measures so taken must be such that they are able to achieve the required goal. In other words, the adoption of a policy, and the taking of related measures, as a mere formality is not sufficient to discharge the obligation of result.

(b) ***Adaptation obligations under the UNFCCC***

209. The Court observes that adapting to the adverse effects of climate change is, along with mitigation, a major area of action for parties under the Framework Convention. Adaptation is defined by the IPCC as "the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities" (IPCC 2023 Glossary, p. 120; see paragraph 86 above).

210. Several provisions of the Framework Convention refer to obligations relating to adaptation. For instance, Article 4, paragraph 1 *(b)*, of the Framework Convention provides that all parties are to "[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to . . . facilitate adequate adaptation to climate change". Article 4, paragraph 1 *(e)*, establishes an obligation for parties to

> "[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods".

Article 4, paragraph 1 *(f)*, requires parties to "[t]ake climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions". It also calls on parties to "employ appropriate methods, for example impact assessments, formulated and determined nationally", with a view to minimizing adverse effects that adaptation projects or measures could have on the economy, on public health or on the quality of the environment. These provisions, like all provisions in Article 4, paragraph 1, are introduced with the term "shall" and are legally binding in nature.

211. While the aforementioned obligations pertain to all parties, Article 4, paragraph 4, of the UNFCCC provides that Annex II parties "shall" assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects. This is a legally binding obligation on all parties that are listed in Annex II.

212. Article 4, paragraph 8, of the Convention obliges parties to give full consideration, in implementing their commitments, to

> "what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures".

It also lists categories of countries that may be particularly affected (Article 4, paragraph 8 *(a)* to *(i)*). The Court observes that funding, insurance and the transfer of technology are three adaptation measures identified in Article 4, paragraph 8. Article 4, paragraph 9, further requires that "Parties

shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology".

213. The Court considers that the phrases "give full consideration" and "take full account" in paragraphs 8 and 9, respectively, have the effect of giving parties some discretion in the implementation of their commitments under Article 4. However, this discretion does not detract from their character as legally binding obligations. In this regard, the Court notes that there exists an institutional framework, consisting of, *inter alia*, the COP and a subsidiary body for compliance, which serves to clarify the obligations under the UNFCCC. To this end, several decisions of the COP are intended to aid in the implementation of parties' obligations under the UNFCCC and provide clarification and specification to obligations under Article 4, paragraphs 8 and 9 (see e.g. decision 3/CP.3, Implementation of Article 4, paragraphs 8 and 9, of the Convention, 11 December 1997, UN doc. FCCC/CP/1997/7/Add.1, p. 32; decision 5/CP.4, Implementation of Article 4.8 and 4.9 of the Convention (decision 3/CP.3 and Articles 2.3 and 3.14 of the Kyoto Protocol), 14 November 1998, UN doc. FCCC/CP/1998/16/Add.1, p. 17; decision 12/CP.5, Implementation of Article 4, paragraphs 8 and 9, of the Convention and matters relating to Article 3, paragraph 14, of the Kyoto Protocol, 4 November 1999, UN doc. FCCC/CP/1999/6/Add.1, p. 32; decision 5/CP.7, Implementation of Article 4, paragraph 8 and 9, of the Convention (decision 3/CP.3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol), 10 November 2001, UN doc. FCCC/CP/2001/13/Add.1, p. 32; and decision 1/CP.10, Buenos Aires programme of work on adaptation and response measures, 17-18 December 2004, UN doc. FCCC/CP/2004/10/Add.1, p. 2) (see paragraph 184 above).

(c) ***Obligations of co-operation and assistance under the UNFCCC***

214. The Court observes that the UNFCCC establishes an obligation for parties to co-operate in different areas regarding "the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases" (Article 4, paragraph 1 *(c)*) and "the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems" (Article 4, paragraph 1 *(d)*), as well as in relation to "adaptation to the impacts of climate change" (Article 4, paragraph 1 *(e)*). The Convention also requires co-operation in, and promotion of, "scientific, technological, technical, socioeconomic and other research" (Article 4 , paragraph 1 *(g)*, and Article 5), "exchange of relevant scientific, technological, technical, socioeconomic and legal information" (Article 4, paragraph 1 *(h)*), and co-operation "in education, training and public awareness related to climate change" (Article 4, paragraph 1 *(i)*), including by facilitating "[p]ublic participation in addressing climate change and its effects and developing adequate responses" (Article 6 *(a)* (iii)).

215. The Court considers that international co-operation is indispensable in the field of climate change, and that the customary duty to co-operate for the protection of the environment is reflected in several provisions of the climate change treaties, including the UNFCCC (see paragraphs 140-141 above and 260-267 below).

216. The rationale for co-operation in the UNFCCC may be found in the treaty's preamble, which provides that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response" (sixth preambular paragraph). The Court considers that paragraph 1 *(c)*, *(d)*, *(e)*, *(g)*, *(h)* and *(i)*, and paragraphs 3 to 5 of Article 4 of the UNFCCC give precise content and scope to the duty to co-operate. In the implementation of these provisions, all parties must co-operate in good faith in order to achieve the objective of each provision.

217. In Article 4, paragraphs 3 to 5, the Framework Convention provides for certain obligations for "developed country Parties and other developed Parties included in annex II" to provide financial assistance, technology transfers and other forms of support to developing country parties, especially those countries that are particularly vulnerable to the adverse effects of climate change, to assist them in meeting their commitments under the UNFCCC.

218. The duty to co-operate is an obligation of conduct, the fulfilment of which is assessed against a standard of due diligence (see paragraphs 280-300 below). Good faith co-operation in this context would entail taking into account the guidance provided by the COP decisions pertaining to financial transfers, technology transfers and capacity-building. The guidelines, frameworks and mechanisms adopted by COP decisions aid in the effective implementation of the UNFCCC's provisions. In the view of the Court, a case-by-case determination of the adequacy of current financial and technology transfer commitments is to be made by the application of the principle of good faith, which governs the duty of co-operation (see paragraph 141).

4. Obligations of States under the Kyoto Protocol

219. The Court now turns to consider the Kyoto Protocol to the UNFCCC. The Kyoto Protocol has concretized certain obligations under the UNFCCC by requiring quantified emission reduction commitments for Annex I parties listed in Annex B of the Protocol. In particular, it has established commitments for these parties to limit and reduce their GHG emissions in accordance with agreed individual targets over a first commitment period from 2008 to 2012 (Article 3, paragraph 1). A second commitment period for some States from 2013 to 2020 was adopted by the Doha Amendment to the Kyoto Protocol on 8 December 2012, and entered into force on 31 December 2020. At present, no additional commitment period beyond 2020 has been set.

220. The Kyoto Protocol specifies and strengthens the mitigation obligations under the UNFCCC. It sets binding GHG emission reduction targets for 37 developed States and economies in transition and for the European Union, which are listed in its Annex B. Over the first commitment period, which ran from 2008 to 2012, the States and entities in Annex B that were parties to the Kyoto Protocol were required to reduce emissions by an average of 5 per cent below their levels of emissions in 1990 (Article 3, paragraph 1). The Protocol also establishes a system to monitor progress made by States and entities in Annex B.

221. In the absence of a further commitment period, several participants submitted that the Kyoto Protocol is no longer relevant and need not be addressed by the Court in these proceedings. Indeed, the Protocol is not listed amongst the instruments enumerated in the *chapeau* to the questions posed by the General Assembly to which the Court was requested to have "particular regard" in formulating its reply. However, the Court notes that the absence of a new commitment period does not deprive the Kyoto Protocol of its legal effect (see paragraph 120 above). The Kyoto Protocol remains in force and its provisions may still serve as, *inter alia*, (i) interpretative aids for the identification of obligations under the climate change treaty framework and (ii) substantive provisions to assess the compliance of Annex B parties with applicable emission reduction targets, i.e. to determine whether a State, during the relevant commitment period, has complied with its emission reduction commitments. Thus, non-compliance with emission reduction commitments by a State may constitute an internationally wrongful act.

5. Obligations of States parties under the Paris Agreement

222. The Court now turns to address the obligations of States parties to the Paris Agreement.

223. The Court observes that the submissions of most participants in these proceedings centred on the Paris Agreement, which was stated to represent the most comprehensive treaty addressing the problem of climate change. Indeed, the Agreement is the most recent legally binding universal instrument addressing the issue of climate change and its provisions set out obligations relating to mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building. The object and purpose of the Paris Agreement, reflected in its Article 2, paragraph 1, is to "strengthen the global response to the threat of climate change" by

> "*(a)* Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> *(b)* Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
>
> *(c)* Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."

The Court considers that the aim of "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels" and pursuing efforts "to limit the temperature increase to 1.5°C above pre-industrial levels" represent an important concretization of the Framework Convention's overall objective of averting dangerous concentrations of GHGs in the atmosphere. Article 2, paragraph 1, of the Paris Agreement confirms this relationship by stating that the temperature goal is aimed at "enhancing the implementation of the [Framework] Convention,

including its objective". Indeed, the preamble to the Paris Agreement makes clear that the Agreement is concluded "[i]n pursuit of the objective of the Convention, [and] being guided by its principles". Given the aims of the Agreement contained in Article 2, paragraph 1 *(a)* to *(c)*, as well as the Agreement's relationship with the Framework Convention, the Court considers that the obligations under the Paris Agreement that are relevant for the purposes of the Court's inquiry may be grouped together as obligations of mitigation, adaptation and co-operation, including in the fields of capacity-building and transfers of finance and technology.

(a) ***General observations***

224. As a general matter, the Court notes that while the Paris Agreement provides for limiting the global average temperature increase to well below 2°C above pre-industrial levels as a goal and 1.5°C as an additional effort, 1.5°C has become the scientifically based consensus target under the Paris Agreement. At the twenty-sixth COP, which was the third CMA to the Paris Agreement, parties "[r]ecognize[d] that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C and *resolve[d] to pursue efforts to limit the temperature increase to 1.5°C*" (see decision 1/CMA.3, Glasgow Climate Pact, 13 November 2021, UN doc. FCCC/PA/CMA/2021/10/Add.1, p. 4, para. 21 (emphasis added)). Subsequently, at the fifth CMA, parties to the Paris Agreement reiterated this resolve and encouraged all parties to submit

> "ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5°C, as informed by the latest science, in the light of different national circumstances" (decision 1/CMA.5, Outcome of the first global stocktake, 13 December 2023, UN doc. FCCC/PA/CMA/2023/16/Add.1, p. 7, para. 39).

In the Court's view, these decisions express the agreement in substance between the parties regarding the interpretation of Articles 2 and 4 of the Paris Agreement, and thus constitute subsequent agreements in relation to the interpretation of the Paris Agreement within the meaning of Article 31, paragraph 3 *(a)*, of the Vienna Convention on the Law of Treaties (see paragraph 184 above). Accordingly, the Court considers the 1.5°C threshold to be the parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement. The Court adds that this interpretation is consistent with Article 4, paragraph 1, of the Paris Agreement, which requires that mitigation measures be based on the "best available science" (see paragraph 74 above).

225. As noted above, the temperature goal in the Paris Agreement is intended to promote the overall object and purpose of the climate change treaty framework, namely "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system" (UNFCCC, Article 2). The Court considers that the Framework Convention's overall objective constitutes the object and purpose of the Paris Agreement, with the temperature goal providing a means for achieving this object and purpose.

226. The Court notes at this juncture that Article 2 of the Paris Agreement, which contains the aforementioned temperature goal, states that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances". There are several references to the principle of common but differentiated responsibilities and respective capabilities in the Agreement, indicating the key role that the principle plays in the interpretation of the provisions of the Agreement (see third preambular paragraph, and Article 2, paragraph 2, Article 4, paragraph 3, and Article 4, paragraph 19). However, it is observed that this principle, which also features in the Framework Convention and COP decisions, has been formulated differently in the Paris Agreement through the addition of the phrase "in the light of different national circumstances". In the view of the Court, the additional phrase does not change the core of the principle of common but differentiated responsibilities and respective capabilities; rather, it adds nuance to the principle by recognizing that the status of a State as developed or developing is not static. It depends on an assessment of the current circumstances of the State concerned. The use of the terms "will be implemented to reflect" in Article 2 generates an expectation that the Paris Agreement will be implemented by the parties in a manner that will reflect their common but differentiated responsibilities and respective capabilities in the light of different national circumstances.

227. Furthermore, the Paris Agreement contains provisions requiring developed States parties to provide support — in the form of financial resources (see Article 9), technology transfers (see Article 10) and capacity-building actions (see Article 11) — to developing States parties with respect to their mitigation and adaptation responsibilities. These provisions reflect a duty to co-operate.

228. The Court also notes that the Paris Agreement contains several obligations of conduct and obligations of result which are mutually supportive. As observed earlier, with regard to obligations of conduct under the customary duty to prevent significant harm to the environment, parties are required to act with due diligence (see paragraph 135 above). That is so because "[t]he notions of obligations 'of due diligence' and obligations 'of conduct' are connected" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 111).

229. Thus, the compliance of parties with their obligations of conduct under the Paris Agreement is assessed on the basis of whether the party in question exercised due diligence and employed best efforts by using all the means at its disposal in the performance of that obligation (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101).

(b) ***Mitigation obligations under the Paris Agreement***

230. The Court recalls that mitigation involves human intervention to reduce emissions or enhance carbon sinks (see paragraph 85 above). The Court notes that the mitigation obligations of States parties under the Paris Agreement are set out in Article 4. Paragraph 1 of that Article states that, in order to achieve the temperature goal set forth in Article 2, "Parties aim to reach a global

peaking of greenhouse gas emissions as soon as possible . . . and to undertake rapid reductions thereafter", so as to achieve net zero emissions by balancing anthropogenic GHG emissions and their removal by sinks by the second half of the century.

231. The Court observes that the achievement of the temperature goal set out in Article 2, which is referenced in Article 4, paragraph 1, as well as the aim to reach a global peaking of GHG emissions as soon as possible, are obligations addressed to all parties as a whole. Thus, the temperature goal contained in Article 2 and referenced in Article 4, paragraph 1, constitutes, in addition to the object and purpose of the Agreement, the "context" relevant for the interpretation of other obligations found elsewhere in the Paris Agreement, such as the mitigation obligations under Article 4. As noted by several participants in their response to the question put by a Member of the Court, this context, together with the ordinary meaning of the terms of the Agreement, as well as its object and purpose play an important role in the interpretation of the other provisions of the Agreement, including Article 4.

232. Article 5 of the Paris Agreement elaborates on the means of achieving the net balance between GHG emissions and carbon sinks contemplated in Article 4, paragraph 1, providing that "Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases . . ., including forests". The Paris Agreement thus reinforces the obligations relating to the promotion and enhancement of carbon sinks and reservoirs set forth in Article 4 of the UNFCCC.

233. To achieve its objectives, the Paris Agreement establishes obligations concerning NDCs whereby parties outline and communicate their climate actions. Under Article 4, paragraph 2, of the Agreement each party is obligated to prepare, communicate and maintain the successive NDCs that it intends to achieve. The Court will now consider the specific mitigation obligations under the Paris Agreement.

(i) Obligation to prepare, communicate and maintain nationally determined contributions

234. The individual mitigation obligations of States are principally reflected in Article 4, paragraph 2, of the Paris Agreement which reads: "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." Both sentences in Article 4, paragraph 2, establish legally binding obligations upon States. The use of the prescriptive term "shall", as well as the reference to "[e]ach Party" in the first sentence and "Parties" in the second sentence, make plain that this provision sets forth two binding legal obligations which must be performed by parties individually.

235. In respect of the obligation contained in the first sentence of Article 4, paragraph 2, the Court observes that the obligation to prepare, communicate and maintain successive NDCs is procedural in nature and an obligation of result. Another obligation of result pertaining to the preparation, communication and maintenance of NDCs is found in Article 4, paragraph 9, of the

Paris Agreement, which provides that "[e]ach Party shall communicate a nationally determined contribution every five years". Similarly, Article 4, paragraph 13, provides that "Parties shall account for their nationally determined contributions", and Article 4, paragraph 12, provides that parties "shall" register them.

236. Given these obligations of result, the failure to prepare, communicate and maintain successive NDCs, to account for them and to register them would constitute a breach of the above-mentioned obligations. As the Court has observed in connection with the obligation to "adopt national policies and take corresponding measures", the mere formal preparation, communication and maintenance of successive NDCs is not sufficient to comply with the obligations under Article 4 (see paragraph 208 above). The content of the NDCs is equally relevant to determine compliance.

(ii) Content of nationally determined contributions

237. The Court now turns to the question whether the content of the NDCs is left to the discretion of each party under the scheme of the Paris Agreement. The Court recalls that some participants argued in their written and oral submissions that the content of NDCs is "self-defined" or subject to the "discretion" of the parties.

238. Whether, and the extent to which, NDCs are discretionary depends on the interpretation of Article 4, which is to be undertaken in good faith, on the basis of the ordinary meaning of the terms in Article 4, in their context and in light of the object and purpose of the Paris Agreement.

239. The Court observes that Article 4, paragraph 2, is silent on the question of the content of NDCs and the discretion afforded to each party to determine their NDCs. The provision neither sets forth requirements for the content of NDCs, nor indicates that the parties have an unfettered discretion in their preparation.

240. However, the Court notes that Article 4, paragraph 3, of the Paris Agreement sets out certain expectations and standards that apply to parties in preparing their NDCs. It reads:

> "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

While Article 4, paragraph 3, uses the term "will", rather than the prescriptive term "shall" in relation to the content of NDCs, the Court considers that the provision is not to be read as merely hortatory, as suggested by some participants. Rather, the term "will" is used here in a prescriptive sense, reflecting the expectation that "successive nationally determined contributions will represent a progression" and "reflect [a party's] highest possible ambition", without prescribing precisely what

constitutes a progression, or what reflects a party's highest possible ambition. In these proceedings, it falls on the Court to shed light on the meaning and scope of the terms contained in Article 4, paragraph 3, thereby clarifying for parties their obligations relating to the content of their NDCs.

241. First, that "[e]ach Party's successive nationally determined contribution will represent a progression" beyond that party's current NDCs means that a party's NDCs must become more demanding over time. The existence of such standards in setting NDCs is also informed by Article 4, paragraph 2 *(a)*, of the UNFCCC, which requires developed countries to take mitigation measures, and by the customary duty to prevent significant harm to the environment, which requires States to exercise due diligence, including with respect to activities such as setting NDCs (see paragraphs 135-139 above).

242. Second, a party's NDCs must reflect "its highest possible ambition". While this term is not defined in the Paris Agreement, the Court considers that the level of ambition to be reflected in a party's NDCs has not been left entirely to the discretion of the parties. The provision, when interpreted in its context and in light of its object and purpose and the customary obligation to prevent significant harm to the environment, reveals that the content of a party's NDCs must, in fulfilment of its obligations under the Paris Agreement, be capable of making an adequate contribution to the achievement of the temperature goal. In the present instance, the relevant context is to be found, *inter alia*, in Article 3, which sets the expectation that parties are to "undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the *view to achieving the purpose of this Agreement as set out in Article 2*" (emphasis added). This provision reveals the necessity for the ambition contained in a party's NDC to relate to the object and purpose of the Agreement set out in Article 2, i.e. to hold the increase in the global average temperature to below 1.5°C, which the Court has interpreted to be the primary temperature goal under the Agreement (see paragraph 224 above).

243. Additionally, Article 4, paragraph 9, provides that the NDCs must be "informed by the outcomes of the global stocktake referred to in Article 14". In this regard, the outcome of the first global stocktake, as adopted in decision 1/CMA.5 at COP 28, makes clear that "despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals" (decision 1/CMA.5, 13 December 2023, UN doc. FCCC/PA/CMA/2023/16/Add.1, p. 3, para. 2). It also recognizes that

> "limiting global warming to 1.5°C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050" (*ibid.*, p. 5, para. 27).

244. Further context is to be found in the transparency and content obligations prescribed under Article 4. Paragraph 8 of that Article provides that, in communicating their NDCs, parties "shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting

of the Parties to this Agreement". Paragraph 13 of Article 4 requires Parties to account for their NDCs and to do so in a manner that promotes "environmental integrity, transparency, accuracy, completeness, comparability and consistency" and ensures "the avoidance of double counting". In the Court's view, such transparency and accountability provisions would be meaningless if the parties had unfettered discretion in setting their NDCs.

245. In light of the above, the Court considers that the discretion of parties in the preparation of their NDCs is limited. As such, in the exercise of their discretion, parties are obliged to exercise due diligence and ensure that their NDCs fulfil their obligations under the Paris Agreement and thus, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels, as well as the overall objective of the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".

246. The Court recalls that the standard of due diligence varies depending on a range of factors (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117). In the current context, because of the seriousness of the threat posed by climate change, the standard of due diligence to be applied in preparing the NDCs is stringent (see paragraph 138 above). This means that each party has to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement.

247. The obligation to prepare and communicate NDCs capable of realizing the objectives of the Agreement applies to all parties to the Paris Agreement (see paragraph 234 above). However, consistent with the varying character of due diligence and the principle of common but differentiated responsibilities and respective capabilities, the standard to be applied when assessing the NDCs of different parties will vary depending, *inter alia*, on historical contributions to cumulative GHG emissions, and the level of development and national circumstances of the party in question. The Court recognized the relationship between the legal concept of due diligence and the national circumstances of a State in its Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, where it noted that due diligence "calls for an assessment *in concreto*" and may vary depending on the circumstances of the State in question and its capacity to influence the salient acts or events (*I.C.J. Reports 2007 (I)*, p. 221, para. 430). There thus exists a link between the concept of due diligence and the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances (see paragraphs 137 above and 290-292 below).

248. This is confirmed by the Paris Agreement. Article 4, paragraph 4, provides that developed country parties "should continue taking the lead by undertaking economy-wide absolute emission reduction targets", whereas developing country parties are expected to "continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances". However, the obligation to prepare and communicate NDCs capable of realizing the objectives of the Paris Agreement applies

to all parties to the Agreement. This is confirmed by the "Paris Rulebook decision", which requires each party to provide information together with its NDCs on how it considers the NDCs fair and ambitious in light of its national circumstances, including in relation to "[f]airness considerations" and "equity" (decision 4/CMA.1, Further guidance in relation to the mitigation section of decision 1/CP.21, 15 December 2018, UN doc. FCCC/PA/CMA/2018/3/Add.1, p. 11, Annex I, paragraph 6 *(a)* and *(b)*), and how each party has addressed progression, highest possible ambition, common but differentiated responsibilities and respective capabilities in light of different national circumstances (*ibid.*, Annex I, paragraph 6 *(c)* and *(d)*).

249. In light of the foregoing, the Court concludes that, rather than being entirely discretionary as some participants argued, NDCs must satisfy certain standards under the Paris Agreement. All NDCs prepared, communicated and maintained by parties under the Paris Agreement must, when taken together, be capable of realizing the objectives of the Agreement which are set out in Article 2.

(iii) Implementation of nationally determined contributions and domestic mitigation measures

250. The Court now turns to the obligation contained in the second sentence of Article 4, paragraph 2, which provides that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of" their successive NDCs. Participants submitted a variety of views on this provision, with some arguing that Article 4, paragraph 2, does not establish legally binding obligations upon parties.

251. The obligation that parties "shall pursue domestic mitigation measures" is substantive in nature. The obligation is incumbent on "[p]arties", which must be read as "all parties", thus creating individual obligations for each party to the Agreement. Moreover, and as noted by most participants, the obligation to pursue domestic mitigation measures is an obligation of conduct and not an obligation of result (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 41, para. 110).

252. Accordingly, since the domestic mitigation obligations under Article 4, paragraph 2, establish an obligation of conduct, parties are required to act with due diligence in taking necessary measures to achieve the objectives set out in their successive NDCs. Thus, a party's compliance with its obligations to pursue domestic mitigation measures under Article 4, paragraph 2, is to be assessed on the basis of whether the party exercised due diligence in its efforts and in deploying appropriate means to take domestic mitigation measures, including in relation to activities carried out by private actors. Indeed, as ITLOS observed, the "obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by private persons or entities" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 90, para. 236).

253. What is required of parties under Article 4, paragraph 2, is not a guarantee that communicated NDCs will be achieved, but rather that they will make best efforts to obtain such a result. The Court considers that the obligation to "pursue domestic mitigation measures" that aim to achieve the objectives of their NDCs requires States to be proactive and pursue measures that are reasonably capable of achieving the NDCs set by them. These measures may include putting in place a national system, including legislation, administrative procedures and an enforcement mechanism, and exercising adequate vigilance to make such a system function effectively, with a view to achieving the objectives in their NDCs (see paragraph 136 above).

254. It bears recalling in this regard that the standard of due diligence varies depending on the particular circumstances to which the standard applies. These circumstances include the obligation in question, the level of scientific knowledge, the risk of harm and the urgency involved (see paragraphs 134-138 above). In the present instance, the Court considers that the standard of due diligence attaching to the obligation to pursue domestic mitigation measures is stringent on account of the fact that the best available science indicates that the "[r]isks and projected adverse impacts and related losses and damages from climate change escalate with every increment of global warming (very high confidence)" (IPCC, 2023 Summary for Policymakers, p. 14, Statement B.2) (see paragraphs 138 above and 258-259 below).

(c) ***Adaptation obligations under the Paris Agreement***

255. The Court observes that adaptation is one of the core objectives of the Paris Agreement, which aims to increase the parties' "ability to adapt to the adverse impacts of climate change and foster climate resilience" (Article 2, paragraph 1 *(b)*). Additionally, paragraph 4 of Article 7 of the Paris Agreement provides that "Parties recognize that the current need for adaptation is significant and that greater levels of mitigation can reduce the need for additional adaptation efforts, and that greater adaptation needs can involve greater adaptation costs". This provision reflects the understanding that parties share, and provides the context for other standard-setting provisions contained in Article 7, but does not itself create any standards or legally binding obligations. Other provisions that provide context in relation to adaptation obligations are Article 7, paragraph 2, in which parties "recognize that adaptation is a global challenge", Article 7, paragraph 5, in which parties "acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach", and Article 7, paragraph 6, in which parties "recognize the importance of support for and international cooperation on adaptation efforts". These provisions do not prescribe obligations of a legally binding character for the parties, but reflect a common understanding of the parties as to the nature of the problem being addressed. In the Court's view, these provisions provide context for the interpretation of other provisions containing obligations.

256. The Court finds that specific obligations pertaining to adaptation are contained in Article 7, paragraph 9, of the Paris Agreement, which provides that "[e]ach Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including

the development or enhancement of relevant plans, policies and/or contributions". This provision, introduced with the terms "[e]ach Party shall", imposes a legally binding obligation upon the parties to undertake adaptation planning actions.

257. While Article 7, paragraph 9, does not provide for any specific actions that parties must take, the provision does specify the types of actions and processes that parties may take to meet their obligations under this provision. These include: the "implementation of adaptation actions, undertakings and/or efforts" (Article 7, paragraph 9 *(a)*); the formulation and implementation of national adaptation plans (Article 7, paragraph 9 *(b)*); the assessment of climate change impacts and vulnerability, with a view to formulating nationally determined prioritized actions, taking into account vulnerable people, places and ecosystems (Article 7, paragraph 9 *(c)*); monitoring, evaluating and learning from adaptation plans, policies, programmes and actions (Article 7, paragraph 9 *(d)*); and building the resilience of socio-economic and ecological systems, including through economic diversification and the sustainable management of natural resources (Article 7, paragraph 9 *(e)*).

258. The Court considers that the fulfilment of adaptation obligations of parties is to be assessed against a standard of due diligence. It is therefore incumbent upon parties to enact appropriate measures (examples of which are provided in Article 7, paragraph 9) that are capable of "enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change" (Article 7, paragraph 1). In this connection, parties must use their best efforts, in line with the best available science, with a view to achieving the aforementioned objectives. In this regard, the Court observes that the IPCC noted in 2023 that adaptation is a particularly pressing challenge in responding to climate change and that adaptation options exist that are effective in reducing climate risks in certain contexts, such as restoration of ecosystems, the creation of early warning systems, and resilience-enhancing infrastructure (see IPCC, *Climate Change 2023: Synthesis Report*, pp. 55-56, section 2.2.3). These options, as well as others such as regenerative farming, crop diversification, weatherproofing of buildings, and managing land to reduce wildfire risk, implemented by parties through the deployment of appropriate measures and the exercise of best possible efforts, could, in the Court's view, meet the adaptation obligations of parties under Article 7, paragraph 9, of the Paris Agreement.

259. Finally, the Court observes that the adaptation obligations under the Paris Agreement complement the mitigation obligations in preventing and reducing the harmful consequences of climate change. This interlinkage is explicitly recognized in Article 7, paragraph 4, of the Paris Agreement, which states that "greater levels of mitigation can reduce the need for additional adaptation efforts".

(d) *Obligations of co-operation, including financial assistance, technology transfer and capacity-building under the Paris Agreement*

260. Many participants in these proceedings submitted that the duty to co-operate, which is reflected in Article 12 of the Paris Agreement, plays an important role in the implementation of the

climate change treaties. The Court notes that the Paris Agreement establishes obligations of co-operation with respect to specific issue areas, such as adaptation, and loss and damage (Article 7, paragraphs 6 and 7; Article 8, paragraph 4). Additionally, Article 12 establishes an obligation to "cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information".

261. As observed earlier in respect of the obligation to co-operate under the UNFCCC (see paragraphs 214-218), such obligations exist for States both under conventional international law, including Articles 7, 9 and 12 of the Paris Agreement, and customary international law. These coexisting obligations inform each other and, in the present instance, the Court considers that the customary duty to co-operate for the protection of the environment (see paragraphs 140-142 above) reinforces the treaty-based co-operation obligations under the Paris Agreement (see also paragraphs 301-308 below). Indeed, State co-operation is a paramount principle in solving global problems and "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 77).

262. Participants made specific submissions on the scope of the obligation to co-operate through the provision of financial assistance, such as providing debt relief to developing parties. The Court notes that States are free to select the means of co-operating, as long as such means are consistent with the obligations of good faith and due diligence. The Court, therefore, does not see it as necessary to highlight one form of co-operation over another. The Court considers, however, that the principal forms of co-operation prescribed by the Paris Agreement are financial assistance, technology transfers and capacity-building. These will be examined below.

(i) Financial assistance

263. Several participants stressed the importance of accessible, fair and transparent climate finance for developing countries, arguing that developed States must provide financial resources and transfer technology to assist developing countries with their mitigation and adaptation obligations.

264. The Court observes that the Paris Agreement establishes obligations for developed States to provide financial resources to developing States, for both mitigation and adaptation. Article 4, paragraph 5, of the Paris Agreement generally requires support to be provided to developing States parties for the implementation of their mitigation obligations, recognizing that enhanced support for developing countries will allow for higher ambition. Article 9 of the Paris Agreement provides that "[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation". The use of the term "shall" to introduce the obligation indicates the legally binding character of that provision. Moreover, the phrase "in continuation of their existing obligations under the Convention" is to be interpreted as a restatement of the obligation of developed country parties to provide financial resources to developing country

parties, as stipulated in Article 4, paragraph 3, of the Framework Convention. In addition to the obligations on mobilization and provision of climate finance, the Paris Agreement sets up a régime on information on climate finance in Article 9, paragraphs 5 to 7, which includes legally binding obligations for developed parties to communicate information on projected climate finance.

265. While the Paris Agreement does not specify the amount or level of financial support that must be provided, the Court considers that, in line with the customary rules of treaty interpretation, this obligation must be interpreted in light of other provisions in the Agreement, including the collective temperature goal provided for in Article 2 (see paragraph 224 above). Accordingly, parties are to implement their obligations under Article 9 in a manner and at a level that allows for the achievement of the objectives listed in Article 2. This level can be evaluated on the basis of several factors, including the capacity of developed States and the needs of developing States.

(ii) Technology development and transfer and capacity-building

266. There are several provisions of the Paris Agreement that refer to technology development and transfer. These include Article 10, paragraph 2, which incorporates an obligation for parties to "strengthen cooperative action on technology development and transfer". Article 10, paragraph 6, also requires that financial support must be provided to developing country parties for the purpose of enabling technology transfer and development.

267. Article 11 of the Paris Agreement governs capacity-building activities and encourages co-operation amongst parties to build the capacity of developing countries to implement the Agreement, in particular that of least developed countries and small island developing States. In the view of the Court, the most relevant obligations concerning capacity-building are contained in the following provisions: Article 11, paragraph 4, which requires that a party, whether developed or developing, that enhances the capacity of a developing country party "shall" fulfil the procedural obligation to communicate the relevant capacity-building actions and measures regularly; Article 11, paragraph 5, which requires that

> "[c]apacity-building activities shall be enhanced through appropriate institutional arrangements to support the implementation of this Agreement, including the appropriate institutional arrangements established under the Convention that serve this Agreement".

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268. For all these reasons, the Court considers that the climate change treaties establish stringent obligations upon States to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. The UNFCCC sets the overall objective of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent

dangerous anthropogenic interference with the climate system", without providing any specific, legally binding, quantitative goals for the achievement of that objective. Under the UNFCCC, and based on the principle of common but differentiated responsibilities and respective capabilities, all parties have an obligation to develop and report on national policies, programmes and measures to address climate change (Article 4, paragraph 1), while developed country parties and other parties identified in Annex I have additional obligations to, *inter alia*, adopt policies and take corresponding measures to limit emissions of GHGs and protect and enhance carbon sinks and reservoirs (Article 4, paragraph 2). Moreover, all parties have adaptation obligations prescribed under Article 4, paragraph 1, and developed country parties identified in Annex II, which are a subset of parties identified in Annex I, have an additional obligation to assist developing country parties in meeting the costs of adaptation (Article 4, paragraph 4). The Framework Convention also sets forth differentiated co-operation obligations regarding the development of technologies to prevent and reduce emissions of GHGs.

269. For its part, the Kyoto Protocol establishes legally binding, quantitative emissions targets for the parties listed in Annex B in pursuit of the overall objective of the UNFCCC. While there is no active commitment period at present, the treaty remains in force and relevant, including as a means for assessing the compliance of parties with their commitments during the first commitment period.

270. Most recently, the Paris Agreement sets an objective of primarily holding the increase in the global average temperature to 1.5°C above pre-industrial levels (Article 2). This "temperature goal" is a specification and quantification of the overall objective set in the UNFCCC. The salient features of the Agreement are its obligations pertaining to mitigation (Articles 3 to 6), adaptation (Article 7), loss and damage (Article 8), and co-operation in the form of finance, technology and capacity-building support (Articles 9 to 11). To comply with their mitigation obligations, all parties must take measures, in fulfilment of their obligations under the Paris Agreement, that make an adequate contribution to achieving the collective temperature goal; these measures must be reflected in parties' NDCs which must be adjusted to be more demanding every five years; and these NDCs must, when taken together, be capable of achieving the temperature goal and the purposes of the Agreement. While the scope and content of measures contained in the NDCs may vary in accordance with the means available to parties and their capabilities, parties do not enjoy unfettered discretion in the preparation of their NDCs. Each party has a due diligence obligation to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement (Article 4, paragraph 2). Consequently, parties have an obligation to undertake best efforts to achieve the content of their NDCs.

C. Obligations of States under customary international law relating to climate change

271. The Court will now determine how (1) the customary duty of States to prevent significant harm to the environment and (2) the customary duty of States to co-operate for the protection of the environment are to be interpreted and applied in respect of climate change. It will then address (3) the relationship between obligations arising from treaties and those arising from customary law with regard to climate change.

1. Duty to prevent significant harm to the environment

272. The duty to prevent transboundary environmental harm was first recognized as a principle of international law in the *Trail Smelter (United States of America/Canada)* arbitration award, which stated that

> "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence" (*Decision of 11 March 1941*, United Nations, *Reports of International Arbitral Awards*, Vol. III, p. 1965).

The Court itself then stated in *Corfu Channel (United Kingdom* v. *Albania)* that it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Merits, Judgment, I.C.J. Reports 1949*, p. 22). The Court thereafter recognized that

> "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat and Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29),

and that the principle of prevention, as a rule of customary environmental law, obliges States

> "to use all the means at [their] disposal in order to avoid activities which take place in [their] territory, or in any area under [their] jurisdiction, causing significant damage to the environment of another State" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101; see paragraph 132 above; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104).

273. The duty to prevent significant harm to the environment also applies to the climate system, which is an integral and vitally important part of the environment and which must be protected for present and future generations (see paragraphs 73-74 above). Taking into account the above observations (see paragraphs 132-139), the Court will now address more specifically certain elements of the obligation of prevention under customary international law in the context of "protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases". The main elements of this duty are *(a)* the environmental harm to be prevented and *(b)* due diligence as the required standard of conduct.

(a) ***Risk of significant harm to the environment, including to the climate system***

274. For the duty to prevent to arise, there must be a risk of significant harm to the environment (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 711, para. 118, and p. 737, para. 217; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 648, para. 99). The Court has recognized that what constitutes a risk of significant environmental harm depends on the environmental context in which an activity is to be carried out (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 720-721, para. 155). States are subject to the duty to prevent significant harm either where no harm has yet been caused but the risk of future significant harm exists, or where some harm has already been caused and there exists a risk of further significant harm.

275. Whether an activity constitutes a risk of significant harm depends on "both the probability or foreseeability of the occurrence of harm and its severity or magnitude" and should therefore be "determined by, among other factors, an assessment of the risk and level of harm combined" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 91, para. 239, and p. 137, para. 397). It is necessary to take into account the risks which current activities might pose in the future, including in the long term. In any case, the degree of a given risk of harm is always an important element for the application of the due diligence standard: the higher the probability and the seriousness of possible harm, the more demanding the required standard of conduct.

276. The Court is of the view that a risk of significant harm may also be present in situations where significant harm to the environment is caused by the cumulative effect of different acts undertaken by various States and by private actors subject to their respective jurisdiction or control, even if it is difficult in such situations to identify a specific share of responsibility of any particular State. States must assess the possible cumulative effects of their acts and the planned activities under their jurisdiction or control. Although such "activities may not be environmentally significant if taken in isolation, . . . they may produce significant effects if evaluated in interaction with other activities" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 128, para. 365).

277. The Court notes the assessment by the IPCC that the risk of significant harm to the climate system results from the cumulative impact of various human activities (see paragraphs 77-83 above). That risk is distinct in the sense that, unlike the instances of transboundary harm, anthropogenic climate change is inherently a consequence of activities undertaken within the jurisdiction or control of all States, although individual States' historical and current contributions differ significantly. It is the sum of all activities that contribute to anthropogenic GHG emissions over time, not any specific emitting activity, which produces the risk of significant harm to the climate system. This does not mean that individual conduct leading to emissions cannot give rise to the obligation to prevent significant transboundary harm even if such activity is environmentally insignificant in isolation.

However, it means that the risk associated with climate change is a consequence of a combination of activities by different States, and that States need to avert the risk through a co-ordinated and co-operative response.

278. The determination of "significant harm to the climate system and other parts of the environment" must take into account the best available science, which is currently to be found in the reports of the IPCC. These reports identify harms associated with climate change as including sea level rise, extreme weather events and severe consequences for ecosystems and biodiversity (see IPCC, *Climate Change 2023: Synthesis Report*, pp. 46-51, section 2.1.2; see Part II.B above). Informed by the best available science and based on the above considerations, the Court considers that the adverse effects of climate change, including rising temperature levels, sea level rise, negative effects on ecosystems and biological diversity, and extreme weather events, indicate that the accumulation of GHG emissions in the atmosphere is causing significant harm to the climate system and other parts of the environment. The question whether any specific harm, or risk of harm, to a State constitutes a relevant adverse effect of climate change must be assessed *in concreto* in each individual situation or case.

279. Accordingly, the Court considers that the diffuse and multifaceted nature of various forms of conduct which contribute to anthropogenic climate change does not preclude the application of the duty to prevent significant harm to the climate system and other parts of the environment. This duty arises as a result of the general risk of significant harm to which States contribute, in markedly different ways, through the activities undertaken within their jurisdiction or control.

(b) ***Due diligence as the required standard of conduct***

280. The Court reaffirms that States must fulfil their duty to prevent significant harm to the environment by acting with due diligence. Due diligence is a standard of conduct whose content in a specific situation derives from various elements, including the circumstances of the State concerned, and which may evolve over time (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 77, para. 140). The following elements are particularly relevant when it comes to determining what due diligence requires from a State in a particular situation, including in the context of climate change.

(i) Appropriate measures

281. The Court recalls that due diligence requires a State to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101). This means that States must

> "put in place a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and . . . exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 89, para. 235).

282. As far as climate change is concerned, such appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. Adaptation measures reduce the risk of significant harm occurring and are therefore also relevant for assessing whether a State is fulfilling its customary obligations with due diligence. These rules and measures must regulate the conduct of public and private operators within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.

(ii) Scientific and technological information

283. The Court considers that the availability of, and the need to acquire and analyse scientific and technological information is another important factor. Scientific information may provide the necessary evidence to assess the probability and seriousness of possible harm, informing the required standard of due diligence. Thus, where there is generally recognized scientific evidence that it is highly probable that significant harm will occur, the standard of due diligence will be more demanding for all States (see paragraph 138 above). Due diligence also requires States to actively pursue the scientific information necessary for them to assess the probability and seriousness of harm, in conformity with the common but differentiated responsibilities and respective capabilities principle. On the other hand, where a State lacks the capacity to access and properly act on relevant scientific information, including when a State lacks necessary resources, failure to take appropriate preventive measures may not constitute a lack of due diligence.

284. The standard of due diligence may also become more demanding in the light of new scientific or technological knowledge. The Court is aware that scientific research on climate change is well developed. In this regard, reports by the IPCC constitute comprehensive and authoritative restatements of the best available science about climate change at the time of their publication (see paragraphs 74, 77-83 and 277-279 above).

285. As concerns technical knowledge, the Court notes that States need to pursue technical co-operation and knowledge-sharing initiatives. This reflects both the scientific complexity of climate change and its status as an issue of common concern. Adaptation and mitigation measures available to States — and their ability to contribute to the prevention of significant harm — depend on the

sharing of information. This also serves to minimize the possibility that a particular adaptation or mitigation measure itself poses a risk of significant transboundary harm.

286. Further, the availability of technological means to prevent or mitigate relevant harm influences what can reasonably be expected of a State. Where a risk can be addressed with readily available technologies, States are expected to use them. However, when technologies pose further risks, States are expected to use them with prudence and caution. In that context, the cost of the relevant technologies may be a crucial factor in determining what can reasonably be expected of a State, depending on its capabilities.

(iii) Relevant international rules and standards

287. The Court's finding that "[i]n order to evaluate environmental risks, current standards must be taken into consideration" also applies to the determination of the required due diligence in respect of climate change (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 77, para. 140; *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 107, para. 285). Current standards may arise from binding and non-binding norms. Such standards may therefore not only be contained in treaties and in customary international law, but they may also be reflected in certain decisions of the COPs to the climate change treaties and in recommended technical norms and practices, as appropriate.

288. Several participants emphasized the role of COP decisions. Apart from the relevance of such decisions in connection with the interpretation and implementation of climate change treaties (see paragraph 184 above), the Court considers that COP decisions may also be relevant for the identification of customary international law, in so far as they reflect State practice and if they express an *opinio juris* of States. Whether a particular COP decision has such legal significance can only be determined *in concreto*.

289. The general duty to prevent significant harm to the environment consists of substantive elements (e.g. the obligation to take appropriate measures) and procedural elements (e.g. the obligation to notify and consult), through both of which States fulfil their duty of due diligence in preventing significant transboundary environmental harm (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104). However, as the Court has observed, there is "a functional link, in regard to prevention, between the two categories of obligations" which "does not prevent . . . States parties from being required to answer for those obligations separately" (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 79).

(iv) Different capabilities

290. The Court considers that the obligation of a State "to use all the means at its disposal" to prevent significant harm to the environment (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104) implies that the capabilities of a State are a key factor, as reflected in the principle of common but differentiated responsibilities and respective capabilities, for the determination of the applicable standard of due diligence in a particular situation. In the view of the Court, when determining the appropriate measures to be adopted by a State, the principle of common but differentiated responsibilities and respective capabilities must be taken into account.

291. Accordingly, as the ILC has noted with respect to general international law, it is "understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed" (see commentary to Article 3, ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 155, para. 17). Similarly, in the context of UNCLOS, ITLOS has recognized that the implementation of the obligation to prevent harm to the marine environment "requires a State with greater capabilities and sufficient resources to do more than a State not so well placed" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 92, para. 241). Implementing the obligation of due diligence requires even the latter State to take all the means at its disposal to protect the climate system in accordance with its capabilities and available resources. This understanding finds expression in the common but differentiated responsibilities and respective capabilities principle, which is implicit in many rules of international environmental law (see paragraphs 148-151 above).

292. While developed States, in the context of climate change, must take more demanding measures to prevent environmental harm and must satisfy a more demanding standard of conduct, the standard required in each case ultimately depends on the specific situation of each State, namely "all the means at its disposal" (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101). The difference between the respective capabilities of States, as one of the factors which determines the diligence required, cannot therefore merely result from a distinction between developed and developing countries, but must also depend on their respective national circumstances. The multifactorial and evolutive character of the due diligence standard entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened. Finally, the reference to available means and capabilities cannot justify undue delay or a general exemption from the obligation to exercise due diligence.

(v) Precautionary approach or principle and respective measures

293. Scientific information regarding the probability and the seriousness of possible harm informs the required standard of due diligence (see paragraph 283 above). States are required to

take appropriate measures to prevent significant harm where reliable scientific evidence of a risk of significant harm exists. However, States should also not refrain from or delay taking actions of prevention in the face of scientific uncertainty. According to Principle 15 of the Rio Declaration, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (see also Article 3, paragraph 3, of the UNFCCC).

294. The Court agrees with the conclusion reached by ITLOS that "where there are plausible indications of potential risks", a State "would not meet its obligation of due diligence if it disregarded those risks" and, in that sense, the "precautionary approach is also an integral part of the general obligation of due diligence" under the duty to prevent significant harm to the environment (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 46, para. 131). Based on the above, the Court considers that the precautionary approach or principle, where applicable, guides States in the determination of the required standard of conduct in fulfilling their customary duty to prevent significant harm.

(vi) Risk assessment and environmental impact assessment

295. The duty to exercise due diligence in preventing significant harm to the environment requires States to take not only substantive measures, but also certain procedural steps. These procedural obligations are distinct from the obligations to take substantive measures to prevent risks.

296. The Court has noted with respect to a proposed industrial activity affecting a shared resource in a transboundary context that "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party . . . did not undertake an environmental impact assessment of the potential effects" of activities that "may have a significant adverse impact in a transboundary context" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83, para. 204). The Court has recognized with respect to such situations that "it may now be considered a requirement under general international law to undertake an environmental impact assessment" (*ibid.*) and that the "[principle] underlying" this obligation applies not only to industrial activities but "generally to proposed activities which may have a significant adverse impact in a transboundary context" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104).

297. The Court therefore considers that the requirement to undertake an environmental impact assessment (hereinafter "EIA") in cases of proposed industrial activities in a transboundary context is an expression of a more general rule requiring the assessment of risks to the environment. Since customary international law does not "specify the scope and content of an environmental assessment" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 83,

para. 205) and given the multifaceted and contextual character of the due diligence standard, any EIA for the purpose of preventing significant harm to the climate system needs to take the specific character of the respective risk into account.

298. The Court recalls that

> "[d]etermination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case . . .:
>
> > 'it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment'" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 707, para. 104, citing *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), I.C.J. Reports 2010 (I)*, p. 83, para. 205).

The Court is of the view that the risks posed by climate change have certain features that may affect the appropriateness of certain forms of environmental risk assessment. It may therefore be reasonable for States to conduct their assessments of the risk caused by GHG emissions by way of general procedures covering different forms of activities. Such general procedures do not exclude that possible specific climate-related effects must be assessed as part of EIAs at the level of proposed individual activities, e.g. for the purpose of assessing their possible downstream effects. While the Court is aware that the cumulative and diffuse nature of GHG emissions may involve some difficulty in risk assessment, it considers it important that all States provide for and conduct EIAs with respect to particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control, on the basis of the best available science. Such specific climate-related assessments could identify previously unknown information about possibilities for reducing the quantity of GHG emissions by relevant proposed individual activities.

(vii) Notification and consultation

299. Due diligence in preventing significant harm to the environment sometimes also implies an obligation of States to notify and consult in good faith with other States with respect to risks of adverse effects of their conduct. This obligation exists where planned activities within the jurisdiction or control of a State create a risk of significant harm, and notification and consultation is necessary to determine the appropriate measures to prevent that risk (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104). The Court considers that, given the specific character of the processes leading to climate

change, notification and consultation are particularly warranted when an activity significantly affects collective efforts to address harm to the climate system, such as the implementation of policy changes in relation to the exploitation of resources linked to GHG emissions, or with respect to information that is necessary for meaningful co-operation among States to address the adverse effects resulting from GHG emissions.

(viii) Conclusion

300. Having considered certain elements of the due diligence standard (see paragraphs 280-299 above), the Court notes that their proper application in a specific situation may be a complex operation due to the variable and evolving nature of the standard. However, the Court considers that the relevant elements, individually and in combination, provide guidance for the identification of an appropriate standard of conduct for different situations. The Court is therefore of the view that the question whether a risk of significant harm exists and whether or how a relevant element of the obligation to exercise due diligence to protect the environment applies in a particular situation should be determined objectively.

2. Duty to co-operate

301. The Court recalls that the duty of States to co-operate for the protection of the environment has a customary character (see paragraphs 140-142 above). The Court emphasized the importance of co-operation in the context of a resource shared by a limited number of States, when it observed that

> "the obligation[] to co-operate [is] an important complement to the substantive obligations of every riparian State. In the Court's view, '[t]hese obligations are all the more vital' when . . . the shared resource at issue 'can only be protected through close and continuous co-operation between the riparian States' (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 51, para. 81)." (*Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 649, para. 101.)

302. This observation applies even more to the climate system, which is a resource shared by all States. Accordingly, in its advisory opinion on climate change, ITLOS characterized co-operation as "a fundamental principle in the prevention of pollution of the marine environment" by the emission of GHGs (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 110, para. 296; see also paragraphs 350-351 below). Co-operation between States is the very foundation of meaningful international efforts with respect to climate change.

303. The Court considers that the principles discussed above (paragraphs 146-161), which form part of the law applicable to the present request, are relevant in giving substance to the duty to co-operate. For example, sustainable development is furthered through close and continuous co-operation in the context of climate change. The Court has also held that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation" (*Nuclear*

Tests (Australia v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). Co-operation between States is governed by the principle of good faith, be it under a treaty or under the customary duty to co-operate (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 67, para. 145) (see paragraph 141 above).

304. The Court is of the view that the specific character of climate change requires States to take individual measures in co-operation with other States. The climate change treaties encourage and provide for certain forms of such co-operation (see paragraphs 214-218 and 260-267 above). While States have obligations to make individual contributions to collective efforts under the duty to prevent significant harm to the environment, the interpretation and fulfilment of their substantive obligations under that duty must also take account of the situation of other States and, as far as possible, be fulfilled in co-operation with other States. The duty to co-operate requires sustained and continuous forms of co-operation, of which treaties and their coordinated forms of implementation are a principal expression. While States are not required to conclude treaties, they are required to make good faith efforts to arrive at appropriate forms- of collective action. In the field of climate change, this requires agreement on forms of bona fide co-operation, such as those contained in the Paris Agreement. However, this does not mean that States discharge their duty to co-operate only by the conclusion and fulfilment of treaties (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 85-86, para. 223; see also paragraph 314 below).

305. The duty to co-operate takes on a special importance in the context of the need to reach a collective temperature goal (see, in the context of treaty obligations, paragraphs 224-229 above). States must co-operate to achieve concrete emission reduction targets or a methodology for determining contributions of individual States, including with respect to the fulfilment of any collective temperature goal. The duty to co-operate is applicable to all States, although its level may vary depending on additional criteria, first and foremost the common but differentiated responsibilities and respective capabilities principle.

306. The Court recognizes that the duty to co-operate leaves States some discretion in determining the means for regulating their GHG emissions. However, this discretion cannot serve as an excuse for States to refrain from co-operating with the required level of due diligence or to present their effort as an entirely voluntary contribution which cannot be subjected to scrutiny. The duty to co-operate is founded on the recognition of the interdependence of States, requiring more than the transfer of finance or technology, in particular efforts by States to continuously develop, maintain and implement a collective climate policy that is based on an equitable distribution of burdens and in accordance with the principle of common but differentiated responsibilities and respective capabilities.

307. The climate change treaties do not address the question whether further treaty-based obligations are necessary owing to the increased urgency of the climate crisis. The customary duties

of States to co-operate and to prevent significant harm to the environment constitute a legal standard for determining whether any existing forms of co-operation, including treaties and their implementation, still serve their purpose and whether further collective action must be undertaken, including the establishment of further treaty-based obligations.

308. Climate change is a common concern. Co-operation is not a matter of choice for States but a pressing need and a legal obligation.

3. Relationship between obligations arising from treaties and from customary international law relating to climate change

309. The Court now turns to the relationship between obligations arising from treaties and from customary international law relating to climate change.

310. The Court recalls that treaty rules and rules of customary international law, as norms belonging to two sources of international law, retain a separate existence (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 95, para. 178). However, when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations (see paragraph 165 above).

311. Treaties, in particular multilateral environmental treaties, need to be interpreted by taking into account any relevant rules of international law that are applicable in the relations between the parties (Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties). Such rules include rules of customary international law. As the Court has confirmed, treaties are to be "interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53).

312. Conversely, treaties may play a role in the identification and determination of the content of rules of customary international law. The Court has held that treaty provisions may "shed light on the content of customary international law" (*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 128, para. 66) and "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27). Moreover, treaties may "g[i]ve expression . . . to principles already present in customary international law", and these customary principles may even "develop[] under the influence of the [treaty], to such an extent that a number of rules contained in the [treaty] . . . acquire[] a status independent of it" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 96-97, para. 181). This is even more likely where the relevant customary and treaty rules "flow from a common fundamental principle" (*ibid.*).

313. Concerning specifically the interplay between different rules for the protection of the environment, the Court emphasized, almost thirty years ago, that

> "[o]wing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of . . . interventions [with nature] at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

Accordingly, the climate change treaties establish standards that may enable or facilitate the identification and application of the diligence that is due in specific instances. The Court also considers that the obligations arising from the climate change treaties, as interpreted herein, and State practice in implementing them inform the general customary obligations, just as the general customary obligations provide guidance for the interpretation of the climate change treaties (see, with regard to the duty to co-operate, *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 110-111, paras. 297-299).

314. As it is difficult to determine in the abstract the extent to which the climate change treaties and their implementation practice influence the proper understanding of the relevant customary obligations and their application, the Court considers that, at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court (see paragraphs 174-270 above), suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate. This does not mean, however, that the customary obligations would be fulfilled simply by States complying with their obligations under the climate change treaties (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 85-86, para. 223). While the treaties and customary international law inform each other, they establish independent obligations that do not necessarily overlap.

315. It follows from the above that the customary obligations of any State which is not a party to one or more of the climate change treaties at present find expression, at least in part, in the general practice of States which is in accordance with their obligations under the climate change treaties, as interpreted herein (see paragraphs 174-270 above). Customary obligations are the same for all States and exist independently regardless of whether a State is a party to the climate change treaties. On this basis, the Court considers that it is possible that a non-party State which co-operates with the community of States parties to the three climate change treaties in a way that is equivalent to that of a State party, may, in certain instances, be considered to fulfil its customary obligations through practice that comports with the required conduct of States under the climate change treaties. However, if a non-party State does not co-operate in such a way, it has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations.

D. Obligations of States under other environmental treaties

316. Obligations of States to protect the climate system encompass their conduct with respect to all the components of the climate system. There are also other international instruments which contribute to the protection of one or more of the components of the climate system, as defined by the IPCC and the UNFCCC (see paragraph 75 above), as well as the interactions between those components. The legal framework established by these instruments forms part of the protection of the climate system under international law and thus are relevant to the Court's analysis under question *(a)*. The Court considers that this is the case for the instruments referenced in General Assembly resolution 77/276, namely the Ozone Layer Convention, the Montreal Protocol, the Biodiversity Convention and the Desertification Convention (see paragraphs 125-130 above).

317. Numerous other instruments and mechanisms were mentioned by the participants, including the Carbon Offsetting and Reduction Scheme for International Aviation, established under the auspices of the International Civil Aviation Organization (hereinafter "ICAO"), as well as various regional instruments. As noted above (see paragraph 130), for the purposes of the present Advisory Opinion, the Court is not called upon to address all treaties that are applicable and may be relevant for the protection of the climate system. The Court nevertheless emphasizes the importance of the role played by certain international organizations, such as ICAO, in regulating GHG-emitting activities in their respective fields. In so far as the States parties to these instruments have obligations thereunder that are relevant for the protection of the climate system, they must have due regard to these obligations when taking measures to ensure the protection of the climate system and other parts of the environment.

318. The Court will therefore consider, in turn, the relevant obligations in the Ozone Layer Convention, the Montreal Protocol, the Biodiversity Convention and the Desertification Convention.

1. Ozone Layer Convention and Montreal Protocol

319. In its preamble, the UNFCCC recalls the 1985 Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol. The ozone layer is part of the atmosphere, which is a component of the climate system. The Court notes that the IPCC has indicated that addressing ozone depletion can contribute to mitigating climate change (IPCC, 2022 contribution of Working Group III, Statement E.6.4).

320. Article 2 of the Ozone Layer Convention contains a general obligation to protect "human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer". To that end, "the Parties shall, in accordance with the means at their disposal and their capabilities", take measures to co-operate and "[a]dopt appropriate legislative or administrative measures".

321. The Montreal Protocol, which supplements the Ozone Layer Convention, recognizes in its preamble "that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment".

322. The meetings of the parties to the Montreal Protocol have played an important role in the implementation of States' obligations under this instrument. The nineteenth meeting of the parties led to the Montreal Declaration, which expressly recognized "the importance of accelerating the recovery of the ozone layer in a way that also addresses other environmental issues, notably climate change" (Montreal Declaration, UNEP, Report of the Nineteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 17-21 September 2007), UN doc. UNEP/OzL.Pro.19/7, Annex IV).

323. States parties to the Montreal Protocol are under an obligation to phase out, according to a fixed schedule, the production and consumption of all the main ozone-depleting substances, including certain GHGs, through control measures.

324. The obligations incumbent upon States parties to the ozone layer treaties complement those set forth in the climate change treaties, to the extent that the States concerned are also parties to those instruments. This is reflected in, *inter alia*, Article 4, paragraph 1 *(a)*, of the UNFCCC, and in Article III of the Kigali Amendment. The Court therefore considers that the obligations under the ozone layer treaties are relevant to the protection of the climate system, and in particular to the preservation of the atmosphere as one of its components. Accordingly, they are obligations that contribute to ensuring the protection of the climate system as a whole.

2. Convention on Biological Diversity

325. The preamble to the Biodiversity Convention affirms that "the conservation of biological diversity is a common concern of humankind", and that Article 1 of the Convention sets out three objectives: "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources". The Court also recalls that the biosphere is one of the components of the climate system comprising

> "all ecosystems and living organisms, in the atmosphere, on land (terrestrial biosphere) or in the oceans (marine biosphere), including derived dead organic matter, such as litter, soil organic matter and oceanic detritus" (see IPCC, 2021, *Climate Change 2021: The Physical Science Basis*, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change; see paragraph 75 above).

326. Biodiversity is defined by the Biodiversity Convention as comprising "the variability among living organisms" and "the ecological complexes of which they are part". This includes diversity of ecosystems (see paragraph 127 above). Ecosystems, in turn, are defined in Article 2 as including the "non-living environment" in so far as it interacts with life to form a functional unit.

327. Under Article 3 of the Biodiversity Convention, States parties to the Convention have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. This provision reflects the customary rule of prevention of significant harm to the environment. The Court observes that, in certain instances, ecosystem protection measures may simultaneously operate as climate change mitigation or adaptation measures. The Court further notes that Article 5 of the Biodiversity Convention establishes the obligation of the States parties to co-operate, as far as possible and as appropriate, in areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

328. The Court observes that, under Article 6 *(a)* of the Convention, each State party must, in accordance with its particular conditions and capabilities, "[d]evelop national strategies, plans or programmes for the conservation and sustainable use of biological diversity". According to Article 6 *(b)*, States must "[i]ntegrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies". Such strategies and plans may encompass measures for mitigation of and/or adaptation to climate change, particularly where they relate to the conservation of vulnerable ecosystems. The Court notes that the Conference of the Parties to the Convention established the Kunming-Montreal Global Biodiversity Framework in its decision of 19 December 2022, with a view to achieving a balanced and enhanced implementation of all obligations under of the Convention, including its three objectives (see paragraph 325 above). In this context, the Framework encourages States parties to "[m]inimize the impact of climate change and ocean acidification on biodiversity and increase its resilience through mitigation, adaptation, and disaster risk reduction actions" (decision 15/4, Kunming-Montreal Global Biodiversity Framework, 19 December 2022, UN doc. CBD/COP/DEC/15/4, Annex, p. 10, target 8).

329. The Court further notes that, pursuant to Article 7 *(c)* of the Biodiversity Convention, States parties are required, as far as possible and as appropriate, to identify and monitor processes and categories of activities that have, or are likely to have, significant adverse impacts on the conservation and sustainable use of biological diversity. Where such significant adverse effects have been identified pursuant to Article 7, States parties have an obligation, as far as possible and as appropriate, under Article 8 (l), to regulate or manage the relevant processes and categories of activities, including those which contribute to anthropogenic GHG emissions. In this regard, the obligations incumbent upon States parties to the Biodiversity Convention complement those set forth in climate change treaties, in so far as the States concerned are also parties to those instruments.

330. The Court considers that these obligations under the Biodiversity Convention are relevant to the protection of the climate system, and in particular to the preservation of the biosphere as one of its components, as they are aimed at the conservation and sustainable use of biological diversity, and the prevention of adverse impacts thereon. Accordingly, they are obligations that contribute to ensuring the protection of the climate system as a whole.

3. United Nations Convention to Combat Desertification

331. The preamble to the Desertification Convention affirms the important "contribution that combating desertification can make to achieving the objectives of the United Nations Framework Convention on Climate Change" (see paragraph 128 above). The link between desertification, land degradation, drought and climate change has been highlighted by intergovernmental scientific bodies (IPCC, 2019, Summary for Policymakers, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, pp. 7-8, subsection A.2, and pp. 15-16, subsection A.5; see also Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), "Assessment Report on Land Degradation and Restoration" (2018), pp. 13, 27 and 31).

332. Desertification is defined in Article 1 *(a)* as "land degradation in arid, semi-arid, and dry sub-humid areas, resulting from various factors, including climatic variations and human activities". Desertification, land degradation and drought affect the geosphere and the biosphere, which are interrelated parts of the climate system, as defined in Article 1, paragraph 3, of the UNFCCC.

333. Under Article 4, paragraph 2 *(a)*, of the Desertification Convention, States parties are required to adopt "an integrated approach addressing the physical, biological and socio-economic aspects of the processes of desertification and drought". The physical aspects to be addressed in such an integrated approach include climate variability and climate change. Moreover, in accordance with Article 4, paragraph 2 *(d)*, States parties must promote "cooperation among affected country Parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought". They must take account of climate change as one of the physical aspects of desertification and drought. Article 6 of the Convention imposes obligations on developed country parties to support affected developing country parties in their efforts to combat desertification and mitigate the effects of drought, including through the provision of financial resources. Finally, Article 8 of the Desertification Convention requires States parties to encourage the co-ordination of their actions and commitments undertaken in the framework of the Desertification Convention, the UNFCCC and the Biodiversity Convention.

334. The obligations incumbent upon parties to the Desertification Convention complement those established under the climate change treaties, in so far as the States concerned are also parties to those instruments. In giving effect to their obligations under the Desertification Convention, such States parties contribute to the protection of the climate system as a whole, and in particular to the preservation of the geosphere and the hydrosphere, as well as their interactions with other components of the climate system. In this regard, the Court considers that the States parties to the Desertification Convention, by complying with their obligations thereunder, contribute to the protection of the climate system and other parts of the environment.

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335. The Court considers that the environmental treaties addressed in this section, the climate change treaties and the relevant obligations under customary international law inform each other (see paragraphs 309-315). States parties must therefore take their obligations under these environmental treaties into account when implementing their obligations under the climate change treaties and under customary international law, just as they must take their obligations under the climate change treaties and under customary international law into account when implementing their obligations under these environmental treaties.

E. Obligations of States under the law of the sea and related issues

336. The Court notes that, while some participants dispute the relevance of UNCLOS, most of the participants that referred to it consider it to be relevant for this Advisory Opinion, since anthropogenic GHG emissions also have deleterious effects on the marine environment, which represents over 70 per cent of the planet and over 95 per cent of the biosphere. These participants consider UNCLOS to be a treaty that can be interpreted in an evolutive manner to address new or emerging issues, including those related to climate change. Many participants noted that Part XII of UNCLOS, which concerns the protection and preservation of the marine environment, is of particular importance in these proceedings.

337. The Court recalls that, on 21 May 2024, ITLOS rendered its advisory opinion regarding the obligations of States parties to UNCLOS to *(a)* prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change and which were caused by anthropogenic GHG emissions into the atmosphere, and *(b)* to protect and preserve the marine environment in relation to the effects of climate change (see paragraph 123 above). Although the questions put to the Court in the present request for an advisory opinion are broader than those put to ITLOS, the Court considers that there are issues common to the two requests.

338. The Court observes in this regard that, since its establishment, ITLOS has developed a considerable body of jurisprudence on UNCLOS, both in contentious and advisory proceedings. Although the Court is not obliged, in the exercise of its judicial functions, to model its own interpretation of UNCLOS on that of ITLOS, it considers that, in so far as it is called upon to interpret the Convention, it should ascribe great weight to the interpretation adopted by the Tribunal. In the view of the Court, "[t]he point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66).

1. Obligations of States under the United Nations Convention on the Law of the Sea

339. The Court notes that one of the purposes of UNCLOS is the protection and preservation of the marine environment, which is the subject of Part XII of the Convention. In this regard, as part of its answer to question *(a)*, the Court will examine whether the States parties to UNCLOS have an

obligation to ensure the protection of the climate system and other parts of the environment from anthropogenic GHG emissions. The Court will first address the question whether anthropogenic GHG emissions fall within the definition of marine pollution under Article 1, paragraph 1, subparagraph 4, of the Convention, which provides that

> "'pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".

340. Based on this definition, the Court is of the view that anthropogenic GHG emissions constitute "substances or energy" introduced by humans, either "directly or indirectly" "into the marine environment", and that such introduction results or is likely to result in "deleterious effects". Accordingly, anthropogenic GHG emissions may be characterized as pollution of the marine environment within the meaning of UNCLOS (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 65-71, paras. 161-179). The Court therefore considers that Part XII of UNCLOS on the protection of the marine environment is applicable in the context of anthropogenic GHG emissions and is thus relevant to answering question *(a)* before the Court in the present advisory proceedings.

341. On this basis, the Court will consider, in turn, the most relevant obligations of States under UNCLOS to ensure the protection of the climate system.

342. The Court observes that, under Article 192 of UNCLOS, "States have the obligation to protect and preserve the marine environment". In the view of the Court, the obligation under Article 192 consists of a positive obligation to take measures to protect and preserve the marine environment and a negative obligation not to degrade it (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 133, para. 385, and pp. 133-134, para. 387).

343. Considering the seriousness of the threat posed by climate change and in view of the high risks of serious and irreversible harm to the marine environment from anthropogenic GHG emissions, the standard of due diligence to be applied when complying with the obligation to protect and preserve the marine environment is stringent (see paragraph 138 above). As ITLOS has recognized, the standard of due diligence has to be "more severe for the riskier activities" (*Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 43, para. 117; *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 91, para. 239). The Court agrees that Article 192 therefore requires States parties to take measures "as far-reaching and efficacious as possible" to protect and preserve the marine environment and "to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment" (*Climate Change, Advisory Opinion, ITLOS Reports 2024,* p. 138, para. 399). Such measures must be adopted in accordance with the obligations incumbent upon States under the UNFCCC and the Paris Agreement, in so far as the States concerned are parties to those instruments (*ibid.*, p. 134, para. 388).

344. The Court also observes that the sovereign right of States parties under Article 193 of UNCLOS "to exploit their natural resources pursuant to their environmental policies" is subject to "their duty to protect and preserve the marine environment" (*Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 72-73, para. 187, and p. 132, para. 380).

345. Article 194, paragraph 1, of UNCLOS provides that

> "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection".

346. States parties are under an obligation to take all necessary measures to reduce and control pollution, with the ultimate aim of preventing its occurrence altogether, although they are not required to ensure an immediate cessation of marine pollution caused by anthropogenic GHG emissions (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 77, para. 199).

347. In the view of the Court, the above obligation is one of conduct. The standard of due diligence required of States in implementing all measures necessary to prevent, reduce and control marine pollution is stringent. These may include legislative measures, administrative procedures, and enforcement mechanisms necessary to regulate the activities concerned (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 89, para. 235). In addition, in the view of the Court, it is not necessarily sufficient for States parties to fulfil their obligations under the UNFCCC and the Paris Agreement in order to satisfy the obligation laid down by Article 194, paragraph 1, of UNCLOS. The Court considers that what constitutes a "necessary measure" within the meaning of Article 194, paragraph 1, of UNCLOS should be assessed according to objective criteria, taking into account the best available science, international rules and standards relating to climate change, and the available means and capabilities of the States concerned, including their different national circumstances (see *ibid.*, pp. 79-80, paras. 206-207, and pp. 91-92, para. 241).

348. Article 194, paragraph 2, of UNCLOS provides that

> "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention".

349. The Court considers that the term "activities" in Article 194, paragraph 2, encompasses activities which produce GHG emissions. The standard of due diligence to be applied when complying with the obligation under Article 194, paragraph 2, is stringent (see paragraphs 138 and 343 above).

350. The Court now turns to Article 197 of the Convention, which reads as follows:

> "States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."

351. The obligation to co-operate under Article 197 is an obligation of conduct which requires States to act with due diligence. The Court considers that this obligation is of a continuing nature and it requires States parties, *inter alia*, to make ongoing efforts to formulate and elaborate rules, standards and recommended practices and procedures. The adoption of treaties for the protection of the climate system, such as the UNFCCC or the Paris Agreement, does not release States parties from this requirement under UNCLOS (see *Climate Change, Advisory Opinion, ITLOS Reports 2024*, pp. 113-114, para. 311). Moreover, the Court agrees with ITLOS that Article 197 does not exhaust the obligation to co-operate under Section 2 of Part XII of UNCLOS. In the view of the Court, States are also required to co-operate under Articles 200 and 201 of the Convention to promote studies, undertake research programmes, encourage the exchange of information and data, and to establish appropriate scientific criteria for regulations (*ibid.*, para. 312).

352. Article 206 of UNCLOS provides that,

> "[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205".

353. The Court considers that, in the context of climate change and in view of the impact of anthropogenic GHG emissions on the marine environment, Article 206 of UNCLOS requires States parties, as far as practicable, to conduct EIAs when there are reasonable grounds for believing that planned activities under their jurisdiction or control which emit GHGs may cause substantial pollution or significant and harmful changes to the marine environment. This obligation also extends to activities with an impact on areas beyond national jurisdiction (see *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, pp. 50-52, paras. 145-150).

354. The Court considers that UNCLOS, the climate change treaties and other relevant environmental treaties, as well as the relevant obligations under customary international law, inform each other (see paragraphs 309-315). States parties must therefore take their obligations under UNCLOS into account when implementing their obligations under the climate change treaties and

other relevant environmental treaties and under customary international law, just as they must take their obligations under the climate change treaties and other relevant environmental treaties and under customary international law into account when implementing their obligations under UNCLOS.

2. Obligations of States in relation to sea level rise and related issues

355. The Court notes that many participants voiced strong concerns about sea level rise and its implications, especially for the stability of maritime zones. They contend that sea level rise should not have the effect of diminishing the maritime entitlements of States. They argue that existing baselines, maritime entitlements, maritime delimitations and statehood should be preserved, notwithstanding the physical effects of sea level rise, including coastal recession. They further contend that the complete submergence of their territory should not deprive them of their maritime entitlements.

356. The Court notes that the IPCC has described sea level rise as "unavoidable" and has concluded with a high level of confidence that, as a result, the risks for coastal ecosystems, people and infrastructure will continue to increase (IPCC, 2023 Summary for Policymakers, p. 15, Statement B.2.2).

357. Scientific data demonstrate that sea level rise is likely to have adverse consequences for States, particularly small island States and low-lying coastal States, potentially leading to the forced displacement of populations within their territory or across borders, as well as affecting the territorial integrity of States and their permanent sovereignty over their natural resources. In the Court's view, since these principles are closely connected with the right to self-determination, sea level rise is not without consequences for the exercise of this right.

358. The Court observes that UNCLOS contains provisions requiring States parties to establish and give due publicity to charts or lists of geographical co-ordinates that show the outer limit of their maritime zones. Concerning the territorial sea, Article 16, paragraph 1, stipulates that the

> "baselines for measuring the breadth of the territorial sea determined in accordance with articles 7, 9 and 10, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 12 and 15 shall be shown on charts of a scale or scales adequate for ascertaining their position".

According to Article 16, paragraph 2, a State "shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations". Regarding the exclusive economic zone, Article 75, paragraph 1, of UNCLOS establishes that the outer limit lines of the exclusive economic zone must be shown on charts of a scale or scales adequate for ascertaining their position. Article 75, paragraph 2, establishes that the coastal State must give due publicity to such charts or lists of geographical co-ordinates and deposit a copy of each such chart or list with the Secretary-General of the United Nations. Similarly, concerning the continental shelf, Article 84, paragraph 1, of UNCLOS

determines that the outer limit lines of the continental shelf must be shown on charts of a scale or scales adequate for ascertaining their position. Article 84, paragraph 2, stipulates that "[t]he coastal State shall give due publicity to such charts or lists of geographical co-ordinates". The coastal State must also "deposit a copy of each such chart or list with the Secretary-General of the United Nations and, in the case of those showing the outer limit lines of the continental shelf, with the Secretary-General of the Authority".

359. The Court further notes that once the breadth of maritime zones measured from the baselines has been duly established and the State has given due publicity to the charts or lists of geographical co-ordinates in accordance with UNCLOS, particularly Article 16, paragraphs 1 and 2, Article 75, paragraph 2, and Article 84, paragraph 2, there is no provision in the Convention requiring States parties to update them. Similarly, the Court observes that UNCLOS does not contain provisions requiring States parties to update normal baselines that have been marked (Article 5), or to update charts or lists of geographical co-ordinates showing straight (Article 16) or archipelagic baselines, once they have been marked, published and deposited in accordance with the Convention (Article 47, paragraphs 8 and 9).

360. The Court notes that, outside the present proceedings, many States have expressed the view that there is no obligation to update the charts or lists of geographical co-ordinates showing the baselines of their maritime zones once they have been duly established, in conformity with UNCLOS. Such views have been expressed, *inter alia*, within the framework of the United Nations as well as in regional and cross-regional declarations, such as, among others, the 2021 Declaration of the Pacific Islands Forum on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, supported in 2022 by the member States of the Organization of African, Caribbean and Pacific States. The Court considers that this practice is relevant for the purposes of the interpretation of UNCLOS.

361. The Court is aware of the work undertaken by the ILC on sea level rise in relation to international law since 2018. The final report of the Study Group on sea level rise in relation to international law, adopted by the ILC at its seventy-sixth session (2025), shows a convergence of views among States across all regions in support of the absence of an obligation of States parties to UNCLOS to update charts or lists of geographical co-ordinates relating to their maritime zones once they have been duly established, in conformity with UNCLOS (*Official Records of the General Assembly, Eightieth Session, Supplement No. 10* (UN doc. A/80/10), Report of the International Law Commission on its work at its Seventy-sixth Session, p. 11, para. 36; and Annex I, Final Report of the Study Group on sea level rise in relation to international law).

362. The Court considers that the provisions of UNCLOS do not require States parties, in the context of physical changes resulting from climate-change related sea level rise, to update their charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones once they have been duly established in conformity with the Convention. For this reason, States parties to UNCLOS are under no obligation to update such charts or lists of geographical co-ordinates.

363. Several participants argued that sea level rise also poses a significant threat to the territorial integrity and thus to the very statehood of small island States. In their view, in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption in favour of continued statehood should apply. In the view of the Court, once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.

364. The Court has already emphasized that climate change is a common concern of humankind, one of the adverse effects of which is sea level rise. The Court has also affirmed that, in the context of climate change, States have a customary obligation to co-operate (see paragraphs 140-142 and 301-308). Moreover, it has recalled that the duty to co-operate lies at the core of the Charter of the United Nations, in particular Article 1 thereof, which states the purpose of the organization and commits States to "achiev[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character" (see paragraph 115). In the Court's view, sea level rise poses challenges in several respects, including of an economic, social, cultural and humanitarian character. It thus finds that the duty to co-operate assumes particular significance in this context, requiring States to take, in co-operation with one another, appropriate measures to address the adverse effects of this serious phenomenon. Such a duty of co-operation is founded on the recognition of the interdependence of States and the ensuing need for solidarity among peoples (see paragraph 308 above). In this regard, co-operation in addressing sea level rise is not a matter of choice for States but a legal obligation.

365. The Court concludes from the foregoing that the legal obligation to co-operate requires States, in the context of sea level rise, to work together with a view to achieving equitable solutions, taking into account the rights of affected States and those of their populations.

3. Other relevant instruments

366. The Court notes that some participants in the proceedings referred to other treaties concerning the protection of the marine environment as being among the most relevant to answering question *(a)*.

367. As noted above (see paragraph 173), for the purposes of the present Advisory Opinion, the Court is not called upon to address all treaties that may be relevant for the protection of the climate system. In this regard, while not seeking to draw up an exhaustive list of treaties relevant to climate change, the Court emphasizes that its examination of the obligations of States under UNCLOS is without prejudice to the applicability of other sources of obligations, be they universal, regional or bilateral, which may apply to the States parties to relevant instruments. The Court considers that, in fulfilling their obligations under certain other instruments, such as the 1973 International Convention for the Prevention of Pollution from Ships (commonly known as "MARPOL") and its Annex VI, adopted under the auspices of the IMO, States parties contribute to the protection of the climate system. In this regard, the Court emphasizes the importance of the role played by certain international organizations, such as the IMO, in regulating GHG-emitting activities within their respective fields.

368. The Court also notes that several participants referred to the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (commonly known as the "BBNJ Agreement"). This agreement, adopted on 19 June 2023, has not yet entered into force. It serves as an implementing agreement of UNCLOS. In pursuit of its aim to ensure the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, the BBNJ Agreement includes provisions relating to the establishment of area-based management tools, including marine protected areas. These provisions reflect the States parties' objectives to, *inter alia*,

> "[p]rotect, preserve, restore and maintain biological diversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution" (Article 17 *(c)*).

Pending its entry into force, signatory States and States parties to this agreement are under the obligation, as reflected in Article 18 of the Vienna Convention on the Law of Treaties, not to act in a manner inconsistent with its object and purpose, as defined therein.

F. Obligations of States under international human rights law

369. The Court recalls that the *chapeau* to the questions put to it by the General Assembly requests the Court to have "particular regard" to the ICCPR, the ICESCR, as well as to the rights recognized in the Universal Declaration of Human Rights. The resolution also "[e]mphasiz[es] the importance of" the Convention on the Rights of the Child (fifth preambular paragraph).

370. Participants that addressed the obligations of States under international human rights law expressed different views on the question whether international human rights law, in and of itself, imposes obligations on States relating to climate change. Most participants argued that such obligations exist, while some maintained that international human rights law does not, in and of itself, impose self-standing obligations to protect the climate system and other parts of the environment.

371. The Court notes that States have obligations under international human rights law to respect, protect and ensure the enjoyment of human rights of individuals and peoples. Human rights are focused on the protection of individuals and peoples and are not limited to specific fields of activity. In order to respond to the question posed by the General Assembly, the Court will first consider the adverse effects of climate change on the enjoyment of human rights. The Court will then address the question of the right to a clean, healthy and sustainable environment as a human right. It will proceed to examine the territorial scope of the application of international human rights law. In light of these considerations, the Court will turn to the obligations of States under international human rights law to protect the climate system and other parts of the environment.

1. Adverse effects of climate change on the enjoyment of human rights

372. Participants are generally of the view that the adverse effects of climate change hinder the full enjoyment of human rights.

373. The environment is the foundation for human life, upon which the health and well-being of both present and future generations depend (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29). The Court thus considers that the protection of the environment is a precondition for the enjoyment of human rights, whose promotion is one of the purposes of the United Nations as set out in Article 1, paragraph 3, of the Charter.

374. The Court further recalls that the preamble to the Paris Agreement states that

> "climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

375. Anthropogenic GHG emissions have an adverse impact on the climate system and other parts of the environment. The IPCC has underscored the interdependence between the vulnerability of human populations and that of ecosystems (see IPCC, *Climate Change 2023: Synthesis Report*, pp. 97-99, section 4.3; IPCC, 2022, *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (hereinafter "IPCC, 2022 contribution of Working Group II"), pp. 9-13; see also paragraph 73 above). The degradation of the climate system and of other parts of the environment impairs the enjoyment of a range of rights protected by human rights law.

376. The Court is thus of the view that the adverse effects of climate change, including, *inter alia*, the impact on the health and livelihoods of individuals through events such as sea level rise, drought, desertification and natural disasters, may significantly impair the enjoyment of certain human rights. The Court will consider some of these rights, without attempting to be exhaustive.

377. The adverse effects of climate change may impair the enjoyment of the right to life in various ways. The right to life is recognized in Article 3 of the Universal Declaration on Human Rights. It is enshrined in human rights treaties, such as in Article 6 of the ICCPR, which provides that "[e]very human being has the inherent right to life" and in Article 6 of the Convention on the Rights of the Child, which recognizes that "every child has the inherent right to life". Respect, protection and fulfilment of this right may depend on measures taken by States parties to these instruments to preserve the environment and protect it against the adverse effects of climate change

caused by anthropogenic GHG emissions. The Human Rights Committee has observed that "environmental degradation can compromise effective enjoyment of the right to life, and that severe environmental degradation can . . . lead to a violation of the right to life" (*Teitiota* v. *New Zealand*, 24 October 2019, doc. CCPR/C/127/D/2728/2016, para. 9.5). In its General Comment No. 36 on the right to life, the Committee also stated that

> "[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors." (General comment No. 36 on Article 6: right to life, 30 October 2018, UN doc. CCPR/C/GC/36, para. 62, footnotes omitted.)

378. The Court considers that conditions resulting from climate change which are likely to endanger the lives of individuals may lead them to seek safety in another country or prevent them from returning to their own. In the view of the Court, States have obligations under the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm to the right to life in breach of Article 6 of the ICCPR if individuals are returned to their country of origin (see Human Rights Committee, *Teitiota* v. *New Zealand*, 24 October 2019, UN doc. CCPR/C/127/D/2728/2016, para. 9.11).

379. In the view of the Court, climate change also threatens the ability of individuals to enjoy the right to health. The "right of everyone to the enjoyment of the highest attainable standard of physical and mental health" is protected by Article 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights has underscored that this right requires States, *inter alia*, to refrain from unlawfully polluting air, water and soil (Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), 11 August 2000, UN doc. E/C.12/2000/4, para. 34). The Human Rights Council has emphasized that the adverse effects of climate change have a range of implications for the effective enjoyment of human rights, including the right to the enjoyment of the highest attainable standard of physical and mental health (Human Rights Council, resolution 53/6 of 12 July 2023, seventeenth preambular paragraph). Furthermore, WHO has identified that climate change potentially poses "the greatest threat to global health in the 21st century" (see WHO, Health, environment and climate change, Report by the Director-General, seventy-first World Health Assembly, 9 April 2018, doc. A71/10, paras. 3-7). There is thus a close link between the right to health and the environmental conditions in which an individual lives. Consequently, States are responsible for promoting environmental conditions that ensure the enjoyment of the right to health. This right is also protected by Article 25 of the Universal Declaration of Human Rights, and Article 24, paragraph 1, of the Convention on the Rights of the Child which affirms "the right of the child to the enjoyment of the highest attainable standard of health".

380. In the Court's view, there is a close connection between the environment and the right to an adequate standard of living, which, for its part, encompasses access to food, water and housing, as set out in Article 11 of the ICESCR and Article 25 of the Universal Declaration of Human Rights. The Human Rights Council has emphasized that climate change can interfere with individuals' effective enjoyment of these rights (Human Rights Council, resolution 53/6 of 12 July 2023, preamble; resolution 50/9 of 7 July 2022, preamble).

381. In the view of the Court, the enjoyment of the right to privacy, family and home, protected by Article 17 of the ICCPR, is also likely to be hindered by the adverse effects of climate change. The Court considers that a State's failure to implement timely and adequate adaptation measures to address the adverse impacts of climate change may violate the right to privacy, family and home (see *Daniel Billy and others* v. *Australia (Torres Strait Islanders Petition)*, 21 July 2022, UN doc. CCPR/C/135/D/3624/2019, paras. 8.9-8.12).

382. Climate change may also impair the enjoyment of the rights of women, children and indigenous peoples (see Joint Statement on "Human Rights and Climate Change", Committee on the Elimination of All Forms of Discrimination against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child and Committee on the Rights of Persons with Disabilities, 16 September 2019, para. 3; see also Human rights and climate change, Human Rights Council resolution 53/6 of 12 July 2023; Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN doc. A/HRC/10/61, paras. 42 *et seq.*). As recalled above, the preamble to the Paris Agreement provides that parties should, when taking action to address climate change, respect, promote and consider the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations as well as gender equality (see paragraph 374).

383. The Committee on the Elimination of Discrimination against Women has stated that mitigation and adaptation measures with respect to climate change "should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law" (General recommendation No. 37 on the gender related dimensions of disaster risk reduction in the context of climate change, 7 March 2018, UN doc. CEDAW/C/GC/37, para. 14).

384. The Court further notes that the Office of the United Nations High Commissioner for Human Rights has observed that extreme weather events and heightened water scarcity are already major contributors to malnutrition, as well as infant and child mortality and morbidity (see Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009, UN doc. A/HRC/10/61, para. 48), and the IPCC has found that women and indigenous peoples may be more severely affected by the impacts of climate change (IPCC, 2007, *Climate Change 2007:*

Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the IPCC, p. 398; IPCC, 2022 contribution of Working Group II, Water, Technical Summaries B.3.5, B.4.1, B.4.4, B.5 and B.7; IPCC, 2023 Summary for Policymakers, p. 31, Statement C.5.3, and p. 15, Statement B.2.4). The Court therefore considers that the enjoyment of human rights by such groups is at risk of being affected by the adverse effects of climate change.

385. Finally, the Court notes that the application of international human rights law in relation to the adverse effects of climate change has been addressed in decisions of regional human rights courts (see, *inter alia*, Inter-American Court of Human Rights, *Advisory Opinion OC-32/25 of 29 May 2025, Series A No. 32*; European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland, Grand Chamber, judgment of 9 April 2024, application No. 53600/20*; Inter-American Court of Human Rights, *Case of La Oroya Population* v. *Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of 27 November 2023, Series C No. 511*), and national courts.

386. Based on all the above, the Court considers that the adverse effects of climate change may impair the effective enjoyment of human rights.

2. Right to a clean, healthy and sustainable environment

387. The Court notes that a number of participants discussed the existence of a right to a clean, healthy and sustainable environment.

388. The close relationship between human beings and the environment was recognized in 1968 in General Assembly resolution 2398 (XXIII) (see paragraph 51 above) and in 1972 in the Stockholm Declaration, Principle 1 of which proclaimed that

> "[m]an is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social, and spiritual growth . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights — even the right to life itself."

Moreover, Principle 1 of the Rio Declaration stated that "[h]uman beings . . . are entitled to a healthy and productive life in harmony with nature".

389. In 1994, the Commission on Human Rights recognized the link between environmental degradation and human rights (Ksentini Report, 6 July 1994, UN doc. E/CN.4/Sub.2/1994/9, Chap. V, pp. 42-57, paras. 161-234). The Court recalls that human rights have been recognized to be indivisible, interdependent and interrelated (see Declaration and Programme of Action, World Conference on Human Rights, Vienna, 1993, para. 5). The Court thus considers that the effective enjoyment of a number of human rights cannot be fully realized if those who hold them are unable to live in a clean, healthy and sustainable environment.

390. The Court notes that several regional human rights instruments recognize, in variously worded provisions, the right to a clean, healthy and sustainable environment. The African Charter on Human and Peoples' Rights provides in Article 24 that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development". Similarly, Article 38 of the Arab Charter on Human Rights states that "[e]veryone shall have the right to an adequate standard of living for himself and his family, ensuring well-being and a decent life . . . and a right to a safe environment". The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) likewise affirms in Article 11 that "[e]veryone shall have the right to live in a healthy environment".

391. The importance of the right to a clean and healthy environment is underscored by the fact that over one hundred States have, in variously worded provisions, enshrined this right in their constitutions or domestic legislation (Human Rights Council, Right to a healthy environment: good practices, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 30 December 2019, UN doc. A/HRC/43/53, Annex II). Several regional and national courts have, in this context, pronounced on the right to a clean, healthy and sustainable environment. During the universal periodic review of the Human Rights Council, many States addressed the manner in which they implement the right to a clean, healthy and sustainable environment.

392. The General Assembly "[r]ecognizes the right to a clean, healthy and sustainable environment as a human right" in its resolution 76/300 of 28 July 2022 (para. 1), which is evidence of the acceptance of this right. Indeed, this resolution, adopted with 161 votes in favour, 8 abstentions and no votes against, notes that "a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies" (twentieth preambular paragraph) and that this right is "related to other rights" (para. 2). In this sense, the resolution affirms the "importance of a clean, healthy and sustainable environment for the enjoyment of all human rights" (eighteenth preambular paragraph) and demonstrates the significance that States attach to this right (see also Human Rights Council resolution 48/13, The human right to a clean, healthy and sustainable environment, 8 October 2021).

393. Based on all of the above, the Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right. The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.

3. Territorial scope of human rights treaties

394. The Court will now consider the question of the territorial scope of certain universal human rights treaties that are relevant to answering question *(a)*. The question of the territorial scope of universal human rights treaties must be addressed in light of each instrument's specific provisions. This Court has previously recognized the applicability of human rights treaties when a State exercises jurisdiction outside its territory.

395. Article 2, paragraph 1, of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".

396. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court considered that Article 2, paragraph 1, of the ICCPR could be construed "as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction" (*I.C.J. Reports 2004 (I)*, p. 179, para. 108). It observed that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside national territory. The Court further considered that, given the object and purpose of the ICCPR, when a State party exercises its jurisdiction outside its national territory, that State should be bound to comply with the provisions of the ICCPR (*ibid.*, para. 109).

397. The Court notes that this interpretation of Article 2, paragraph 1, of the ICCPR is consistent with the practice of the Human Rights Committee, which has found the ICCPR to be applicable where a State exercises its jurisdiction on foreign territory (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 179, para. 109). This interpretation is in line with the *travaux préparatoires* of the ICCPR, which, according to the Court, demonstrate that the drafters of the ICCPR "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory" (*ibid.*); rather, they "only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence" (*ibid.*).

398. In this regard, the Court concluded that the ICCPR is "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 180, para. 111).

399. The Court reiterated these findings in its 2005 Judgment concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* (*I.C.J. Reports 2005*, p. 243, para. 216) and in its Advisory Opinion of 19 July 2024 on the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (para. 99).

400. As regards the ICESCR, the Court has observed that it "contains no provision on its scope of application", adding that

> "[t]his may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which 'at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge'." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004 (I)*, p. 180, para. 112.)

401. Furthermore, with respect to the Convention on the Rights of the Child, the Court has observed that Article 2 thereof provides that "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction" and concluded that this Convention was therefore applicable "within the Occupied Palestinian Territory" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 181, para. 113).

402. In the context of the present advisory proceedings, the Court need not determine the specific circumstances under which a State can be regarded as exercising its jurisdiction outside its own territory, since any such determination depends on the provisions of each treaty. The Court emphasizes, in this regard, that the scope of human rights treaty law and that of customary law are distinct.

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403. Taking into account the adverse effects of climate change on the enjoyment of human rights, the Court considers that the full enjoyment of human rights cannot be ensured without the protection of the climate system and other parts of the environment. In order to guarantee the effective enjoyment of human rights, States must take measures to protect the climate system and other parts of the environment. These measures may include, *inter alia*, taking mitigation and adaptation measures, with due account given to the protection of human rights, the adoption of standards and legislation, and the regulation of the activities of private actors. Under international human rights law, States are required to take necessary measures in this regard.

404. The Court is of the view that international human rights law, the climate change treaties and other relevant environmental treaties, as well as the relevant obligations under customary international law, inform each other (see paragraphs 309-315 above). States must therefore take their obligations under international human rights law into account when implementing their

obligations under the climate change treaties and other relevant environmental treaties and under customary international law, just as they must take their obligations under the climate change treaties and other relevant environmental treaties and under customary international law into account when implementing their human rights obligations.

V. QUESTION *(B)* PUT TO THE COURT: LEGAL CONSEQUENCES ARISING FROM STATES' ACTS AND OMISSIONS THAT CAUSE SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT

405. The Court now turns to question *(b)*, which reads in the relevant part as follows: "What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment . . .?" As observed earlier (see paragraphs 104-106), the Court considers that this question concerns the legal consequences arising for States that have breached any of the obligations identified in relation to question *(a)*. As the Court noted above (see paragraph 104), the term "legal consequences" in question *(b)* is to be understood as referring to the legal consequences arising from internationally wrongful acts of States, which are to be ascertained on the basis of the primary rules and the customary rules on State responsibility. The rules and principles governing injuries arising out of acts not prohibited by international law do not fall within the scope of question *(b)* and are thus not addressed by the Court.

406. Additionally, it bears repeating that it is not the Court's task in this Opinion to establish the individual responsibility of a State or group of States for the damage caused to the climate system (see paragraphs 107-110 above); such responsibility can only be established on a case-by-case basis. In the Court's view, in respect of question *(b)*, the object of this Opinion is to provide a reply that sets out the general legal framework that governs the responsibility of States for their failure to comply with their obligations "to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases". Put differently, the Court's task is to identify, in a general manner, the legal framework under which the conduct of States can be assessed in order to determine whether a State, or a group of States, is responsible for a breach of its obligations pertaining to the protection of the climate system; whether a State, or group of States, can invoke the responsibility of another State or group of States in breach; and the remedies that are available to the injured State or States in case of such a breach.

A. Applicable law

407. The Court considers that the obligations to which question *(b)* applies are the obligations provided for under the various treaties, in particular the climate change treaties, and rules of customary international law considered under question *(a)*. The rules on State responsibility under customary international law are also applicable to the determination of legal consequences for States that, by their actions or omissions, have breached those obligations. In this regard, the Court recalls

that it has previously relied on the ILC Articles on State Responsibility which in many respects are reflective of the customary rules on State responsibility (see e.g. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, pp. 138-139, para. 177; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 195, para. 140).

408. With regard to primary obligations under the climate change treaty framework, the Court observes that it has identified a number of legal obligations under the UNFCCC, the Kyoto Protocol and the Paris Agreement in respect of the protection of the climate system from anthropogenic GHGs (see paragraphs 268-270 above). In the absence of special rules to the contrary, the responsibility of a party may be engaged under the rules on State responsibility if there is any breach of the obligations identified in question *(a)*.

409. With regard to obligations under customary international law, the Court observes that the most significant primary obligation for States in relation to climate change is the obligation to prevent significant harm to the climate system and other parts of the environment (see paragraphs 132-139 above), which applies to all States, including those that are not parties to one or more of the climate change treaties. Under this obligation, as well as under other obligations of conduct identified under question *(a)*, a State does not incur responsibility simply because the desired result is not achieved; rather, responsibility is incurred if the State fails to take all measures which were within its power to prevent the significant harm. In this connection, the notion of due diligence, which calls for an assessment *in concreto*, is the relevant standard for determining compliance (see paragraph 137 above). Thus, a State that does not exercise due diligence in the performance of its primary obligation to prevent significant harm to the environment, including to the climate system, commits an internationally wrongful act entailing its responsibility.

410. The Court observes that participants in these proceedings are divided in their views as to whether the general rules on State responsibility apply in the context of climate change or whether the legal consequences arising from a breach of States' obligations identified under question *(a)* are solely or primarily governed by the climate change treaty framework. The disagreement between the participants concerns the question whether the customary rules on State responsibility are excluded by virtue of the application of *lex specialis* in respect of the legal consequences for breaches of obligations to protect the climate system and other parts of the environment. This disagreement is different from the arguments made by participants on the issue whether the primary rules of international law found in the climate change treaties constitute *lex specialis* in respect of the obligations found under customary or other rules of international law (see paragraph 163 above). This question is not resolved by the conclusion of the Court that the primary obligations under the climate change treaties do not constitute *lex specialis* in respect of the obligations of States under other rules of international law (see paragraphs 164-171 above).

411. In this respect, the Court recalls its conclusion, with regard to question *(a)*, that the application of the *lex specialis* maxim does not result in a general exclusion by the climate change treaties of other primary rules of international law (see paragraph 171 above). With regard to the question of applicability of the rules on State responsibility under question *(b)*, the Court notes that those rules "do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 209, para. 401). It follows that the rules on State responsibility under general international law do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law. In order for the *lex specialis* maxim to apply, there must be "some actual inconsistency . . . or else a discernible intention that one provision is to exclude the other" (see Article 55, paragraph 4 of the commentary, ILC Articles on State Responsibility, p. 140; see also paragraph 167 above). Whether States derogated from the general rules on State responsibility by agreeing on special rules is a matter of interpretation for each supposedly special régime.

412. Therefore, the Court considers that a discernible intention to establish *lex specialis*, varying or excluding the application of the general rules on State responsibility, must be found in the climate change treaty framework itself (see paragraphs 162-171 above). Such an interpretation must take into account the object and purpose of the instrument being interpreted. Not only must these special rules and their operation be clear from the interpretation of the relevant instrument, but it is also for the special rules to determine the extent of exclusion.

413. Participants submitted two main arguments for the proposition that the climate change treaty framework constitutes *lex specialis* in respect of State responsibility. The first concerns the procedural mechanisms contained in Articles 8 and 15 of the Paris Agreement, which relate to "loss and damage" and "compliance", respectively. The second concerns Article 14 of the UNFCCC, which establishes a dispute settlement mechanism under that treaty and which has been incorporated into both the Kyoto Protocol (Article 19) and the Paris Agreement (Article 24). The Court will examine each of these mechanisms in order to ascertain whether they constitute *lex specialis*.

414. The Court recalls that Article 8 of the Paris Agreement, which establishes a loss and damage mechanism, reads in relevant part as follows:

> "2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.
>
> 3. *Parties should enhance understanding, action and support*, including through the Warsaw International Mechanism, *as appropriate*, *on a cooperative and facilitative*

> *basis* with respect to loss and damage associated with the adverse effects of climate change." (Emphasis added.)

The Court observes that Article 8 encourages parties to the Agreement to adopt a co-operative and facilitative approach with respect to loss and damage associated with the adverse effects of climate change, including recourse to the mechanism established under that provision. The provision does not, however, address issues of liability or compensation of parties for such loss and damage, since the expression "as appropriate, on a cooperative and facilitative basis" emphasizes co-operation rather than compensation or liability.

415. This interpretation is confirmed by paragraph 51 of the COP decision that adopted the Paris Agreement, which states that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation" (decision 1/CP.21, 12 December 2015, UN doc. FCCC/CP/2015/10/Add.1, p. 8, para. 51). Moreover, the fact that the fund for responding to loss and damage is limited to "provid[ing] complementary and additional support" confirms the intention of the parties not to base the contributions of funds on State responsibility (see decision 5/CMA.5, Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2-3 of decisions 2/CP.27 and 2/CMA.4, 6 December 2023, UN doc. FCCC/PA/CMA/2023/16/Add.1, Annex I, Governing Instrument of the Fund, p. 39, para. 7). Accordingly, the Court does not find in Article 8 of the Paris Agreement any clearly expressed *lex specialis* that would exclude the application of the general rules on State responsibility.

416. Turning now to Article 15 of the Paris Agreement, the Court observes that paragraph 1 of that Article establishes the Paris Agreement Implementation and Compliance Committee (PAICC), which has the power to facilitate implementation of and promote compliance with the Agreement. However, the Court observes that this compliance mechanism does not have the power to settle disputes or provide for remedies. In the Court's view, the mechanism does not have the capacity to determine State responsibility. This interpretation is confirmed by Article 15, paragraph 2, which provides that the PAICC is a "transparent, non-adversarial and non-punitive" mechanism. Accordingly, the Court does not find in Article 15 of the Paris Agreement any clearly expressed *lex specialis* that would exclude the application of the general rules on State responsibility.

417. The dispute settlement scheme under Article 24 of the Paris Agreement further confirms the conclusion that the loss and damage mechanism and the PAICC were not designed as a special régime to address disputes relating to the breach of the provisions of the Paris Agreement. Article 24 of the Paris Agreement provides that "[t]he provisions of Article 14 of the [Framework] Convention on settlement of disputes shall apply *mutatis mutandis* to this Agreement". To recall, Article 14 of the UNFCCC is a compromissory clause that provides, *inter alia*, for the settlement of disputes concerning the interpretation or application of the UNFCCC by this Court or through arbitration. Since Article 14 of the UNFCCC and Article 24 of the Paris Agreement are silent on any special rules to be applied by the bodies seised under this compromissory clause, the Court considers that the rules to be applied by this Court or any potential arbitral tribunal in the event of a breach of the provisions of the climate change treaties are the general rules on State responsibility under customary international law.

418. The Court, therefore, finds that the text, context, and object and purpose of the climate change treaties do not support the proposition that the parties intended to exclude the general rules on State responsibility. In particular, the Court finds no evidence in Articles 8 and 15, or in the procedural mechanisms thereunder, of any discernible intention on the part of the parties to the Paris Agreement to derogate from the customary international law rules on State responsibility for breaches of treaty obligations.

419. The Court further recalls that several States, when becoming parties to the climate change treaties, entered declarations affirming the continued application of the customary international law rules on State responsibility. In the Court's view, these declarations support the interpretation that the climate change treaties do not derogate from or displace general international law of State responsibility. This interpretation also finds support in the majority of the replies to a question posed by a Member of the Court.

420. Therefore, the Court concludes that responsibility for breaches of obligations under the climate change treaties, and in relation to the loss and damage associated with the adverse effects of climate change, is to be determined by applying the well-established rules on State responsibility under customary international law.

B. Determination of State responsibility in the climate change context

421. The Court recalls that climate change is a highly complex and multifaceted phenomenon involving possible responsibilities for multiple States over long periods of time. The unprecedented nature and scale of harm resulting from climate change give rise to particular issues in relation to the application of the customary rules on State responsibility. That is so because concentrations of GHG emissions are not produced by a single activity or group of activities identifiable or associated with a certain State or States. Moreover, it is the collective and aggregate effects of GHGs, anthropogenic as well as from natural sources, that cause damage to the climate system. While, in general, all States both contribute to these emissions and are adversely affected by climate change, it is to be recalled that States have contributed to significantly different degrees to the concentration of GHGs in the atmosphere and are affected differently by the effects of climate change. The Court finds it necessary to address, as part of its reply to the General Assembly, some of the issues raised by these special features of climate change to the application of the customary rules on State responsibility.

422. Chief amongst these issues are questions relating to attribution and causation, which require clarification in view of the special features of climate change. Indeed, the need for such clarifications is self-evident given that, under the rules on State responsibility, only an action or omission attributable to a State can give rise to international responsibility. Moreover, in cases where reparation is claimed, it must be shown that the damage for which reparation is claimed has been factually and legally caused by a State.

423. A related issue that arises in the context of climate change is that of temporality, since the breach of an obligation identified in question *(a)* does not necessarily occur through one, temporally contained, action or omission. Participants expressed diverging views on the issue of temporality. The Court observes that the issue has two distinct, albeit intertwined, aspects: *first*, the temporal scope of the international obligations of States pertaining to the protection of the climate system from anthropogenic GHG emissions; *second*, the temporal scope of a breach of those international obligations by States. With respect to the latter, some participants sought to rely on the rules on State responsibility concerning acts having a continuing character (ILC Articles on State Responsibility, Article 14) and composite acts (*ibid.*, Article 15) to address challenges of precisely determining the critical date for the identification of a breach of States' obligations to protect the climate system. As observed earlier, the issue of the temporal scope of the obligations, and the related issue of breach of those obligations, comprise elements of an *in concreto* assessment for the determination of State responsibility (see paragraph 97 above), which is beyond the scope of this Advisory Opinion.

424. In contrast, the Court observes that general questions of attribution and causation, which require clarification on account of the diverging views of the participants, do not necessitate an individualized assessment of State conduct. Thus, the Court will address below certain issues raised in these proceedings regarding the applicability and operation of the respective rules.

1. Questions relating to attribution

425. At the outset, the Court wishes to clarify that the term "attribution" was used in these proceedings in different senses. While attribution in the field of climate science refers to "the process of evaluating the relative contributions of multiple causal factors to a change or event with an assessment of confidence" (IPCC, 2021, *Climate Change 2021: The Physical Science Basis*, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex VII, Glossary, p. 2219), attribution in the context of determining State responsibility denotes "the operation of attaching a given action or omission to a State" under international law. (see Article 2, paragraph 12 of the commentary, ILC Articles on State Responsibility, p. 36). Attribution in the latter sense is one of the elements necessary for finding an internationally wrongful act, and all international claims may be said to require attribution to establish the responsibility of a particular State under international law.

426. Some participants expressed the view that the application of the rules on State responsibility is difficult in the context of climate change, since the emission of GHGs as such is not an internationally wrongful act and difficulties arise for its attribution. They also asserted that the plurality of responsible and injured States makes attribution difficult, if not impossible. Other participants submitted that there is no difficulty in applying the general legal framework for attribution reflected in Articles 4 to 11 of the ILC Articles on State Responsibility, and that the conduct attributable to States includes the adoption of laws, policies and programmes, including decisions, that promote fossil fuel production and consumption; and failure to adequately regulate the GHG emissions under the State's jurisdiction or control.

427. In considering the alleged difficulties in attributing actions or omissions to a State, the Court emphasizes at the outset that attribution is to be based on criteria determined by international law. In the Court's view, the "well-established rule of international law" that "the conduct of any organ of a State must be regarded as an act of that State" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242, para. 213, citing *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62) is applicable in the context of climate change. Failure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State. The Court also emphasizes that the internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary obligations identified under question *(a)* pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases.

428. Some participants also argued that the conduct of private actors resulting in emissions of GHGs is not attributable to States. In relation to private actors, the Court observes that the obligations it has identified under question *(a)* include the obligation of States to regulate the activities of private actors as a matter of due diligence. Therefore, attribution in this context involves attaching to a State its own actions or omissions that constitute a failure to exercise regulatory due diligence. In such circumstances, the question of attributing the conduct of private actors to a State does not arise. The legal standard to assess compliance with the obligation to regulate, as well as the nature of the actions or omissions that lead to attribution, has been set out by the Court in several cases (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 79-80, para. 197; *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 31, para. 63). Thus, a State may be responsible where, for example, it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction.

429. The Court further notes that some participants submitted that it is difficult to invoke responsibility in the context of climate change given that the wrongful conduct is cumulative in nature, involving different States over a period of time, and involving a plurality of States that cause injury to a plurality of injured States. In this respect, the Court observes that while climate change is caused by cumulative GHG emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions. For instance, since the adoption of the UNFCCC, States are required to communicate information on their emissions. The 2023 IPCC report includes data on cumulative net emissions by region, and other studies include data on current and historical emissions that can be attributed to individual States (IPCC, *Climate Change 2023: Synthesis Report*, p. 45; European Commission, Joint Research Centre Science for Policy Report, *CO_2 Emissions of all World Countries*, 2022, p. 5). Indeed, other courts and tribunals have considered the link between GHG emissions and climate change, the link

between climate change and adverse effects suffered by litigants, the link between such harm and the actions or omissions of a particular State, and the attributability of responsibility for such adverse effects. It is important to recall at this stage that what constitutes a wrongful act is not the emissions in and of themselves but actions or omissions causing significant harm to the climate system in breach of a State's international obligations.

430. The Court acknowledges that the fact that multiple States have contributed to climate change may indeed increase the difficulty of determining whether and to what extent an individual State's breach of an obligation identified in question *(a)* has caused significant harm to the climate system. However, the Court considers that, in principle, the rules on State responsibility under customary international law are capable of addressing a situation in which there exists a plurality of injured or responsible States. Such a situation was recognized by the Court in its Judgment concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, where it observed that "in certain situations in which multiple causes attributable to two or more actors have resulted in injury . . . responsibility for part of such injury should [be] allocated among [the] actors" (*I.C.J. Reports 2022 (I)*, pp. 49-50, para. 98). While the Court's observations were not made in the context of climate change, they are of general import and show that the rules on State responsibility are capable of addressing situations where damage is caused by multiple States engaging in wrongful conduct, and that the responsibility of a single State for damage may be invoked without invoking the responsibility of all States that may be responsible.

431. Therefore, in the climate change context, the Court considers that each injured State may separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system and other parts of the environment. And where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

432. Thus, the Court considers that the rules on State responsibility admit the possibility of determining the responsibility of States in the climate change context. Factual questions arising in the context of attribution and apportionment of responsibility are to be resolved on a case-by-case basis.

2. Questions relating to causation

433. The Court begins by observing that causation of damage is not a requirement for the determination of responsibility as such. For a finding of State responsibility, what is required is an internationally wrongful act and its attribution to a State, whether the act causes harm or not. Causation or causality is a legal concept that plays a role in determining reparation. Since reparation implies the existence of damage, causation must be established between the wrongful act of a State — or group of States — and particular damage suffered by the injured State or, in the case of a breach of obligations under international human rights law, by the injured individuals.

434. Causation of harm was raised by many participants, with some arguing that causation is impossible to establish in the present context due to the diffuse nature of climate change. Other participants submitted that causation between a wrongful act and damage should be presumed in the context of climate change.

435. The Court finds neither of these positions convincing. As it has previously observed, "the fact that the damage was the result of concurrent causes is not sufficient to exempt [a State] from any obligation to make reparation" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 49, para. 97). At the same time, causation cannot be presumed and is a necessary element for reparation to be accorded (*ibid.*, p. 48, para. 93).

436. The existing legal standard for establishing causation, which has been developed in the jurisprudence of the Court, is capable of being applied to the establishment of causation between the internationally wrongful act of non-compliance with States' obligations to protect the climate system from harm caused by anthropogenic GHG emissions and the damage suffered by States as a result of such a wrongful act. This standard requires the existence of "a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant" *(Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 32; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 48, para. 93). Moreover, as the Court has observed, the "causal nexus" between the wrongful act and the damage in question is not static in nature, and "may vary depending on the primary rule violated and the nature and extent of the injury" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 48, para. 93). Accordingly, the Court is of the view that the standard of "a sufficiently direct and certain causal nexus" between an alleged wrongful action or omission and the alleged damage is flexible enough to address the challenges arising in respect of the phenomenon of climate change.

437. In terms of the operation of this legal standard in the climate change context, the Court observes that causation involves two distinct elements. *First*, whether a given climatic event or trend can be attributed to anthropogenic climate change; and *second*, to what extent damage caused by climate change can be attributed to a particular State or group of States. While the second element must be established *in concreto* in respect of specific claims brought by States in respect of damage, in many cases the first element may be addressed by recourse to science. The scientific evidence adduced in these proceedings establishes that significant harm to the climate system and other parts of the environment has been caused as a result of anthropogenic GHG emissions (see paragraph 277 above). For example, the IPCC's 2023 Synthesis Report includes data clearly linking the human contribution to climate change to observed increases in heatwaves, flooding and drought (p. 48, figure 2.3). As for establishing causality between damage caused and an internationally wrongful act, the Court has observed in the past that

> "[i]n cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court.

> Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 34.)

438. In light of the foregoing, the Court concludes that while the causal link between the wrongful actions or omissions of a State and the harm arising from climate change is more tenuous than in the case of local sources of pollution, this does not mean that the identification of a causal link is impossible in the climate change context; it merely means that the causal link must be established in each case through an *in concreto* assessment while taking into account the aforementioned elements outlined by the Court.

3. *Erga omnes* character of the underlying obligations

439. The Court now turns to the question whether the character of certain obligations identified under question *(a)* results in any special legal consequences for States. A number of participants in these proceedings maintained that the Court has already found that some obligations implicated by climate change are obligations *erga omnes*, including most notably, certain international human rights obligations.

440. The Court observes that certain rules of international law relating to global common goods, such as the climate system, may produce *erga omnes* obligations (see Conclusion 17, paragraph 3 of the commentary, ILC Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Yearbook of the International Law Commission*, 2022, Vol. II, Part Two, p. 66). In the present context, the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*. In the treaty context, the Court recalls that the UNFCCC and Paris Agreement acknowledge that climate change is "a common concern of humankind" (UNFCCC, first preambular paragraph; Paris Agreement, eleventh preambular paragraph), requiring "a global response" (Paris Agreement, Article 2). They seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole. As such, the Court considers that the obligations of States under these treaties are obligations *erga omnes partes*.

441. As the Court has observed in the past, obligations *erga omnes* are "[b]y their very nature . . . the concern of all States" (*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The Court has also previously found that treaties protecting common interests imply, with respect to some provisions, the existence of obligations *erga omnes partes* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, pp. 515-516, para. 107; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J.*

Reports 2012 (II), p. 449, para. 68; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). As a result, all States parties have a legal interest in the protection of the main mitigation obligations set forth in the climate change treaties and may invoke the responsibility of other States for failing to fulfil them.

442. The Court recalls that under the rules on State responsibility, "[a]ny State other than an injured State is entitled to invoke the responsibility of another State . . . if . . . the obligation breached is owed to the international community as a whole" (ILC Articles on State Responsibility, Article 48, paragraph 1 *(b)*). It follows that responsibility for breaches of such obligations, such as climate change mitigation obligations, may be invoked by any State when such obligations arise under customary international law. When such obligations arise under the climate change treaties, all parties to the treaty may invoke such responsibility, since every party is deemed to have a legal interest in the protection of these obligations. As observed by the Court in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*,

> "[t]he common interest in compliance with the relevant obligations under the [treaty] implies the entitlement of each State party to the [treaty] to make a claim concerning the cessation of an alleged breach by another State party" (*Judgment, I.C.J. Reports 2012 (II)*, p. 450, para. 69).

443. There is, however, a difference between the position of injured States or specially affected States on the one hand, and that of non-injured States on the other, as concerns the availability of remedies. While a non-injured State may pursue a claim against a State in breach of a collective obligation, it may not claim reparation for itself. Rather, it may only make a claim for cessation of the wrongful act and assurances and guarantees of non-repetition, as well as for the performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. These legal consequences are addressed below.

C. Legal consequences arising from wrongful acts

444. It is well established that every internationally wrongful act of a State entails the international responsibility of that State. In the present context, the internationally wrongful act may range from breaches of treaty obligations, such as the procedural obligation of a State to prepare, communicate or implement NDCs under Article 4 of the Paris Agreement, to breaches of obligations under customary international law, such as the failure of a State to regulate emissions of GHGs under its duty to exercise due diligence to prevent significant harm, or its failure to conduct EIAs.

445. The Court cannot, in the context of these advisory proceedings, specify precisely what consequences are entailed by the commission of an internationally wrongful act of breaching obligations to protect the climate system from the anthropogenic GHG emissions, since such consequences depend on the specific breach in question and on the nature of the particular harm. As a general observation, the Court notes that breaches of States' obligations under question *(a)* may

give rise to the entire panoply of legal consequences provided for under the law of State responsibility. These include obligations of cessation and non-repetition, which are consequences that apply irrespective of the existence of harm, as well as the consequences requiring full reparation, including restitution, compensation and/or satisfaction. The Court also notes that breaches of States' obligations do not affect the continued duty of the responsible State to perform the obligation breached. The Court will address each of these in turn below.

1. Duty of performance

446. The breach by a State of its international obligations does not extinguish its underlying duty of performance. States have a continuing duty to perform their obligations despite their breaches thereof (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 68, para. 114). For instance, States have a continuing duty to preserve and improve the absorption capacity of reservoirs and sinks, notwithstanding any breaches of those obligations under the climate change treaties. Similarly, in the case of a State party setting an inadequate NDC under Article 4 of the Paris Agreement, a competent court or tribunal could order that State to perform its obligations by adopting an NDC consistent with its obligations under the Paris Agreement.

2. Duty of cessation and guarantees of non-repetition

447. Under customary international law, a State responsible for an internationally wrongful act is under an obligation to cease that act if it is continuing and if the breached obligation is still in force (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 201-202, para. 163 (3) (A)-(C)). In this context, the Court is of the view that the obligation to put an end to the wrongful act may require a State to revoke all administrative, legislative and other measures that constitute an internationally wrongful act of that State.

448. The duty of cessation may also require States to employ all means at their disposal to reduce their GHG emissions and take other measures in a manner, and to the extent, that ensures compliance with their obligations. Additionally, in appropriate circumstances, a responsible State could be required to offer appropriate assurances and guarantees of non-repetition (see ILC Articles on State Responsibility, Article 30 *(b)*).

3. Duty to make reparation

449. As noted above, reparation implies the existence of damage which must be demonstrated by the injured State or, in the case of a breach of an obligation under international human rights law, by the injured individuals. Therefore, to establish reparation, causation must be established between the wrongful act of a State — or group of States — and particular damage suffered by the injured State, or, in the case of human rights law, by the injured individuals.

450. Article 31 of the ILC Articles on State Responsibility provides that a responsible State is under an obligation to make full reparation for the damage caused by the internationally wrongful act (see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, para. 152). As stated by the Permanent Court of International Justice in the *Factory at Chorzów* case, reparation must "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). "[F]ull reparation" can be achieved by restitution, compensation, satisfaction or a combination thereof. The appropriate nature and quantum of reparations cannot be assessed in the abstract and depends on the circumstances of a particular case.

(a) ***Restitution***

451. The Court observes that the remedy of restitution, which involves the re-establishment of the situation that existed before the wrongful act was committed, may prove difficult or unfeasible in the case of environmental harm, since such harm is often not easily reversible. Nonetheless, the Court considers that, in the circumstances of climate change caused by emissions of GHGs, restitution may take the form of reconstructing damaged or destroyed infrastructure, and restoring ecosystems and biodiversity. Whether or not these special forms of restitution are appropriate as reparation for damage suffered by States in relation to climate change is to be determined on a case-by-case basis. Such determinations cannot be made in the abstract.

(b) ***Compensation***

452. In the event that restitution should prove to be materially impossible, responsible States have an obligation to compensate. The Court observes that compensation, as a form of reparation, has the function of addressing the losses incurred as a result of the internationally wrongful act. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. The Court is not requested in this Advisory Opinion to indicate reparation for specific States or to identify such States individually, nor to proceed to the quantification of compensation to be paid by specific States or a plurality of States. However, the Court considers that it is within the scope of this Opinion, in the context of setting out the applicable legal framework for State responsibility, to consider whether compensation could be owed for significant harm caused by climate change, if a sufficiently direct and certain causal nexus can be shown between the wrongful acts of one or more States and the resulting harm.

453. The Court has previously had occasion to confirm that environmental damage is compensable under international law, and that compensation will be due for both damage caused to the environment, "in and of itself" — which may include "indemnification for the impairment or loss of environmental goods and services in the period prior to recovery" — and expenses incurred by injured States as a consequence of such damage (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 28-29, paras. 41-43). With respect to the valuation of the damage caused to the environment, the Court has held that

> "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage. For example, in the *Ahmadou Sadio Diallo* case, the Court determined the amount of compensation due on the basis of equitable considerations" (*ibid.*, pp. 26-27, para. 35).

454. Therefore, where there is uncertainty with respect to the exact extent of the damage caused, compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations, may be awarded on an exceptional basis (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 52, para. 106). In the climate change context, reparations in the form of compensation may be difficult to calculate, as there is usually a degree of uncertainty with respect to the exact extent of the damage caused.

(c) ***Satisfaction***

455. Whether satisfaction is warranted for a violation by a State or States of obligations regarding the emission of GHGs, and what form that satisfaction could take, will depend on the nature and circumstances of the breach. It is possible for satisfaction to take the form of expressions of regret, formal apologies, public acknowledgments or statements, or education of the society about climate change. In the past, the Court has also recognized that a formal declaration by an international court or tribunal of the wrongfulness of State conduct is a potential form of satisfaction (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 35).

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456. Before concluding, the Court recalls that it has been suggested that these advisory proceedings are unlike any that have previously come before the Court. At the same time, as the Court concluded earlier, the questions put to it by the General Assembly are legal ones (see paragraph 40), and the Court, as a court of law, can do no more than address the questions put to it through and within the limits of its judicial function; this is the Court's assigned role in the international legal order. However, the questions posed by the General Assembly represent more than a legal problem: they concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet. International law, whose authority has been invoked by the General Assembly, has an important but ultimately limited role in resolving this problem. A complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other. Above all, a lasting and satisfactory solution requires human will and wisdom — at the individual, social and political levels — to change our habits, comforts and current way of life in order to secure a future for

ourselves and those who are yet to come. Through this Opinion, the Court participates in the activities of the United Nations and the international community represented in that body, with the hope that its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis.

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457. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) Unanimously,

Decides to comply with the request for an advisory opinion;

(3) As regards question *(a)* put by the General Assembly:

A. Unanimously,

Is of the opinion that the climate change treaties set forth binding obligations for States parties to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions. These obligations include the following:

(a) States parties to the United Nations Framework Convention on Climate Change have an obligation to adopt measures with a view to contributing to the mitigation of greenhouse gas emissions and adapting to climate change;

(b) States parties listed in Annex I to the United Nations Framework Convention on Climate Change have additional obligations to take the lead in combating climate change by limiting their greenhouse gas emissions and enhancing their greenhouse gas sinks and reservoirs;

(c) States parties to the United Nations Framework Convention on Climate Change have a duty to co-operate with each other in order to achieve the underlying objective of the Convention;

(d) States parties to the Kyoto Protocol must comply with applicable provisions of the Protocol;

(e) States parties to the Paris Agreement have an obligation to act with due diligence in taking measures in accordance with their common but differentiated responsibilities and respective capabilities capable of making an adequate contribution to achieving the temperature goal set out in the Agreement;

(f) States parties to the Paris Agreement have an obligation to prepare, communicate and maintain successive and progressive nationally determined contributions which, *inter alia*, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels;

(g) States parties to the Paris Agreement have an obligation to pursue measures which are capable of achieving the objectives set out in their successive nationally determined contributions; and

(h) States parties to the Paris Agreement have obligations of adaptation and co-operation, including through technology and financial transfers, which must be performed in good faith;

B. Unanimously,

Is of the opinion that customary international law sets forth obligations for States to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions. These obligations include the following:

(a) States have a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities;

(b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system and other parts of the environment, which requires sustained and continuous forms of co-operation by States when taking measures to prevent such harm;

C. Unanimously,

Is of the opinion that States parties to the Vienna Convention for the Protection of the Ozone Layer and to the Montreal Protocol on Substances that Deplete the Ozone Layer and its Kigali Amendment, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, have obligations under these treaties to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions;

D. Unanimously,

Is of the opinion that States parties to the United Nations Convention on the Law of the Sea have an obligation to adopt measures to protect and preserve the marine environment, including from the adverse effects of climate change and to co-operate in good faith;

E. Unanimously,

Is of the opinion that States have obligations under international human rights law to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment;

(4) As regards question *(b)* put by the General Assembly:

Unanimously,

Is of the opinion that a breach by a State of any obligations identified in response to question *(a)* constitutes an internationally wrongful act entailing the responsibility of that State. The responsible State is under a continuing duty to perform the obligation breached. The legal consequences resulting from the commission of an internationally wrongful act may include the obligations of:

(a) cessation of the wrongful actions or omissions, if they are continuing;

(b) providing assurances and guarantees of non-repetition of wrongful actions or omissions, if circumstances so require; and

(c) full reparation to injured States in the form of restitution, compensation and satisfaction, provided that the general conditions of the law of State responsibility are met, including that a sufficiently direct and certain causal nexus can be shown between the wrongful act and injury.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-third day of July, two thousand and twenty-five, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) IWASAWA Yuji,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President SEBUTINDE appends a separate opinion to the Advisory Opinion of the Court; Judge TOMKA appends a declaration to the Advisory Opinion of the Court; Judges YUSUF, XUE and BHANDARI append separate opinions to the Advisory Opinion of the Court; Judges BHANDARI and CLEVELAND append a joint declaration to the Advisory Opinion of the Court;

Judge NOLTE appends a declaration to the Advisory Opinion of the Court; Judge CHARLESWORTH appends a separate opinion to the Advisory Opinion of the Court; Judges CHARLESWORTH, BRANT, CLEVELAND and AURESCU append a joint declaration to the Advisory Opinion of the Court; Judge CLEVELAND appends a declaration to the Advisory Opinion of the Court; Judge AURESCU appends a separate opinion to the Advisory Opinion of the Court; Judge TLADI appends a declaration to the Advisory Opinion of the Court.

(Initialled) I.Y.

(Initialled) Ph.G.

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TAB 8

Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), UN Doc E/1992/23

Sixth session (1991)*

General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)

1. Pursuant to article 11 (1) of the Covenant, States parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

2. The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third (see E/1989/22, para. 312) and fourth sessions (E/1990/23, paras. 281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987.[1] The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[2]

3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing[3] article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.

4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed.[4] There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing.

5. In some instances, the reports of States parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the State concerned. This general comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate

* Contained in document E/1992/23.

housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost".

8. Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) *Legal security of tenure*. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) *Availability of services, materials, facilities and infrastructure*. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the *Health Principles of Housing*[5] prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

10. Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11 (1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

11. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its general comment No. 2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

12. While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures". Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.

13. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations under article 11 (1) it must demonstrate, inter alia, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasize the need to "provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing". They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in "illegal" settlements, those subject to forced evictions and low-income groups.

14. Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.

15. Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind. Nevertheless, the role of formal legislative and administrative measures should not be underestimated in this context. The Global Strategy

for Shelter (paras. 6-67) has drawn attention to the types of measures that might be taken in this regard and to their importance.

16. In some States, the right to adequate housing is constitutionally entrenched. In such cases the Committee is particularly interested in learning of the legal and practical significance of such an approach. Details of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18. In this regard, the Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19. Finally, article 11 (1) concludes with the obligation of States parties to recognize “the essential importance of international cooperation based on free consent”. Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.

Notes

[1] *Official Records of the General Assembly, Forty-third Session, Supplement No. 8*, addendum (A/43/8/Add.1).

[2] Commission on Human Rights resolutions 1986/36 and 1987/22; reports by Mr. Danilo Türk, Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/1990/19, paras. 108-120; E/CN.4/Sub.2/1991/17, paras. 137-139); see also Sub-Commission resolution 1991/26.

[3] See, for example, article 25 (1) of the Universal Declaration of Human Rights, article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, article 27 (3) of the Convention on the Rights of the Child, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements, 1976 (*Report of Habitat: United Nations Conference on Human Settlements* (United Nations publication, Sales No. E.76.IV.7 and corrigendum, chap. I), article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115)).

[4] See note 1.

[5] Geneva, World Health Organization, 1990.

TAB 9

CESCR, General Comment No 3: The Nature of States Parties' Obligations, UN Doc. INT_CESCR_GEC_4758_E (14 December 1990)

OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)

Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23)

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as

specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties' reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, inter alia, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the

vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps

"to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its general comment No. 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment with a human face: protecting the vulnerable and promoting growth,[1] the analysis by UNDP in its *Human Development Report 1990*[2] and the analysis by the World Bank in the *World Development Report 1990.*[3]

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in general comment No. 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized ...".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international

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[1] G.A. Cornia, R. Jolly and F. Steward, Eds., Oxford, Clarendon Press, 1987.

[2] Oxford, Oxford University Press, 1990.

[3] Oxford, Oxford University Press, 1990.

cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its general comment No. 2 (1990).

TAB 10

Report of the UN Special Rapporteur on the Right to Adequate Housing, UN Human Rights Council Thirty-first session, A/HRC/31/54 (30 December 2015)

United Nations A/HRC/31/54

General Assembly

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Human Rights Council
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Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the thematic report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Leilani Farha, prepared pursuant to Council resolution 25/17. In the report, the Special Rapporteur considers homelessness as a global human rights crisis directly linked to increased inequality of wealth and property, requiring urgent attention. She examines how homelessness is caused by States' failures to respond both to individual circumstances and to a range of structural causes, abandoning responsibility for social protection and allowing unregulated real estate speculation and investment to exclude a growing number of people from any form of housing. She outlines a clear set of obligations on States under international human rights law that, if complied with, would eliminate homelessness. She proposes a global campaign to eliminate homelessness by 2030.

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Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

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I. Introduction

1. The present report of the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, is submitted pursuant to Human Rights Council resolutions 15/8 and 25/17.

2. Homelessness is a global human rights crisis that demands an urgent global response. It is occurring in all socioeconomic contexts — in developed, emerging and developing economies, in prosperity as well as in austerity. It is a diverse phenomenon, affecting different groups of people in different ways but with common features. It is symptomatic of the failure of governments[1] to address growing inequalities in income, wealth and access to land and property and to effectively respond to the challenges of migration and urbanization. Homelessness occurs when housing is treated as a commodity rather than as a human right.

3. At the same time, homelessness represents individual experiences of some of the most vulnerable members of society, characterized by abandonment, despair, erosion of self-esteem, denial of dignity, serious health consequences and loss of life. The term "homeless" describes not only a lack of housing but also identifies a social group. The close link between the denial of rights and a social identity distinguishes homelessness from deprivations of other socioeconomic rights. People denied water or food are rarely treated as a social group in the way homeless people are. Those who are homeless are subject to stigmatization, social exclusion and criminalization.

4. Homelessness is an extreme violation of the rights to adequate housing and non-discrimination and often also a violation of the rights to life, to security of person, to health, to protection of the home and family and to freedom from cruel and inhuman treatment. However, it has not been addressed with the urgency and priority that ought to be accorded to so widespread and severe a violation of human rights. Homelessness was not mentioned in the Millennium Development Goals, is absent from the Sustainable Development Goals and has been rarely mentioned in the preparatory work for the United Nations Conference on Housing and Sustainable Urban Development (Habitat III). Violations of the right to life because of homelessness have rarely been addressed as such by international human rights bodies.

5. In the present report, the Special Rapporteur considers how homelessness is experienced as a human rights violation and how it can be effectively challenged and eliminated if addressed within a human rights framework. She urges that the elimination of homelessness be affirmed as a cross-cutting human rights priority in socioeconomic policy, planning and development.

6. The Special Rapporteur solicited and received over 70 responses with information and views on the issue from States, civil society, national human rights institutions and United Nations agencies.[2] She held a two-day expert consultation in Buenos Aires[3] with 25 experts in homelessness and the right to housing from around the world. She is grateful for

[1] In the present report, "governments" refers to all levels of government, including local and subnational, unless otherwise stipulated.

[2] All responses to questionnaires and information on the consultation are available from www.ohchr.org/EN/Issues/Housing/Pages/Homelessnessandhumanrights.aspx.

[3] Co-organized with the Argentinian non-governmental organization Centro de Estudios Legales y Sociales in November 2015.

all the information and guidance received. The Special Rapporteur is also appreciative of the important work done on this topic by her predecessor, Miloon Kothari.

II. Towards a human rights definition of homelessness

A. What does "homelessness" mean?

7. The word "homelessness" in English does not always have an equivalent translation in other languages. In English, "homelessness" suggests both a lack of physical housing and a loss of a sense of social belonging. In some other languages, the closest word to homelessness would be "rooflessness", lacking shelter or transience. In French, homelessness is referred to as either "*sans domicile fixe*" or "*sans-abrisme*". In Spanish, homelessness is referred to as "*sin hogar*" or "*sin techo*" or "*en situación de calle*" or "*poblaciones callejeras*".

8. Definitions of homelessness adopted by international agencies, governments, researchers or civil society vary widely, depending on language, socioeconomic conditions, cultural norms, the groups affected and the purpose for which homelessness is being defined. It is generally agreed, however, that the experience of homelessness around the world is not fully captured without a richer definition that goes beyond reference to deprivation of physical shelter.

9. The definition of homelessness is often based on where individuals live or sleep, for instance, those who sleep "rough", in emergency shelters or in institutions, such as prisons or psychiatric institutions. While definitions on the basis of location have the advantage of being less ambiguous, they tend to distort perceptions of who is homeless. Single men will live on the streets or in shelters, for example, while women with children will seek other options, such as with family or friends, to avoid the severe repercussions associated with street life, including violence and child apprehension.

10. Homelessness has also been defined with reference to what is lacking. The Statistics Division of the Department of Economic and Social Affairs of the United Nations has defined "primary homelessness" as persons living without a shelter or living quarters and "secondary homelessness" as including persons with no place of usual residence. In some contexts, homelessness is understood as a lack of access to land as well as to shelter. In rural Bangladesh, for example, homelessness is assessed on the basis of whether a household has a regularized plot of land as well a roof overhead.[4] Other definitions focus on being deprived of a certain minimum quality of housing. The Institute of Global Homelessness has proposed as a global definition: "lacking access to minimally adequate housing", while listing various categories of living situations that fall within this general definition.

11. However, many people living in informal settlements and lacking basic services are certainly deprived of minimally adequate housing yet they have worked hard to establish and build homes and, importantly, would not self-identify as homeless. It would, therefore, be inappropriate to define the more than 1 billion people worldwide estimated to be living in informal settlements as homeless, even though their needs are critical and must also be addressed as a priority. Within informal settlements there are, however, residents who have established temporary accommodation because they have no other options who are living in

[4] See G. Tipple and S. Speak, "Definitions of homelessness in developing countries", *Habitat International*, 29 (2005), p. 342. See also the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (E/CN.4/2005/48).

particularly precarious situations — overcrowded and unsafe situations, sometimes renting informally, subject to eviction at a moment's notice or in grossly inadequate shelter unfit for human habitation. These households might reasonably be considered and may self-identify as homeless.

12. Different definitions can create different perceptions and policy priorities. In Japan, when homelessness was defined in terms of those living on the street, available data suggested declining numbers as a result of shelter programmes. However, when defined as "lacking access to minimally adequate housing", data showed increasing numbers of homeless.[5]

13. Definitions relating only to a lack of physical shelter also fail to take into account the loss of social connection — the feeling of "belonging nowhere"[6] — experienced by homeless persons. A number of States have attempted to address this concern by referencing the rupture of family or social connections in their definitions of homelessness. Including the more qualitative aspects of social exclusion linked to homelessness, however, can make definitions too imprecise for some purposes.

14. Different types of homelessness can also be understood in relation to choices of survival strategies and lifestyles. Advocates for street-connected children and young people suggest that a definition of homelessness that recognizes agency and choice as well as deprivation is preferable.

B. A three-dimensional human rights definition of homelessness

15. Different definitions of homelessness serve different purposes. A universally applied definition with common measurement, as proposed by the Institute of Global Homelessness could play an important role in promoting enhanced State accountability and informing development goals.

16. From a human rights perspective, the Special Rapporteur advocates a flexible and contextual approach to defining homelessness that recognizes experiences and understandings of homelessness among different groups and in diverse circumstances. A human rights definition should focus attention on the most desperate situations while ensuring that those who are homeless identify those circumstances themselves, define their needs and are recognized as actors in effecting change to fully realize their right to adequate housing. The social dimensions of homelessness are also central to a human rights definition.

17. In light of these considerations, the Special Rapporteur proposes the following three-dimensional approach anchored in human rights:

(a) The first dimension addresses the absence of home — both the absence of the material aspect of minimally adequate housing and of the social aspect of a secure place to establish a family or social relationships and participate in community life;

(b) The second dimension considers homelessness as a form of systemic discrimination and social exclusion, recognizing that being deprived of a home gives rise to a social identity through which "the homeless" is constituted as a social group subject to discrimination and stigmatization;

[5] Rayna Rushenko, "Homelessness and related policy in Japan and Malaysia", presentation on homelessness in a global landscape, 2 June 2015. Available from http://media.wix.com/ugd/d41ae6_167a5007c11a4cc49fe75499fd60325b.pdf.

[6] United Nations Human Settlements Programme, *Strategies to Combat Homelessness* (2000).

(c) The third dimension recognizes those who are homeless as rights holders who are resilient in the struggle for survival and dignity. With a unique understanding of the systems that deny them their rights, homeless people must be recognized as central agents of the social transformation necessary for the realization of the right to adequate housing.

18. A human rights definition of homelessness undermines "moral" explanations of homelessness as personal failures to be solved with acts of charity and instead reveals patterns of inequality and injustice that deny those who are homeless their rights to be equal members of society.

III. Discrimination, stigmatization and social exclusion

A. Social construction of homelessness

19. Those who are homeless are constructed as a social group. Worldwide, their identity is created and then reinforced by people who have more money, more power or more influence. It is a vicious circle. Laws, policies, business practices and media stories depict and treat homeless people as morally inferior, undeserving of assistance and authors of their own misfortune, and blame them for the social problems they come to represent. Once stigmatized, their needs are further neglected and inequality and discrimination further entrenched.

20. Strategies to address homelessness are, ironically, often tainted with prejudice and stigmatization. For example, in August 2015, the office of the Mayor of New York introduced a mobile telephone application called Map the Homeless[7] that allowed users to take snapshots of homeless people and report them to the police. Social media hashtag labels included #AggressivePanhandling and #Violent.

21. Homeless people are subject to constant intimidation and harassment by authorities and the general public; they are denied access to basic services or places to shower, urinate or defecate; they are rounded up and forced out of cities and relocated to uninhabitable places; they are walked over and passed by; they are subject to extreme forms of violence, including hate crimes and sexual violence; and they are often the subject of vilification. At the same time, some forms of homelessness remain totally invisible and neglected, in particular in parts of the global South, where homelessness remains relatively unacknowledged or where the distinction between very precarious housing conditions and homelessness may not be easily drawn.

22. The humiliation homeless people suffer in their daily lives cannot be underestimated. Take for example, the experience of women who lack adequate sanitation facilities, especially during menstrual cycles, or of families who are treated like "human waste", forced to establish their households on or next to a garbage dump. Homeless people have told the Special Rapporteur, often through tears, that more than any material security, what they yearn for is to be "seen", to be recognized and treated by society as human beings with inherent dignity and respect.

[7] Available online from https://play.google.com/store/apps/details?id=com.dfox.nycmapthehomeless&hl=en.

B. Criminalization of homelessness

23. National and local laws often make homeless people into lawbreakers, rather than protecting their rights. Laws are created to render homeless people invisible, to displace them from land or housing and destroy their makeshift shelters. In many places punitive measures such as fines or incarceration are imposed for activities linked to basic survival, including constructing any kind of shelter out of cardboard.[8] Laws enable authorities to "rescue" street-connected children, depriving them of their liberty without due process or respect for the social networks upon which they rely.

24. Such laws are often framed under the guise of public health and safety but, in reality, the aim is to "beautify" an area for the promotion of tourism and business or to increase property values. Examples are countless: in Zimbabwe, an operation to "sweep out the rubbish" through demolitions of shanty towns in 2005 left up to 1.5 million people homeless in the middle of the winter.[9] In June 2014, the Mayor of Honolulu introduced new measures to crack down on homelessness because tourists want to see "their paradise, not homeless people sleeping". In Medellín, Colombia, during the World Urban Forum, the homeless population was transported outside of the city.[10] In Australia, "move on" laws permit authorities to "disperse" homeless people "where a person's mere presence could cause anxiety to another person or interfere with another's 'reasonable enjoyment' of the space".[11]

C. Discrimination in access to land and housing

25. The favouring of profit over people's human rights through the unequal allocation of land, property, housing and related services in cities is a major driver of homelessness. Unregulated or underregulated financial and other market forces, and unfettered land and property speculation resulting in escalating land values, all contribute to the inequality of wealth distribution and homelessness. These systemic inequalities are compounded by direct discrimination against people who are poor, often pushing them to precarious housing conditions, including into informal settlements or on occupied land, and ultimately into homelessness. Many municipalities use planning and zoning laws or regulations to prevent construction of shelters or affordable housing in their communities. Homeless people are often denied opportunities to live in central locations; instead, they are compelled to live in remote, isolated and poorly serviced areas where there are no jobs.

26. Dichotomies of legal/illegal, formal/informal and deserving/undeserving applied in the global South parallel the criminalization of homelessness in northern countries. The urban poor are made "illegal" and "encroachers" by the denial of fair access to land and legal status or title. People who have been rendered homeless in urban centres are relocated

[8] National Coalition for the Homeless, *Share No More: The Criminalization of Efforts to Feed People in Need* (October 2014), available from http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf.

[9] Owen Dyer, "Zimbabwean clearance policy leaves 1.5 million people homeless", *British Medical Journal*, vol. 331, No. 7509, p. 130 (2005).

[10] Greg Scruggs, "Medellin Opens Its Changing Streets to the World Urban Forum", available from https://nextcity.org/daily/entry/medellin-opens-its-changing-streets-to-the-world-urban-forum.

[11] Response to the questionnaire from the Australian Human Rights Commission.

to city peripheries and deprived of economic opportunities and social networks, a process that has been labelled "socio-spatial stigmatization".[12]

27. Widespread and severe discrimination and stigmatization on the ground of homelessness has rarely been addressed effectively by national human rights institutions or subjected to effective judicial or administrative remedies, and only rarely recognized in domestic legislation as a prohibited form of discrimination.

IV. Interconnected causes of homelessness

28. Homelessness is caused by the interplay between individual circumstances and broader systemic factors. A human rights response to homelessness addresses both. It understands that homelessness may be linked to individual dynamics such as psychosocial disabilities, unexpected job loss, addictions or complex choices to become street–connected, and that a major cause of homelessness is the failure of governments to respond to unique individual circumstances with compassion and respect for individual dignity. A human rights approach must also, however, address the overarching structural and institutional causes of homelessness — the cumulative effect of domestic policies, programmes and legislation, as well as international financial and development agreements that contribute to and create homelessness. In her consultations, the Special Rapporteur found that inequality and the conditions that breed it are the most consistently identified causes of homelessness.

29. Rapid global urbanization has resulted in an astonishing accumulation of wealth for a few, accompanied by increasing poverty for many. Reliance on private market housing supply to respond to urbanization needs has meant that new housing supply has targeted mostly the rich, creating inflated real estate values, speculation and significant deficits of affordable housing. People who move to cities often have no choice but to live in informal settlements where millions suffer, in varying degrees, from poor sanitation, lack of access to clean water, overcrowding and makeshift structures. Instead of ensuring access for people in need of housing, land regulations, planning and zoning have rendered informal settlements "illegal", favoured commercial development over housing and failed to respect the social function of land as a public good. The legacy of colonialism in some countries has embedded inequality in land and property.

30. The precariousness of informality and the prevalence of development-based evictions continue to be major structural causes of homelessness. Informal neighbourhoods are wiped out and replaced with high-end tourist attractions, shopping malls or entertainment districts. Land contamination and mismanagement compound these effects. Evictions without adequate resettlement, as is common, invariably lead to homelessness.[13]

31. Worldwide, there is evidence of a consistent pattern: governments have abandoned their critical role in ensuring social protection, including affordable housing, have cut or privatized social benefits and have deferred to the private market, allowing private actors and elites with access to power and money to control key areas of decision-making.[14] As a result, real estate and speculative capital have guided land use and urban development.

[12] See *Urban Policies and the Right to the City in India*, United Nations Educational, Scientific and Cultural Organization (New Delhi, 2011), pp. 63-75. Available from http://unesdoc.unesco.org/images/0021/002146/214602e.pdf.

[13] See, for example, the case of the Badia community in Lagos, Nigeria (case NGA 1/2015). An urgent appeal by the Special Rapporteur will be made available at the thirty-first session of the Human Rights Council.

[14] Response to questionnaire from the Danish Institute for Human Rights.

Even where there has been large-scale investment in affordable housing, such as in Sao Paulo, Brazil, the interests of speculative capital have dominated.[15] Labour market deregulation, reduced rates of taxation on wealthier individuals and corporations, displacement by extractive industries, dams and other developments, the privatization of infrastructure and services, predatory lending and many other factors have all emerged from the abandonment of the central role of governments.

32. The proliferation of trade and investment agreements has dramatically altered State accountability, with the interests of large corporate investors prioritized over obligations to protect human rights and ensure the sustainability of local enterprises and communities.

33. Fiscal crises around the world have resulted in significant increases in homelessness and have given rise to a new category of homeless — highly educated individuals who had a good standard of living but who, due to an economic crisis, experienced unemployment and ultimately homelessness. The 2008 crisis, for example, and the accompanying austerity measures, caused a massive rise in homelessness in several European countries.[16] Evidence suggests, however, that widespread homelessness did not occur in the aftermath of the global economic crisis in countries where governments were careful to ensure that reactive measures did not undermine social protection.

34. The causes of homelessness vary among particular groups. Street-connected children come from families with a wide range of experiences, including death, dislocation, disease, isolation, poverty, mental illness, domestic violence, child abuse and drug use. Women are forced into homelessness because of violence, unequal access to land and property, unequal wages and other forms of discrimination. Persons with disabilities are made homeless by lack of work, livelihoods and accessible housing. Young people are often denied access to housing and services in cities if they do not have appropriate government-issued documentation or identity cards. Conflict results in massive displacement and migration, as has been evidenced clearly by the waves of refugees from countries such as Afghanistan, Eritrea, Iraq, Somalia and the Syrian Arab Republic escaping from conflict, widespread violence and insecurity.

35. Rural homelessness has been the result of decreasing food security from household production, climate change, corporatization of agriculture, loss of land through subdivision at inheritance, declining civil security in rural areas, extreme poverty, unregulated resource exploitation and natural disasters. Rural homelessness usually leads people to migrate to urban areas in search of work and housing.

36. Many societal changes without adequate State responses contribute to homelessness. For example, the break-up of traditional family structures is a prevalent cause of homelessness. Men who move to cities for economic reasons often forgo shelter in order to save money to send back to their families in rural areas. In many States, long traditions of extended family support and kinship responsibility at the community level have been eroded. Illness, including the HIV/AIDS pandemic, is both a major cause and effect of homelessness.

37. Natural disasters, such as the 2004 tsunami in South-East Asia and the 2008 earthquake that struck Sichuan Province, China, result in homelessness by destroying housing, infrastructure and livelihoods and setting back housing strategies. The earthquake

[15] Response to the questionnaire from the Public Defender of Sao Paulo, Brazil.

[16] See, for illustration, the response to the questionnaire from the Spanish Ombudsman; Olga Theodorikakou et al, "'Neo-homelessness' and the Greek Crisis" (2013), available from http://feantsaresearch.org/IMG/pdf/ot_et_al_review.pdf; and European Commission, "Homelessness during the crisis", available from http://ec.europa.eu/social/BlobServlet?docId=9847&langId=en.

in Nepal in 2015 left thousands homeless, with 320,000 children sleeping rough in the immediate aftermath.[17] Informal settlements are often located in disaster-risk areas. International responses to natural disasters tend to focus on immediate emergency needs for medical care and shelter, sometimes requiring proof of prior residence or tenure arrangements in order to provide services — which homeless people lack — and neglecting the need for longer-term strategies to address the resulting legacy of homelessness.

38. The common denominator in virtually all structural causes of homelessness is government decision-making inconsistent with human rights — neglecting or failing to respond adequately to the needs of the most disadvantaged in response to crises or economic developments and allowing unregulated market forces to render large numbers of people homeless.[18] Homelessness is created when apparently external structural causes converge with the systemic patterns of social exclusion and discrimination and when governments fail to address new challenges within a human rights framework.

V. Homelessness and marginalized groups

39. Discrimination is both a cause and a consequence of homelessness. Those who face discrimination on the grounds of race, ethnicity, place of origin, socioeconomic status, family status, gender, mental or physical disability, health condition, sexual orientation and/or gender identity and age are more likely to become homeless and, once homeless, experience additional discrimination. The intersections of other grounds of discrimination with homelessness vary in different countries. In some, for example, racial inequality intersects strongly with homelessness. In Brazil, African-Brazilians make up only 7 per cent of the population of wealthy areas and yet make up the majority in informal settlements.[19] In the United States of America, black families are seven times more likely to be homeless than white families.[20]

40. The ongoing legacy of discriminatory customary and statutory laws on divorce, inheritance and matrimonial property — as well as social practices that attribute housing to male heads of households and the resultant poverty — deprive women of security of tenure and render them particularly vulnerable to homelessness.[21] When women are widowed, separated or divorced,[22] need to leave violent households or flee situations of armed conflict or natural disasters, or are evicted from their homes, they face significant risks of becoming homeless.[23] Divorced and widowed women in Bangladesh and Lebanon, for example, are reported to be living in dilapidated shacks in dangerous informal settlements and women fleeing violence in Kyrgyzstan and Papua New Guinea are left with few housing options.[24]

41. The global economic crisis has had a distinct impact on women's homelessness. In Spain, for example, many single mothers were overindebted from home purchases. In many

[17] Save the Children, "320,000 Children Homeless in Nepal" (1 May 2015), available from www.savethechildren.org/site/apps/nlnet/content2.aspx?c=8rKLIXMGIpI4E&b=9241341&ct=14637607.

[18] According to the response to the questionnaire from the Norwegian Refugee Council, humanitarian aid often is allocated to male heads of households, thus further discriminating against women.

[19] *The Economist*, "Race in Brazil" (28 January 2012), available from www.economist.com/node/21543494.

[20] National Coalition for the Homeless, "Who is homeless?" (2009), available from www.nationalhomeless.org/publications/facts/Whois.pdf.

[21] Response to the questionnaire from Human Rights Watch, United States.

[22] Response to the questionnaire from Monarch Housing Association.

[23] Response to the questionnaire from Human Rights Watch, United States.

[24] Ibid.

cases, former partners or husbands who shared mortgages refused to negotiate with banks for debt restructuring, relief or cancellation. When their homes were repossessed, they were left with significant debt, often living in insecure housing — at severe risk of homelessness.[25]

42. Once homeless, women's experiences are acute. They are exposed to high rates of violence, including rape. In its inquiry into the situation of missing and murdered indigenous women in Canada, the Committee on the Elimination of Discrimination against Women recognized the link between Aboriginal women's poverty, homelessness and their disappearances and murder.[26]

43. Homelessness among children and young people has reached critical proportions. Factors that push children into leaving home include parents' unemployment and poverty; family disintegration and parental abuse; parental drug and alcohol addictions; and being orphaned owing to HIV/AIDS, Ebola, armed conflict or natural disaster. Some families, unable to support children because of extreme poverty, abandon or send them to urban areas to work.[27] Children raised in residential institutions often find themselves homeless when they reach the age at which institutional care ceases.[28] Identified "pull" factors include "spatial freedom, financial independence, adventure, city glamour and street-based friendships or gangs".[29]

44. Most families of street-connected children have experienced persistent discrimination, poverty and social exclusion. Street-connected children and young people face particular challenges, including the threat of being removed from their parents for neglect and put into orphanages or foster systems.[30] Lesbian, gay, bisexual, transgender and intersex young people are overrepresented in homeless populations in some countries and face additional stigmatization and social exclusion from their families and communities, and are more vulnerable to violence and more likely to be turned away from shelters.

45. Families with children are at increasing risk of homelessness as parents are deprived of the income necessary for housing and supply of affordable housing is depleted. In Ireland, families with children have become the fastest growing group within the homeless population.[31] Those families risk losing their children to public authorities for failing to provide adequate housing.

46. People on the move, especially international migrants, refugees and internally displaced persons, are also at significant risk of homelessness. Those groups suffer multiple discrimination and numerous obstacles in securing temporary or permanent housing. In many countries, such as Denmark[32] and the Netherlands, public shelters do not accommodate migrants or only accommodate them for limited periods of time.[33] Migrants are consequently forced to settle in slums, shacks and derelict or unfinished buildings;

[25] Ibid.
[26] See CEDAW/C/OP.8/CAN/1, paras. 112-118.**Error! Hyperlink reference not valid.**
[27] Response to the questionnaire from Safe Child Africa, United Kingdom.
[28] Response to the questionnaire from Ombudsman of the Republic of Moldova.
[29] See A/HRC/19/35, para. 19.
[30] Responses to the questionnaire from the organizations El Caracol AC of Mexico and Habitat for Humanity of Hungary.
[31] Response to the questionnaire from the organization FOCUS, Ireland.
[32] Response to the questionnaire from the Danish Institute for Human Rights.
[33] See case No. NLD 1/2014, in A/HRC/29/50.

migrant domestic workers have reported being forced to sleep in hallways, unprotected living spaces or closets of the homes in which they work.[34]

47. Persons with disabilities are particularly vulnerable to homelessness. In all parts of the world, psychosocial disability can make it impossible for people to secure employment and earn a living to pay for housing.[35] At the same time, many States do not ensure access to the community-based support that people with disabilities need. In States where people with perceived psychosocial disabilities are institutionalized, the support or housing available upon their release are often inadequate.[36] Where deinstitutionalization has been implemented, States have failed to provide the necessary social support for housing in the community.

VI. The human rights framework for addressing homelessness and access to justice

A. State obligations

48. Homelessness lies at the extreme end of the spectrum of violations of the right to adequate housing. As such, States should treat homelessness with the highest level of urgency. Twenty-five years ago, the Committee on Economic, Social and Cultural Rights stated that a State party to the International Covenant on Economic, Social and Cultural Rights in which any significant number of individuals are deprived of basic shelter and housing is, prima facie, failing to discharge its obligations under the Covenant.[37] States are required to demonstrate that every effort has been made to use all resources that are at their disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[38]

49. State obligations in relation to homelessness have been clearly articulated and can be summarized as follows:

(a) States have an immediate obligation to adopt and implement strategies to eliminate homelessness. These strategies must contain clear goals and timelines and must set out the responsibilities of all levels of government and of other actors for the implementation of specific, time-bound measures, in consultation with and with participation by homeless people;[39]

(b) States must combat discrimination, stigma and negative stereotyping of homeless people as a matter of urgency and provide legal protection from discrimination because of social and economic situation, which includes homelessness;[40]

[34] Human Rights Watch, “Domestic plight: how Jordanian laws, officials, employers and recruiters fail abused migrant domestic workers” (27 September 2011), available from www.hrw.org/report/2011/09/27/domestic-plight/how-jordanian-laws-officials-employers-and-recruiters-fail-abused.

[35] Response to questionnaire from the Ombudsman of Albania.

[36] Response to the questionnaire from Human Rights Watch, United States.

[37] See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties’ obligations, para. 10.

[38] Ibid.

[39] See Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing, para 12; concluding observations of the Committee on Economic, Social and Cultural Rights on Canada (E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5).

[40] See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 35.

(c) Evictions should never render individuals homeless. The prohibition of evictions leading to homelessness is immediate, absolute and is not subject to available resources;[41]

(d) Eviction without full consultation with those affected is a clear violation of international human rights. The obligation to explore every alternative to eviction, never to evict into homelessness and to ensure that residents are adequately consulted about resettlement plans should be applied under domestic law to both private and public land or property owners.[42] States must take all appropriate measures, to the maximum of available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available;

(e) States have an immediate obligation to ensure that every decision or policy is consistent with the goal of the elimination of homelessness. Any decision that results in homelessness must be regarded as unacceptable and contrary to human rights. Policy and planning must apply the maximum of available resources, including unused or vacant lands and housing units, with a view to ensuring access to land and housing for marginalized groups;

(f) States have a firm legal obligation to regulate and engage with non-State actors so as to ensure that all of their actions and policies are in accordance with the right to adequate housing and the prevention and amelioration of homelessness. Regulation of private actors should include requirements on developers and investors to address homelessness and work in partnership to provide affordable housing in all developments;[43]

(g) Access to effective remedies to homelessness must be ensured, including enforcement of obligations linked to the progressive realization of the right to housing and the elimination of homelessness.[44]

B. Access to justice

50. It is of critical importance that courts and international human rights bodies engage more actively with the need for access to justice and protection of human rights of those who are homeless. Access to effective remedies was the subject of the first case under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights regarding foreclosure procedures in Spain, where an estimated 400,000 mortgage foreclosures took place between 2008 and 2012.[45] The Committee clarified that ensuring effective judicial remedies for the right to adequate housing is an immediate obligation of States, since "there cannot be a right without a remedy to protect it", and held that the State had violated the obligation to provide effective remedies in the context of foreclosure procedures.

[41] See Committee on Economic, Social and Cultural Rights, general comment No. 7. See also S. Wilson, "Breaking the tie: evictions from private land, homelessness and a new normality", *South African Law Journal*, volume 126, No. 2 (2009).

[42] See, for example, *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* (CCT 37/11) [2011] ZACC 33 (1 December 2011).

[43] See Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States Parties' obligations.

[44] See concluding observations of the Committee on Economic, Social and Cultural Rights on Canada (E/C.12/CAN/CO/4 and E/C.12/CAN/CO/5).

[45] See communication No. 2/2014, *I.D.G. v. Spain*, Views adopted by the Committee on Economic, Social and Cultural Rights on 17 June 2015. In its response to the questionnaire, the organization Arrels Fundació estimates that, for every 100,000 persons, 71 are homeless in Spain.

51. Other treaty monitoring bodies and human rights mechanisms have articulated legal standards with respect to remedies in the context of homelessness. In *A.T. v. Hungary*, the Committee on the Elimination of Discrimination against Women addressed the link between violence against women and homelessness, recommending as part of an effective remedy to "ensure that A. T. is given a safe home in which to live with her children".[46]

52. In its 2014 concluding observations on the United States, the Human Rights Committee noted that criminalization of homeless people raises concerns of discrimination and cruel, inhuman or degrading treatment.[47] It recommended that the federal Government engage with State and local authorities to abolish discriminatory laws and policies criminalizing homelessness; intensify efforts to find solutions for people who are homeless; and offer incentives for decriminalization to local authorities.. The federal Government recently announced that it is implementing the recommendations, including by linking access to federal housing grants to the repeal of local laws that criminalize homelessness.

53. The Human Rights Committee has also acknowledged that widespread homelessness leads to serious health consequences and death and has stated that positive measures are required under article 6 of the International Covenant on Civil and Political Rights on the right to life to address homelessness.[48] The Committee has considered homelessness in the context of forced evictions, finding that failure to consider that an eviction might result in homelessness constitutes an arbitrary interference with the home.[49]

54. Regional human rights systems have also, to various extents, offered avenues for effective remedies for those who are homeless. The revised European Social Charter, in its article 31, includes the obligation "to prevent and reduce homelessness with a view to its gradual elimination". In *European Federation of National Organisations working with the Homeless (FEANTSA) v. France*,[50] the European Social Rights Committee held that "the measures currently in place to reduce the number of homeless are insufficient, both in quantitative and qualitative terms", and constituted a violation of article 31.2 of the Charter.

55. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have developed important jurisprudence recognizing the obligation of the State to protect the special relationship between indigenous peoples and land in addressing violations in which, for example, members of indigenous communities have been "violently forced from their homes and traditional lands into a situation of ongoing displacement".[51] In addition, in considering the plight of street-connected children, the Court has explained that the right to life requires States to take positive measures to ensure access to the conditions needed to lead a dignified life, recognizing that the right to life belongs "at the same time to the domain of civil and political rights as well as economic, social and cultural rights".[52]

56. The African Commission on Human and Peoples' Rights has affirmed that the right to adequate housing is implied in the African Charter by its articles 14 on the right to property, 16 on the right to highest attainable standard of mental and physical health and

[46] See communication No. 2/2003, *A.T. v. Hungary*, Views adopted by the Committee on the Elimination of Discrimination against Women on 26 January 2005, para. 9.

[47] See CCPR/C/USA/CO/4.

[48] See, for example, CCPR/C/79/Add.105, para. 12.

[49] See communication No. 2073/2011, *Liliana Assenova Naidenova et al. v. Bulgaria*, Views adopted on 30 October 2012, para. 14.7.

[50] Complaint 39/2006 (2007).

[51] See Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, judgement of 15 June 2015, para. 186. Available from www.corteidh.or.cr/docs/casos/articulos/seriec_124_ing.pdf

[52] See Inter-American Court of Human Rights, *Villagran-Morales et al. v. Guatemala*, judgement of 19 November 1999. Available from www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf.

18 (1) on protection accorded to the family.[53] It considers that forced evictions leading to homelessness are contrary to the Charter, and has urged all States to report on measures taken to address homelessness and to appoint an independent national body to monitor State compliance with the right to adequate housing.[54]

57. Important advances have been made in domestic jurisdictions recognizing that homelessness violates a range of human rights. The Grundgesetz (Basic Law) of Germany has been interpreted to ensure that adequate and humane housing is a component of a minimum standard of living in line with human dignity.[55]

58. The Supreme Court of India has affirmed that the right to life "includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter".[56] The High Court of New Delhi initiated a case on its own motion to consider whether the demolition of a temporary homeless shelter in preparation for the 2010 Commonwealth Games had violated the right to life. The loss of the shelter resulted in the death of one former resident. The Court ordered the Delhi government to rebuild the shelter and to stop evicting homeless persons in winter.[57]

59. Claims brought by homeless people before domestic courts have led to significant advances in many jurisdictions. In Argentina, homeless people have the right to assistance, but it is claimed on a case-by-case basis before the court. For example, in *Q. C. S. Y. v. Government of the Autonomous City of Buenos Aires*, the National Supreme Court ordered the Buenos Aires government to provide adequate shelter for a homeless mother and her disabled son, noting that there should be a minimum guarantee of access to housing for those facing situations of extreme vulnerability.

60. The Colombia Constitutional Court ordered the Municipality of Dosquebradas and the Department of Risaralda to design a pilot programme for homeless people in line with constitutional requirements and relevant experiences of other municipalities. The Court also called on all relevant authorities to immediately prepare a national public policy for homeless people in line with requirements of the national law about the rights of homeless people.

61. The Constitutional Court of South Africa ordered the Government to devise and implement a comprehensive and coordinated programme to realize the right to adequate housing that prioritizes those in most urgent need.[58] In the context of forced evictions, the Court has implemented a number of protections for those threatened with homelessness, including imposing on all levels of government a duty to meaningfully engage with

[53] See resolution 231 of the African Commission on Human and People's Rights, on the right to adequate housing and protection from forced evictions, available from www.achpr.org/sessions/52nd/resolutions/231.

[54] See African Commission on Human and People's Rights, Principles and Guidelines for the Implementation of Economic, Social and Cultural Rights, available from www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf.

[55] Response to the questionnaire from Germany.

[56] See Supreme Court of India, *Francis Coralie Mullin v. The Administrator*, judgement dated 13 January 1981, para. 6.

[57] Urban Rights Forum: With the Homeless, *The Trajectory of a Struggle* (2010), available from http://hlrn.org.in/documents/SAM-BKS_The_Trajectory_of_a_Struggle.pdf.

[58] See *Government of the Republic of South Africa et al v. Grootboom et al,* case No. CCT11/00 of October 2000.

communities involved in resettlement and recognizing the obligations of private landlords to ensure that no one is evicted into homelessness.[59]

62. In many countries, social movements are incorporating legal strategies into broader political strategies to challenge homelessness and affirm the right to adequate housing. Abahlali baseMjondolo, the South African shack-dwellers' movement, and other organizations in South Africa have developed approaches to social mobilization linked to legal strategies to claim rights, without losing sight of the fundamentally political nature of the struggle for adequate housing. [60]

63. In Argentina, the non-governmental organization Centro de Estudios Legales y Sociales has integrated test-case litigation to advance the right to adequate housing for homeless people with political initiatives, in order to change the way land, property and housing is distributed and ensure broader access to justice. The newly adopted Law for the Province of Buenos Aires on Access to Dignified Habitat affirms a number of guiding principles, including the right to the city, the social function of property, meaningful democratic participation and equitable sharing of benefits of urbanization.

64. The Special Rapporteur is encouraged by the proliferation of locally based initiatives to create more robust human rights frameworks, programmes, policies and laws, whether they take the form of new constitutional rights, charters on the right to the city/human rights city, local ordinances or enhanced mandates for human rights institutions and ombudspersons. Much more is needed, however. The implementation of a human rights framework for governance at all levels is the most critical component of any strategy for the elimination of homelessness.

VII. Metrics of homelessness and human rights accountability

65. Measuring the extent of homelessness among different groups helps to assess priorities, ensure effective design and implementation of policy responses and determine whether States are meeting their human rights obligations. According to the Committee on Economic, Social and Cultural Rights, States have an obligation to measure the extent of homelessness, using data disaggregated by gender, race and other relevant characteristics, and to establish effective means of monitoring progress.[61]

66. Beyond national measures of homelessness, there is also a need for global indicators. Addressing homelessness should be a central part of global development goals. While the Sustainable Development Goals omit any explicit reference to homelessness, target 11.1 of the Goals commits States to ensure access for all to adequate, safe and affordable housing and basic services and upgrading slums by 2030. Measuring and committing to reduce and eliminate homelessness with clear benchmarks and timelines will be critical to the successful realization of this target.

67. There are, however, serious challenges in measuring homelessness, both within States and globally, that need to be addressed. It has proven difficult to secure accurate and comparable data from all States in order to develop reliable global data. The Statistics Division of the Department of Economic and Social Affairs has noted that data on the

[59] See *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another*, case No. CCT 37/11, paras. 46, 54 and 57.

[60] See Jackie Dugard et al., "Rights-compromised or rights-savvy? The use of rights-based strategies to advance socio-economic struggles by Abahlali baseMjondolo, the South African shack-dwellers' movement", *Social and Economic Rights in Theory and Practice* (2014).

[61] See the Committee's general comment No. 4 on the right to adequate housing.

number of homeless households is scarce in all regions.[62] Initiatives to count the number of homeless people have often emerged organically from local communities and address variable local conditions and challenges in different ways. Local governments, service providers, ombudspersons and human rights institutions can play important roles in ensuring that data are accurate and inclusive. This, however, makes it challenging to develop common measures across cities and internationally.

68. Some States have also been reluctant to collect and provide reliable data, perceiving it to be contrary to their interests, particularly if they are seeking to attract development or tourism or to host mega events. Data collected by governments need to be supplemented by information that may only be available to non-governmental organizations and community-based organizations working directly with homeless populations.

69. The Institute of Global Homelessness has brought together researchers and civil society organizations working on homelessness from around the world to take up these challenges, urging a renewed commitment to achieving the most useful global measures through the adoption of a standard approach based on collaboration with governments.[63] The Special Rapporteur is hopeful that collaborative initiatives such as this will provide a foundation for significant advances in understanding global patterns and challenges in relation to homelessness and enhanced accountability to the obligation to eliminate it.

70. While improved statistical data will be important to guide public policy and to hold governments accountable, adjustments will need to be made for the inevitable limitations, omissions and possible distortions in available data. Challenges associated with measuring homelessness should not be allowed to encourage policies that respond only to the visible and more easily measured forms of homelessness. Homelessness among single men living on the streets or using emergency shelters is more easily measured. It is more difficult to measure homelessness among women, children and young people living temporarily with family or friends, or among those most marginalized and precariously housed within informal settlements, who may be altogether left out of census or data collection. It is equally difficult to identify and measure homelessness among indigenous households or communities displaced from ancestral lands. Members of ethnic minorities may not wish to be identified by authorities. In Kenya, for instance, many of the people who become homeless because of ethnic violence did not want to be identified for fear of reprisal.[64] Policy responses and assessments of progress in eliminating homelessness must make allowances for less visible dimensions of homelessness that may not have been measured.

71. It is also important to supplement data on services used by homeless people with estimates of those who are homeless but do not access services. When homelessness is assessed by counting the number of people sleeping in shelters or using services, improvements in those services may appear to increase the number of homeless, when in fact lower numbers simply reflect some improvements in meeting emergency needs. On the other hand, some cities have denied services as a punitive means of attempting to reduce the numbers of homeless in their jurisdiction. In those cases, lower numbers of people in homeless shelters is evidence of a serious violation of human rights. It is always important, therefore, to look behind numbers. Policies and accountability measures based exclusively on raw numbers are inadequate or incomplete from a human rights standpoint. Raw

[62] See http://unstats.un.org/unsd/demographic/products/dyb/techreport/hhchar.pdf, para. 68.

[63] See Institute of Global Homelessness, "A global framework for understanding and measuring homelessness" (2015), available from http://works.bepress.com/dennis_culhane/188.

[64] See V. Metcalfe et al., *Sanctuary in the city? Urban displacement and vulnerability in Nairobi* (London, 2011), available from www.rescue.org/sites/default/files/resource-file/Sanctuary%20in%20the%20City.pdf.

numbers may perpetuate exclusion and invisibility and fail to identify changes in the nature or experience of homelessness.

72. For this reason, the Special Rapporteur underlines the critical importance of qualitative evidence, including, for example, oral testimony, photographs or videos. A human rights-based measurement of homelessness should focus on prevention and on addressing underlying causes, and qualitative information capturing actual experiences often reveals more about how to prevent or solve it than numbers alone.[65] It is also vital to understand the trajectories into and out of homelessness, with longitudinal analysis of how people become homeless, how long they are homeless and how they escape from it to supplement point-in-time counts.

73. A human rights approach to effective measurement must involve genuine consultation with stakeholders. For some groups, statistical invisibility or being excluded from a census is experienced as marginalization and likely to lead to neglected needs in programmes and legislation. For other groups, however, such as street-connected young people or irregular migrants, being identified by government authorities may be threatening. Homeless people are best placed to ensure that methods of measurement are accurate and inclusive and at the same time sensitive to their circumstances.

VIII. Strategic policy responses to homelessness

74. The Special Rapporteur's consultations suggested that, while effective policy responses depend on particular circumstances, effective strategies must always be multi-pronged, engage a range of policies and programmes and address simultaneously social exclusion and housing deprivation. Most importantly, strategies must be led by stakeholders, combining social mobilization with legislative and policy reform.

75. The Committee on Economic, Social and Cultural Rights has focused on the need for comprehensive housing strategies to address homelessness, framed around the right to housing and ensuring monitoring and accountability with goals, timelines and complaints procedures. Similarly, in the case of street children, the United Nations High Commissioner for Human Rights advocates a holistic approach that recognizes rights as interdependent and interconnected, through a coordinated approach across government departments and with the involvement of family and community.[66]

76. Housing First has recently emerged as a dominant model for responses to homelessness in countries such as Belgium, Denmark, Hungary, the Netherlands, Portugal, and the United Kingdom of Great Britain and Northern Ireland. The model is straightforward, providing chronically homeless people, for example, those with psychosocial disabilities, with housing and support as needed.[67] There are obvious benefits of keeping people in their communities as opposed to providing treatment services without housing, and this model offers easily measured outcomes. At the same time, concerns have been raised that Housing First may not serve as a generalized model as it tends to focus on

[65] Institute of Global Homelessness, "A global framework for understanding and measuring homelessness" (2015), available from http://works.bepress.com/dennis_culhane/188/.

[66] See A/HRC/19/35, para. 30.

[67] Lars Benjaminsen, "Policy review update: results from the Housing First-based Danish homelessness strategy", *European Journal of Homelessness*, vol. 7, No. 2 (December 2013), available from www.feantsaresearch.org/IMG/pdf/lb_review.pdf.

visible forms of homelessness and does not address systemic causes of homelessness or ensure rehabilitation and production of affordable housing.[68]

77. National homelessness strategies have relied on legislation to clarify government obligations. Scotland enacted the Homelessness etc. (Scotland) Act in 2003, which includes the commitment to make housing a legal right by 2012. In keeping with this, an order was passed by the Scottish Parliament in 2012 that ensures that all individuals assessed to be "unintentionally homeless" have a right to settled accommodation.[69]

78. In many countries, national human rights institutions are able to investigate allegations of human rights violations related to homelessness and make recommendations to relevant authorities to design public policy and to remedy those violations. For the first time, the Human Rights Commission of Mexico City held a public hearing with groups of homeless people, then issued a report that focused on their human rights situation, including discrimination, criminalization and other human rights issues.[70]

79. The Norwegian Refugee Council has canvassed a number of housing alternatives to prevent and address homelessness for internally displaced persons. Options include incremental housing — providing land or a basic house for the recipient to upgrade over time; housing purchase certificates; social housing; the transfer of public buildings to private ownership; rental support; incremental tenure — starting from administrative recognition then legal recognition, developmental recognition to establishment of towns or districts; neighbourhood upgrades; and support for municipalities.[71]

80. Homeless people have begun to reassert their identity through human rights claims through both social movements and legal action. In South Africa, the shack-dwellers' movement, Abahlali, has emerged as a vibrant social movement, claiming the right to housing through both legal and political means. In Uganda, the Uganda Network on Law, Ethics and HIV/AIDS provides free legal representation for homeless widows dispossessed of their homes and properties as a result of discriminatory property and inheritance laws.[72] In the Simon Community in northern Belfast, homeless people, with the assistance of the organization Participation and the Practice of Rights, launched the Homelessness Action Charter to promote the human rights of homeless people.[73] In Canada, homeless people and supportive organizations challenged as unconstitutional national and subnational governments' failure to effectively address homelessness,[74] while simultaneously lobbying for legislation[75] to create a national homelessness and housing strategy. In the United States, homeless peoples' organizations have systematically and successfully challenged laws and policies that criminalize homelessness and have lobbied for federal, State and municipal housing strategies. In El Salvador, local community members formed a national

[68] Response to questionnaire from the Danish Institute for Human Rights.

[69] See www.gov.scot/News/Releases/2012/11/tackling-homelessness21112012.

[70] Comisión de Derechos Humanos del Distrito Federal, *Informe especial: Situación de los derechos humanos de las poblaciones callejeras en el Distrito Federal 2012-2013* (Mexico City, 2014), available in Spanish from http://cdhdfbeta.cdhdf.org.mx/wp-content/uploads/2014/09/poblaciones-callejeras-integrado-imprenta.pdf. Executive summary in English.

[71] See Norwegian Refugee Council et al., "Home sweet home: housing practices and tools that support durable solutions for urban IDPs" (Geneva, Internal Displacement Monitoring Centre, March 2015), pp. 25-51.

[72] See www.uganet.org/site/women-property-rights.

[73] Response to the questionnaire from the organization Participation and the Practice of Rights, United Kingdom.

[74] See *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852.

[75] See Bill C-400, an act to ensure secure, adequate, accessible and affordable housing, available from https://openparliament.ca/bills/41-1/C-400/.

commission for residents to advocate for housing rights alongside other civil society organizations.[76]

81. There are diverse models for ensuring participation of stakeholders in strategies to address homelessness. Brazil, for example, has created a participatory model for social policy that relies on policy councils of stakeholders. In Munich, Germany, special units for the prevention of homelessness have provided support in preventing evictions or repossessions.[77] In Europe, FEANTSA has organized and advanced rights claims on behalf of homeless people in a wide range of legal and political forums.

82. There is no universal policy or legislative solution to homelessness. It must be addressed in multiple ways, engaging with the structural causes of homelessness in particular circumstances. Any chosen policy must address issues faced by different groups and support individuals in their own personal struggles. The FEANTSA survey of strategies finds that effective strategies must be evidence-based, comprehensive, multi-dimensional, rights-based, participatory, based on statutes or legislation, sustainable, needs-based and bottom-up.

83. All levels of government should design and implement policies, laws and strategies to prevent and remedy homelessness. Failure to do so reflects that homelessness has neither been recognized nor addressed as a violation of human rights. What is lacking at all levels is a shared commitment to ensuring the enjoyment of the right to adequate housing — and related rights such as life and health. As the Consortium for Street Children has stated, "the greatest challenge for all street-connected children is being identified and treated as a rights holder".[78]

84. Since ensuring the enjoyment of human rights is a firm legal responsibility of all levels of government, policymakers can be compelled to incorporate human rights into their laws, policies and programmes, such as: consulting with homeless people throughout the policy development and implementation process; incorporating measureable goals and timelines into strategies; including monitoring and review mechanisms to ensure successful outcomes; and providing homeless people with a mechanism through which to claim their rights and with access to remedies. These are essential requirements for there to be meaningful inclusion of homeless people in the human family, restoring to them dignity, respect and protection under the rule of law.

IX. Conclusions and recommendations

85. **Widespread homelessness is evidence of the failure of States to protect and ensure the human rights of the most vulnerable populations. It is occurring in all countries, regardless of the phase of development of their economic or governance systems, and it has been occurring with impunity. The nature and scope of homelessness globally suggests society's lack of compassion for the full scale of deprivation and loss of dignity associated with being homeless. It is a phenomenon requiring urgent and immediate action by the international community and by all States.**

86. **Homelessness is one of the least examined consequences of unabated inequality, unfair distribution of land and property and poverty occurring on a global scale. It is a result of State acquiescence to real estate speculation and unregulated markets — a**

[76] Response to the questionnaire from the organization FUNDASAL, El Salvador.
[77] See European Commission, "Homelessness during the crisis", Research note 8/2011 (2011), p. 16.
[78] Response to the questionnaire from the organization Consortium for Street Children.

result of treating housing as a commodity rather than as a human right. It is rooted in a global privileging of wealth and power, and scapegoating and scorning of those who do not have a home.

87. **Homelessness disproportionately affects particular groups, including women, young people, children, indigenous peoples, people with disabilities, migrants and refugees, the working poor, and lesbian, gay, bisexual and transgender people, each in different ways, but with common structural causes. These include: (a) the retreat by all levels of government from social protection and social housing and the privatization of services, infrastructure, housing and public space; (b) the abandonment of the social function of land and housing; (c) the failure to address growing inequalities in income, wealth and access to land and property; (d) the adoption of fiscal and development policies that support deregulation and real estate speculation and prevent the development of affordable housing options; and (e), in the face of urbanization, the marginalization and mistreatment of those who are most precariously housed in informal settlements, living in temporary overcrowded structures, without access to water, sanitation or other basic services and living under the constant threat of eviction.**

88. **Instead of being treated as a group of rights bearers whose rights have been systematically violated, homeless people have become a stigmatized group subject to criminalization, discrimination and social exclusion. To be homeless is to experience acts of violence, a shortened life span and ill-health and to be criminalized for survival strategies for eating or sleeping in public space. Homeless people are rendered voiceless and invisible, banished to the peripheries of cities and towns, out of sight. Their humanity and dignity are rarely considered in legislation, public policies and strategies.**

89. **Failures to measure and document homelessness effectively, including in its less visible forms and in its more qualitative dimensions, have contributed to the lack of State-led or global responses. The absence of any reference to homelessness in development goals attests to the continued marginalization of homeless people.**

90. **From a human rights perspective, State obligations in relation to homelessness are well established and have been clearly articulated. These include the following immediate obligations of States: (a) to adopt and implement strategies to eliminate homelessness, with clear goals, targets and timelines; (b) to eliminate the practice of forced eviction, especially where it will lead to homelessness; (c) to combat and prohibit in law discrimination, stigma and negative stereotyping of homeless people; (d) to ensure access to legal remedies for violations of rights, including for the failure of States to take positive measures to address homelessness; and (e) to regulate third-party actors so that their actions are consistent with the elimination of homelessness and do not discriminate either directly or indirectly against homeless people.**

91. **In line with the present conclusions, the Special Rapporteur offers the following recommendations to States:**

(a) All States must commit to eliminating homelessness by 2030 or earlier if possible, in a manner that upholds international human rights and in keeping with target 11.1 of the Sustainable Development Goals;

(b) All States must develop and implement, on an immediate basis, coordinated rights-based strategies to prevent and eliminate homelessness. Those strategies must include measureable goals and timelines; be developed and implemented in consultation and collaboratively with stakeholders; make explicit reference to international human rights law, including the right to adequate housing and non-discrimination; include monitoring and review mechanisms to ensure

progress; and incorporate claiming mechanisms for alleged violations of human rights, including failures of States to adequately implement required strategies;

(c) Homelessness strategies must be cross-sectoral, clearly allocate and coordinate responsibilities of all levels of government and address the structural causes of homelessness, including those that are particular to the needs of marginalized or vulnerable groups;

(d) More reliable measures of homelessness, inclusive of less visible forms of homelessness and its qualitative dimensions, must be developed. Data collection methodologies should combine longitudinal analysis of homelessness with point-in-time counts. Beyond adopting definitions and methodologies suited to local circumstances, States and subnational governments should apply internationally agreed upon definitions, methodologies and indicators to permit a more objective assessment of progress made, including with respect to target 11.1 of the Sustainable Development Goals;

(e) Any and all laws or measures that criminalize, impose fines on or restrict homeless people or behaviour associated with being homeless, such as sleeping or eating in public spaces, must be immediately repealed;

(f) Homeless people must be recognized as a protected group in all relevant domestic anti-discrimination and hate-crime laws, including where relevant in national Constitutions, national and subnational human rights legislation and in city charters;

(g) A careful review of existing legislation and policies must be undertaken to ensure that those that include discriminatory intent or effect against people who are homeless are repealed or amended, in compliance with international human rights law. Funding or transfer payments for local programmes should be made conditional on the elimination of all laws that criminalize or discriminate against homeless persons;

(h) Homeless people must be ensured access to hearings and effective remedies for violations of their rights, including as a result of the failure of States to take reasonable measures within the maximum available resources to eliminate homelessness. Class or group actions should be facilitated where possible and effective remedies should be available in multiple forums, including courts, administrative tribunals and national human rights institutions;

(i) National and local governments must re-engage and recommit to their role of providing social protection and ensuring access to affordable housing for marginalized and vulnerable groups, reaffirming that housing is a human right rather than a commodity. Subnational governments must have access to adequate resources to meet their allocated responsibilities;

(j) Any evictions that may result in homelessness, including those intended to render homeless people less visible, such as to promote tourism or facilitate mega events, must be recognized under domestic law as gross violations of human rights and be immediately stopped. Forced evictions must not occur without prior meaningful consultation with affected groups, an exploration of all alternatives, including in situ upgrading, and the implementation of agreed-upon resettlement options for those affected;

(k) Special attention must be directed to homelessness among indigenous peoples caused by displacement from land and resources and the destruction of cultural identity. Indigenous peoples should be provided with resources to implement

programmes to address homelessness in both urban and rural contexts, consistent with the Declaration on the Rights of Indigenous Peoples.

92. **The Special Rapporteur offers the following recommendations to other actors**

(a) The media, including journalists, editorial boards, producers and owners, must ensure that homeless people are never depicted in a discriminatory or hateful manner. Oversight and regulation in this regard is needed;

(b) Humanitarian assistance must not be conditional on place of residence prior to conflict or natural disaster. Property titles or other documents that are often not available to people who are homeless should not be a barrier to receiving emergency and longer-term humanitarian assistance;

(c) Lawyers and advocates must work closely with homeless people and their representatives to ensure that homelessness is addressed as a human rights violation through any available avenues. The judiciary must develop its capacity and commitment to adjudicating these claims, including where the claims seek a remedy requiring positive measures. In this context, States must refrain from adopting positions in litigation that are contrary to international human rights law.

TAB 11

CESCR, General Comment No. 7, The Right to Adequate Housing: Forced Evictions, Sixteenth session, UN Doc. INT_CESCR_GEC_6430_E (16 May 1997)

OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

The right to adequate housing (Art.11.1): forced evictions : . 20/05/97. CESCR General comment 7. (General Comments)

Convention Abbreviation: CESCR

GENERAL COMMENT 7

The right to adequate housing (art. 11.1 of the Covenant):
forced evictions

(Sixteenth session, 1997)*

1. In its General Comment No. 4 (1991), the Committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. It concluded that forced evictions are prima facie incompatible with the requirements of the Covenant. Having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.

2. The international community has long recognized that the issue of forced evictions is a serious one. In 1976, the United Nations Conference on Human Settlements noted that special attention should be paid to "undertaking major clearance operations should take place only when conservation and rehabilitation are not feasible and relocation measures are made". [1/] In 1988, in the Global Strategy for Shelter to the Year 2000, adopted by the General Assembly in its resolution 43/181, the "fundamental obligation [of Governments] to protect and improve houses and neighbourhoods, rather than damage or destroy them" was recognized. [2/] Agenda 21 stated that "people should be protected by law against unfair eviction from their homes or land". [3/] In the Habitat Agenda Governments committed themselves to "protecting all people from, and providing legal protection and redress for, forced evictions that are contrary to the law, taking human rights into consideration; [and] when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided". [4/] The Commission on Human Rights has also indicated that "forced evictions are a gross violation of human rights". [5/] However, although these statements are important, they leave open one of the most critical issues, namely that of determining the circumstances under which forced evictions are permissible and of

spelling out the types of protection required to ensure respect for the relevant provisions of the Covenant.

3. The use of the term "forced evictions" is, in some respects, problematic. This expression seeks to convey a sense of arbitrariness and of illegality. To many observers, however, the reference to "forced evictions" is a tautology, while others have criticized the expression "illegal evictions" on the ground that it assumes that the relevant law provides adequate protection of the right to housing and conforms with the Covenant, which is by no means always the case. Similarly, it has been suggested that the term "unfair evictions" is even more subjective by virtue of its failure to refer to any legal framework at all. The international community, especially in the context of the Commission on Human Rights, has opted to refer to "forced evictions", primarily since all suggested alternatives also suffer from many such defects. The term "forced evictions" as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

5. Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States parties. Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is required so that any limitations imposed must be "determined by law only insofar as this may be compatible with the nature of these [i.e. economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society".

6. Many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing

renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.

8. In essence, the obligations of States parties to the Covenant in relation to forced evictions are based on article 11.1, read in conjunction with other relevant provisions. In particular, article 2.1 obliges States to use "all appropriate means" to promote the right to adequate housing. However, in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (as defined in paragraph 3 above). Moreover, this approach is reinforced by article 17.1 of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, inter alia, the right to be protected against "arbitrary or unlawful interference" with one's home. It is to be noted that the State's obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

9. Article 2.1 of the Covenant requires States parties to use "all appropriate means", including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its General Comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.

10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.

12. Forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction.

13. States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure "an effective remedy" for persons whose rights have been violated and the obligation upon the "competent authorities (to) enforce such remedies when granted".

14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. In this regard it is especially pertinent to recall General Comment 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person's home can only take place "in cases envisaged by the law". The Committee observed that the law "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". The Committee also indicated that "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted".

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

17. The Committee is aware that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions. In this regard, the Committee recalls its General Comment No. 2 (1990) which states, inter alia, that "international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account". [6/]

18. Some institutions, such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of and human suffering associated with forced evictions. Such practices often accompany large-scale development projects, such as dam-building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and States parties to the Covenant. The Committee recalls in this respect the statement in the Vienna Declaration and Programme of Action to the effect that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights" (Part I, para. 10).

19. In accordance with the guidelines for reporting adopted by the Committee, State parties are requested to provide various types of information pertaining directly to the practice of forced evictions. This includes information relating to (a) the "number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction", (b) "legislation concerning the rights of tenants to security of tenure, to protection from eviction" and (c) "legislation prohibiting any form of eviction". [7/]

20. Information is also sought as to "measures taken during, inter alia, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics and other sporting competitions, exhibitions, conferences, etc.) 'beautiful city' campaigns, etc. which guarantee protection from eviction or guarantee rehousing based on mutual consent, by any persons living on or near to affected sites". [8/] However, few States parties have included the requisite information in their reports to the Committee. The Committee therefore wishes to emphasize the importance it attaches to the receipt of such information.

21. Some States parties have indicated that information of this nature is not available. The Committee recalls that effective monitoring of the right to adequate housing, either by the Government concerned or by the Committee, is not possible in the absence of the collection of appropriate data and would request all States parties to

ensure that the necessary data is collected and is reflected in the reports submitted by them under the Covenant.

Notes

* Contained in document E/1998/22, annex IV.

1/ Report of Habitat: United Nations Conference on Human Settlements, Vancouver, 31 May - 11 June 1976 (A/CONF.70/15), chap. II, recommendation B.8, para. C (ii).

2/ Report of the Commission on Human Settlements on the work of its eleventh session, Addendum (A/43/8/Add.1), para. 13.

3/ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol. I (A/CONF.151/26/Rev.1(vol.I), annex II, Agenda 21, chap. 7.9 (b).

4/ Report of the United Nations Conference on Settlements (Habitat II) (A/CONF.165/14), annex II, The Habitat Agenda, para. 40 (n).

5/ Commission on Human Rights resolution 1993/77, para. 1.

6/ E/1990/23, annex III, paras. 6 and 8 (d).

7/ E/C.12/1999/8, annex IV.

8/ Ibid.

TAB 12

CESCR, General Comment No. 20: Non-discrimination, UN Doc. E/C.12/GC/20 (2 July 2009)

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GENERAL COMMENT No. 20

Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)

I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

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4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free to all" and provides that "higher education shall be made equally accessible to all".

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,[1] while other treaties require the elimination of discrimination in specific fields, such as employment and education.[2] In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.[3]

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security.[4]

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[1] See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

[2] ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

[3] See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

[4] The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005):

Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.[5] The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[6] Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:[7]

(a) **Formal discrimination**: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination**: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.[8] The effective

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The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

[5] CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

[6] For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

[7] CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

[8] See also CESCR general comment No. 16.

enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

Private sphere

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination[9]

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

"Race and colour"

19. Discrimination on the basis of "race and colour", which includes an individual's ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term "race" in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.[10]

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.[11] Since the adoption of the Covenant, the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

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[9] See para. 27 of the present general comment on intersectional discrimination.

[10] See the outcome document of the Durban Review Conference, para. 6: "*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races."

[11] See art. 3 of the Covenant, and CESCR general comment No. 16.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.[12] For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".[13]

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that

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[12] See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

[13] See paras. 25, 26 and 35, of the present general comment.

Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.[14]

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.[15] States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status[16]

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities[17] as "any distinction, exclusion, restriction or preference, or denial of reasonable

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[14] See CESCR general comments Nos. 15 and 4 respectively.

[15] For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

[16] See para. 15 of the present general comment.

[17] For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights".[18] The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.[19] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,[20] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.[21] In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

30. The ground of nationality should not bar access to Covenant rights,[22] e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[23]

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[18] See CESCR general comment No. 5, para. 15.

[19] See CRPD, art. 2: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

[20] See CESCR general comment No. 5, para. 22.

[21] See, further, CESCR general comment No. 6.

[22] This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

[23] See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Marital and family status

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.[24] States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.[25]

Health status

33. Health status refers to a person's physical or mental health.[26] States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.[27] States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to

[24] See CESCR general comments Nos. 14 and 15.

[25] For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

[26] See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

[27] See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version". Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

Economic and social situation

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Legislation

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and

private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Elimination of systemic discrimination

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.[28]

Monitoring, indicators and benchmarks

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.[29]

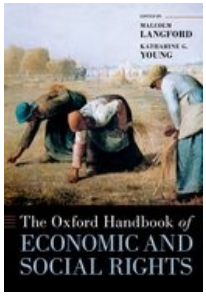
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[28] See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

[29] See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).

TAB 13

Sandra Liebenberg, “Reasonableness Review” in Malcolm Langford & Katherine Young, eds., The Oxford Handbook on Social and Economic Rights (Oxford: OUP 2022)



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CHAPTER

Reasonableness Review

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Abstract

Reasonableness has emerged as a significant review standard for economic and social rights' claims, most prominently in the contexts of the jurisprudence of the South African Constitutional Court and in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This chapter examines the historical trajectory of reasonableness as an adjudicative review standard and its relationship to other doctrinal concepts such as proportionality and minimum core obligations. It proceeds to conduct a close analysis of the practical application of various forms of reasonableness review in the jurisprudence of the South African Constitutional Court and the UN Committee on Economic, Social and Cultural Rights. Based on this analysis it identifies the main features as well as the advantages and disadvantages of reasonableness as an adjudicative review standard. It concludes with a proposal to reform aspects of the reasonableness model of review to facilitate a more substantive and transparent engagement by adjudicators with the normative commitments of economic and social rights.

Keywords: reasonableness review, proportionality, minimum core obligations, model of review, standards of scrutiny, South African Constitutional Court, Optional Protocol, International Covenant on Economic, Social and Cultural Rights

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1. Introduction

The ideal of reason with its roots in enlightenment values of fairness, objectivity, consistency, and rationality is central to the emergence of the modern concept of law.[1] Various explicit or implicit values connected to reasonableness are pervasive in public law and private law, constitutional law and international law, and across common law, civil law, and mixed legal systems.[2] Reasonableness has come to occupy a prominent place in the adjudication of economic and social rights (ESRs), primarily in the context of South African constitutional law and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR or OP).[3]

Despite its pervasiveness in law, reasonableness is a notoriously malleable concept which accords adjudicators a broad discretion in its interpretation and application. This raises the fundamental question as to its appropriateness as a model of review for the enforcement of the normative commitments embodied in ESRs as human rights.

This chapter seeks to address this question through the following methodology. First, it considers reasonableness as a public and human rights law judicial review standard through a historical and comparative lens. This section also considers the relationship between reasonableness review and other doctrines used in ESR adjudication, particularly proportionality and minimum core obligations.[4] The chapter then proceeds to examine the practical application of reasonableness review standards in the jurisprudence of the South African Constitutional Court and the UN Committee on Economic, Social and Cultural Rights (UN CESCR). The jurisprudence of the latter two adjudicatory bodies is selected for close analysis as they have both explicitly adopted a reasonable review standard in adjudicating ESRs.[5] Moreover, both bodies have developed a substantive body of jurisprudence that generates rich material for evaluating the advantages and disadvantages of different manifestations of reasonableness review. Finally, the comparison between a national and international law jurisdiction generates useful insights on the factors that can explain the divergences in the respective approaches to reasonableness review.

Based on this jurisprudential analysis, the final section of this chapter identifies the main differences in the application of the reasonableness standard in the jurisprudence of the aforementioned bodies. It also identifies the primary advantages and disadvantages of reasonableness as a review standard for ESRs' claims. This chapter ultimately argues in favour of embedding reasonableness in a two-stage model of review, which, it is argued, requires adjudicators to engage with the normative commitments of ESRs.

2. Reasonableness Review in Historical Perspective and Relationship with Other Doctrines

The most direct descendant of the judicial model of reasonableness review in public law can be traced to British administrative review with roots going back to the seventeenth century.[6] Initially it constituted a highly deferential standard, which permitted judges to interfere only in manifestly irrational exercises of administrative discretion.[7] It has evolved in British administrative law and some common law jurisdictions into a more searching standard that interrogates whether the decision maker has struck a reasonable balance between competing relevant normative considerations and contextual factors.[8]

In comparison, the concept of reasonableness does not feature explicitly in administrative law in countries with a civil law tradition where notions of legality and proportionality constitute the main conceptual tools for reviewing administrative decisions.[9] As Michal Bobek notes, where "reasonableness" or "rationality" appear in the reasoning of administrative courts, it is "as a supporting argument or sometimes perhaps an argument of last resort."[10] According to Bobek, these differences are attributable to the different evolutionary trajectory of

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the public administration and judicial review in civil law countries such as Germany and the Czech Republic. In these countries, the "post-dictatorial" approach was to insist that the acts of public bodies were constrained or mandated only by express statutory empowerment, without conceding any "normatively-free space."[11] Thus judicial review of administrative actions was a question of legality, rather than "reason" or "propriety."[12]

However, Bobek emphasizes that it would be a mistake to conclude that the reasonableness standard of judicial review is "exclusively an Anglo-American matter with no parallel in the continental legal systems."[13] He argues that common law reasonableness and civil law proportionality inquiries are in practice "functional equivalents." They serve the same goal of inquiring whether an administrative decision maker exercised her discretion in a way that is narrowly tailored to legitimate purposes, and took into account the legally relevant factors governing the particular case. The main difference in jurisprudential approaches can be ascribed to a preference in civilian systems for legislatures to specify what constitutes reasonable exercises of administrative discretion. In contrast, the Anglo-American tradition is more comfortable with the concept of public reason evolving through case-by-case interpretation by the judiciary of broadly framed legislative or constitutional standards.[14]

George P. Fletcher argues that the pervasive reliance on reasonableness as a doctrinal concept in common law jurisdictions reflects a preference for pluralism in legal thought in which there may be "many reasonable answers" to any problem as opposed to one right answer.[15] The pluralism inherent in reasonableness lends itself to what Fletcher describes as a "holistic" or "single-step" structure of judicial argumentation.[16] Within this single step structure, reasonableness acts as a placeholder for "a range of values that are typically invoked to fine-tune legal rules by recognizing the peculiarities of every case" as well as "all the variables of cost and benefit that the judge needs to know."[17] In contrast, European lawyers start their argument with a broad concept of the relevant right, and then rely on doctrines such as proportionality to qualify or limit the scope of the broad right identified at the first stage.[18] Fletcher characterizes this a two-step, structured legal argument.[19]

This two-step approach to judicial review in civil law systems resonates with the typical two-stage analysis of fundamental rights adjudication in comparative constitutional law and international human rights law. It entails an initial step of defining—usually capaciously[20]—the scope of the fundamental right in question, and a second stage of assessing the justifiability of limitations to that right according to the discipline of a structured proportionality analysis.[21] While formulations vary, the latter generally entails a fourfold judicial inquiry into: (1) the existence of a legitimate and sufficiently weighty reason to justify limiting the right; (2) the suitability of the limiting measures (sometimes also referred to as the "rational connection test"); (3) alternative, less restrictive means that will achieve the purpose of the limitation equally effectively ("necessity"); and finally, (4) whether the impact of the limitation on the rights holder is disproportionate in relation to its goals (so-called proportionately *strictu sensu*).[22]

Kai Möller argues that this two-stage model of review incorporating a proportionality analysis has become a core feature of what he terms, "the global model of constitutional rights."[23] Robert Alexy's theory of rights as principles that must be optimized through balancing against competing principles has been highly influential in the evolution of proportionality review in the context of constitutional rights adjudication.[24]

Ultimately, the proportionality inquiry entails a structured set of questions to guide the courts in determining whether the limitation represents a reasonable balance between the right invoked by the claimant and legitimate public purposes, including the protection of the rights of others. The legislature has the primary role in striking the relevant balance between rights and public purposes. The court's secondary role is to assess, whether the balance struck was proportional in the specific circumstances of the case.[25] Implicit in this model is the notion that there is no one, universally correct way to strike the balance.[26] Contextual factors relevant to the rights infringement and the state's purposes will be highly determinative of outcomes. Even within the

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various structured inquiries of a proportionality test, the standard of scrutiny applied to the various inquiries can vary across different cases and jurisdictions.[27]

Conceived in this way, proportionality review is another species of reasonableness review lying on the opposite end of the spectrum to the Anglo-descendent rationality review discussed earlier.[28] Both share the common attribute of according the legislature a margin of policy choice, but subjecting the justifications for those choices to a spectrum of weaker or stronger judicial scrutiny.

The main difference between proportionality and reasonableness review arises from the *model of review* associated with each embedded in human rights adjudication. As Danie Brand explains, the *model of review* refers to the overall approach to analyzing the rights claim in question (for example, a one-step versus a two-step structure of analysis). The *standard of scrutiny* refers to the intensity with which a court "chooses to test the link between chosen means and constitutionally required end."[29] As noted, proportionality review in fundamental rights analysis is generally associated with the structured inquiry within a two-stage model of review for assessing whether rights have been justifiably limited. In contrast, one-stage reasonableness tests are usually associated with assessing whether duty bearers have complied with the positive duties imposed by human rights.[30] However, the intensity of the scrutiny applied in particular cases by judges within either model can be more or less stringent (regardless of the particular labels attached to the relevant scrutiny standard by the adjudicators).

Having identified the broad nature of reasonableness review and its relationship with proportionality analysis, further questions arise concerning its relationship with other doctrinal concepts used in the adjudication of ESRs. Of particular interest is the doctrine of "minimum core obligations" (or affiliated concepts), which has been advanced as a preferable doctrinal basis for the adjudication of ESR.[31] In 1990, the UN CESCR interpreted the obligations imposed on states parties by the ICESCR to incorporate a minimum core obligation.[32] According to the Committee, state parties are under a duty to prioritize minimum essential levels of each of the Covenant rights. A heavy burden of justification is imposed on states parties that seek to rely on a lack of available resources to justify their failure to fulfill these minimum core obligations. Thus they are required to "demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter or priority, those minimum obligations."[33]

National courts have also relied on notions of minimum levels of social rights to adjudicate cases. Prominent examples include the right to an *Existenzminimum* based on human dignity and the social state principle by the German Federal Constitutional Court,[34] and the *mínimo vital* doctrine of the Colombian Constitutional Court.[35] The minimum core doctrine appears to offer the clarity and predictability of a rule with a cognisable content accorded to ESRs.[36]

In contrast, reasonableness appears as an amorphous standard, and more prone to deference by adjudicators to the policy choices of the other institutional actors. However, these theoretical distinctions represent an oversimplification of a more complex set of adjudicative practices. Thus in some contexts, minimum core entitlements are subject to proportionality assessments,[37] or are defined abstractly with the legislature being accorded the primary function of defining their content subject to certain procedural criteria.[38] Similarly adjudicators may apply reasonableness review in ways which engage with the substantive values and purposes underlying social rights and substantially narrow the band of legislative discretion, particularly where minimum core type interests are at stake.[39] This brief overview suggests that the minimum core doctrine the reasonableness review model for ESRs may overlap and combine in various ways in adjudicative practice.[40]

The following section examines how the reasonable review has been applied in the South African jurisprudence on ESRs.

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3. The South African Model of Reasonableness Review

A distinctive model of reasonableness review has evolved in the context of the socioeconomic rights entrenched in Sections 26 and 27 of the South African Constitution.[41] These sections will accordingly be the primary focus.[42]

The structure of these two sections consists of a first subsection that entrenches a right of "access to" the relevant socioeconomic rights. In the case of Section 26(1), the relevant right is "access to adequate housing." In the case of Section 27(1), the relevant rights are "access to health care services, including reproductive health care; sufficient food and water"; and "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance." The second subsection of both Section 26 and Section 27[43] is virtually identical and reads:

> The state must take "reasonable legislative and other measures, within its available resources, to achieve the progressive realization" of each of these rights.

The taking of "reasonable legislative and other measures" constitutes a description of the constitutional duty imposed on the state to achieve the goal of access to adequate or sufficient levels of the goods or services recognized as part of the various rights.[44] The formulation of Sections 26(2) and 27(2) was inspired by the description of states parties' obligations in Article 2 of the ICESCR. The inclusion of the adjective, "reasonable" in these sections is most likely due its familiarity as a legal concept in South African law.[45] On this textual hook, the Constitutional Court has developed reasonableness both as *a model of review* and as *a standard of scrutiny* for the state's conduct in the sphere of the positive duties imposed by socioeconomic rights.[46]

The model of review adopted by the South African Constitutional Court in the context of Sections 26 and 27 rests on an interpretive distinction between negative and positive obligations. Thus the Court has held that the first subsection of Sections 26 and 27 delineates "the scope of the right," and incorporates "at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."[47] Any measure that permits a person to be deprived of their existing access to one of the socioeconomic rights protected in Sections 26(1) and 27(1) constitutes a limitation of the relevant rights. As such, it falls to be justified by the public or private party concerned in terms of the proportionality analysis required by the general limitations clause (Section 36) of the South African Constitution.[48] Thus, the customary two-step model of review in fundamental rights analysis under the South African Bill of Rights[49] is applied to "negative" violations of socioeconomic rights.

A similar two-step inquiry is also applicable to the socioeconomic rights, which are formulated in unqualified terms such as the right "to a basic education, including adult basic education" in Section 29(1)(a) of the constitution. The Constitutional Court has held that this is an "immediately realisable" right.[50] The implication is that the limitations of the negative and positive duties imposed by this right would have to comply with the requirements of the general limitations clause (Section 36).

In contrast, the Constitutional Court applies a different model of review when adjudicating cases in which it is alleged that the state has failed to comply with the positive obligations imposed by Sections 26 and 27. Although it has not provided a comprehensive definition of these positive obligations, the jurisprudence suggests that it encompasses all affirmative measures required to advance the realization of the relevant rights. Thus in well-known judgment of *Grootboom*, the Court stated that the positive obligation imposed by Section 26(2) requires the state "to devise a comprehensive and workable plan to meet its obligations in terms of the subsection."[51] In other words, the state is required to adopt measures that progressively advance access by everyone to adequate housing.[52] These measures must be "capable of facilitating the realisation of the right" in question.[53] The Court has also applied the reasonableness standard to cases involving challenges to the

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sufficiency of the quantum of socioeconomic services provided, most notably in its judgment of *Mazibuko v City of Johannesburg*.[54]

The Constitutional Court has expressly rejected the notion that the concept of minimum core obligations[55] could found an independent cause of action under Sections 26 and 27, while maintaining that, in appropriate cases, it could be relevant to inform the reasonableness inquiry.[56] However, to date, the South African courts have not expressly relied on minimum core obligations in assessing reasonableness.

As a *model of review* for the positive duties imposed by socioeconomic rights, reasonableness review in the South African context is akin to the one-stage model described by Fletcher. The relevant court assesses factors relevant to the realization of the rights ("the rights-orientated inquiry") alongside the state's justifications for its conduct or omissions (the justifications inquiry). In relation to the rights-orientated inquiry, the South African Constitutional Court has identified a set of conduct-based criteria to guide its assessment of the reasonableness of the state's acts or omissions. A significant criterion is that a reasonable program should provide short-term relief for those living in intolerable conditions or experiencing urgent need.[57] Other criteria are that the relevant program should avoid unreasonably excluding or restricting certain groups from accessing its benefits.[58] The program should be sufficiently flexible and responsive to changing circumstances,[59] and authorities should engage meaningfully with the beneficiaries of the program.[60]

Factors relevant to the justifications inquiry are considered alongside the aforementioned rights-orientated criteria. These include whether the relevant organ of state has acted within the bounds of the reasonable policy-making discretion afforded to it as a matter of democratic accountability;[61] its resource constraints;[62] the latitude of time allowed by the concept of progressive realization;[63] and the impact of the relief sought by the claimants on other rights and legitimate state priorities.[64]

In essence, the reasonableness model of review entails an omnibus ("all-things-considered") assessment of the aforementioned rights-orientated and justifications criteria.[65] Noncompliance with the rights-orientated criteria accompanied by unpersuasive state justifications will be found to be unreasonable and a violation of Section 26 or Section 27. Thus, for example, the absence of an emergency housing programme for those in urgent housing need, without compelling reasons for failing to include such a program within the state's long-term housing plans, was declared a breach of Section 26 of the constitution in the *Grootboom* judgment. In the *TAC* judgment, the Constitutional Court held that excluding women giving birth in the public health sector from the provision of affordable and effective antiretroviral treatment to reduce mother-to-child transmission of the HIV virus during childbirth violated the right of access to health care services in Section 27. The Court scrutinized the state's policy and resource-based justifications and found them to be without persuasive evidential bases.

In contrast, in *Mazibuko*, the Court rejected a constitutional challenge to the sufficiency of the free basic water program of the City of Johannesburg in terms of Section 27(1)(b) read with Section 27 (2) of the constitution. It found that the applicants had not demonstrated that the program was unreasonable given the administrative and resource-based challenges faced by the City of Johannesburg in its water provision program. A persuasive fact in upholding the reasonableness of the City of Johannesburg's free basic water program was the adjustment of the program after the inception of the litigation to increase the allocation of free water for those who could prove indigence. According to the Court, this demonstrated the flexibility and responsiveness of the city's water policy to the needs of applicants.[66] Despite criticisms of the means-tested indigency policy, the Court held that this fell within the bounds of a reasonable policy choice by the City.[67]

The one-stage model of reasonableness review described earlier contrasts with the traditional two-step model applied to other rights in the bill of rights,[68] as well as the negative duties imposed by socioeconomic rights. The Constitutional Court has not to date applied the general limitations clause (Section 36) to the positive duties imposed by socioeconomic rights. Although it has raised the question whether the internal

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reasonableness test in Sections 26(2) and 27(2) differs from the inquiry under Section 36 as to whether a limitation of rights is "reasonable and justifiable," it has not yet decided this question.[69]

Thus far, the focus has been on reasonableness as *a model of review* in South Africa's socioeconomic rights jurisprudence. However, as argued in the previous section, reasonableness also functions as *a standard of scrutiny* along a spectrum of deferential forms of rationality review to more demanding forms of proportionality review. The Court has held that reasonableness in terms of Sections 26(2) and 27(2) is a higher standard than rationality review.[70] However, an analysis of the jurisprudence reveals considerable variations in the standard of scrutiny applied. These variations are well illustrated by the *Soobramoney* and *Khosa* judgments.

In *Soobramoney*, the Court rejected the claim of a dying man to kidney dialysis treatment at a public hospital on the basis that the applicant did not meet the medical rationing criteria to gain access to the hospital's limited supply of kidney dialysis machines. The Court held that the relevant rationing criteria had not been shown to be unreasonable, nor that they had been applied unfairly or irrationally in the applicant's case.[71] The Court noted the limited resources in the public health care sector and the broader polycentric implications of imposing a duty on the state to provide expensive tertiary-level medical treatment to an individual whose health profile did not meet the rationing criteria.[72]

A light standard of scrutiny was applied and the Court readily accepted that the relevant kidney dialysis criteria bore a rational relationship with the legitimate state purpose of ensuring an equitable distribution of scare health care resources.[73] It noted that "[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[74] The rational relationship inquiry applied in this context is similar to the suitability stage under a limitations inquiry.[75] The Court did not conduct an inquiry into other less restrictive rationing criteria or weigh the impact of the denial of kidney dialysis treatment on Mr. Soobramoney against the state's purpose of achieving a fair distribution of limited health care resources. The latter are the inquiries typically conducted under the necessity and balancing steps of a classic proportionality analysis in terms of limitations clauses in bills of rights or international human rights instruments.[76]

In contrast, in the *Khosa* judgment the Court closely scrutinized the state's policy and resource-based justifications for excluding permanent residents from the legislative scheme conferring noncontributory social security grants. The Court held that there were less restrictive methods for preventing permanent residents becoming "a burden" on the state than excluding them from accessing social assistance.[77] Moreover, the serious impact of this denial on the life and dignity of permanent residents outweighed the policy and budgetary justifications the state proffered for excluding permanent residents from the social grants scheme.[78] The limited financial implications as well as the vagueness of the budgetary evidence presented by the state were also influential factors in reaching this conclusion.[79]

The internal reasonableness scrutiny conducted by the Court in *Khosa*, while not following the disciplined structure of a proportionality analysis conducted under the general limitations clause, entailed a similar inquiry. The analytical approach in the *Khosa* judgment exemplifies what Katharine G. Young describes as "proportionality-inflected reasonableness."[80] Beth Goldblatt and I have argued that the fact that the Court found that the exclusion of permanent residents from the social grants scheme also constituted unfair discrimination on the basis of citizenship influenced the application stricter form of reasonableness scrutiny under Section 27.[81]

Unfortunately, the Court has not been explicit in identifying the factors that would trigger more intense "proportionality-inflected" reasonableness review as opposed to a lighter "rationality-inflected" scrutiny. However, the jurisprudence suggests that the closer the good or service claimed approximates minimum core-type essential needs or implicates values of equality in the distribution of resources, the more intense will be

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the standard of judicial scrutiny. This may explain why claims to emergency housing, affordable life-saving antiretroviral medicine and non-discriminatory access to subsistence social grants succeeded in the Constitutional Court,[82] whereas claims to expensive, tertiary kidney dialysis treatment and free basic water beyond a prescribed minimum quantum did not.[83]

In concluding this section, it should also be noted that the South African Constitution makes provision for the horizontal application of constitutional rights to non-state actors.[84] The Constitutional Court has held that the negative duties imposed by ESRs are also applicable to private parties.[85] In applying these negative duties, the Court has followed the typical two-stage model for negative deprivations of ESR and for violations of the unqualified ESR in the bill of rights, such as the right to basic education in Section 29(1)(a).[86] The Constitutional Court has further held that, depending on a range of factors, the positive duties imposed by ESRs can also bind private parties.[87] Finally, another way in which ESRs and their underlying normative values impact on private parties is through influencing the adoption of legislation,[88] and the development of common or customary law norms in spheres such as property law, contract law, and family law.[89]

We turn next from a constitutional to an international human rights law context to examine the operation of the reasonableness review under the OP-ICESCR.

4. Reasonableness Review under the OP-ICESCR

The OP-ICESCR was adopted on December 10, 2008, and entered into force on May 5, 2013.[90] It provides for an individual communications procedure.[91] Prior to its adoption, the jurisprudential principles developed by CESCR for interpreting the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant) were derived from its General Comments and Concluding Observations on state reports under the periodic reporting procedure. The Statements adopted by CESCR on various contemporary themes affecting the enjoyment of Covenant rights have also contributed to developing its doctrines.[92]

Although a detailed examination of the CESCR's Concluding Observations and General Comments is beyond the scope of this chapter, two features of relevance to the themes of this chapter will be highlighted. Firstly, the Committee has made significant efforts to develop the normative content of the relevant rights by identifying "core obligations" as well as factors relevant to assessing whether a state has attained "adequate" fulfillment of the relevant rights.[93] Secondly, the Committee has also foreshadowed a two-step model of review in certain General Comments. Thus in General Comment No. 7 it has recalled that forced evictions are "*prima facie* incompatible with the Covenant."[94] Limitations to this principle must comply with Article 4 of the Covenant (the article governing limitations to Covenant rights).[95] These are similar to the general principles of a weighty purpose and proportionality analysis described earlier.[96]

A review standard of reasonableness was presaged in the Committee's 2007 Statement[97] in assessing whether a state had taken adequate or appropriate steps "to the maximum of its available resources" to achieve the progressive realization of Covenant rights.[98] Significantly, the text of the OP-ICESCR included an explicit description of the review standard to be applied by CESCR when examining communications under the Protocol, a feature which had hitherto not formed part of communications procedures under UN Human Rights treaties.[99] Thus Article 8 (4) of the OP-ICESCR provides:

> When examining a communication under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

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According to Bruce Porter, Article 8(4) assisted in resolving the impasse that developed in the Open-Ended Working Group charged with drafting the OP. The impasse concerned how the text of the OP should signal that CESCR should respect the policymaking prerogatives of sovereign states without compromising its mandate to advance accountability for violations of Covenant rights.[100] Ultimately, the impasse was resolved by the formulation contained in Article 8(4), which draws its inspiration from the language in the South African *Grootboom* judgment.[101]

A difference between the reasonableness model of review in Article 8(4) and the South African constitutional provisions on socioeconomic rights is that reasonableness finds no explicit textual support in the Covenant. There is thus a conceptual distinction between the nature of states' obligations under the Covenant as defined by Article 2 and the reasonableness standard, which the Committee is enjoined to apply in assessing whether these obligations have been complied with under the OP. The Committee also faces the challenge of reconciling the reasonableness standard in Article 8(4) of the OP with the concept of minimum core obligations, which has been an importantcomponent of its doctrinal approach to the interpretation of the Covenant since it made its initial appearance in General Comment No. 3. How the Committee has sort to resolve these tensions will be considered next in the context of its evolving jurisprudence under the OP.[102]

In its jurisprudence under the OP, the CESCR has generally followed (or expected national courts to follow) a two-stage model of review in respect of alleged violations of Covenant rights. The first stage focuses on the question whether the relevant Covenant right have been violated. The second stage focuses on whether the violation can be justified by the state party. The justificatory arguments are assessed in terms of a proportionality analysis either in a more structured form under Article 4, or in the form of the "proportionality-inflected reasonableness" assessment described by Young.[103] Two examples demonstrate this approach.

The first example arises from the Committee's jurisprudence on the eviction of people from their homes. Communications have alleged that the relevant evictions have violated the right to adequate housing in Article 11 of the Covenant. In its decisions, the Committee has applied the principle developed in General Comments No. 4 and 7 that evictions of people from their homes are *prima facie* incompatible with Article 11 of the Covenant.[104] If an eviction from public or private housing leads to homelessness, the state party bears the burden of justifying the eviction.[105] This requires the state party to demonstrate, firstly, that its domestic legal framework permits eviction only for a legitimate purpose such as the protection of rights established in its legal system[106] pertaining to ownership of the property in question.[107]

Even when there is a justifiable reason for the eviction, domestic courts (or other independent and impartial authorities) are required to consider the proportionality of an eviction order, taking into account the particular circumstances of the case. This entails an assessment as to whether the legitimate objective of the eviction outweighs the possible consequences for the persons evicted.[108] In this regard, the Committee has held that this "inevitably involves making a distinction between properties belonging to individuals who use them as a home or to provide vital income and properties belonging to financial institutions or other entities."[109] It requires a proper assessment of the owner's interest in recovering possession of his or her property, as well as facts relevant to the impact of an eviction order on occupiers and their dependants.[110]

Related considerations include whether the occupiers were occupying the property in good faith and their cooperation with the authorities in the search for housing solutions suited to their situation.[111] Other elements of a classic proportionality analysis include whether less restrictive measures or mitigating alternatives were available to avoid exposing the evicted persons to homelessness or violations of other Covenant rights.[112] Such measures could include suspending or postponing the eviction order,[113] or making it conditional on the relevant public authorities providing suitable alternative accommodation.[114] The Committee has also emphasized the importance of prior procedural steps such as "genuine prior consultation" between the authorities and persons affected by an eviction.[115]

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The second example of the application of this two-stage model in the Committee's jurisprudence is in a communication concerning the right to social security, *Calero v Ecuador*.[116] In this communication, the Committee held that the retrospective termination of Ms. Calero's membership in the voluntary affiliation scheme of the Ecuadorian Social Security Institute violated the right to social security in Article 9 of the Covenant. Her membership was terminated on the basis that she had exceeded the permissible limit in the Codified Statute of the Ecuadorian Social Security Institute of a six months' consecutive break in contributions. This break in contributions occurred several years previously while she was unemployed and performing unpaid domestic work at home.

The Committee found that the failure of the Social Security Institute to inform her timeously of the termination of her membership, coupled with her acceptance of contributions to the voluntary scheme subsequent to her break in contributions had created a legitimate expectation that she qualified for special early retirement.[117] These failures to provide timeous notice and give effect to the legitimate expectations violated the author's right to social Ssecurity under Article 9 of the Covenant.

However, the Committee took the further step of holding that the legislative sanction of terminating membership of the scheme if an insured person has a break in contributions of more than six months was not reasonable and proportionate.[118] While not expressly referring to Article 4, the Committee's assessment of Ecuador's justifications for this legislative sanction incorporated many of the typical inquiries of a limitations analysis. It assumed that the aforementioned legislative sanction had a legitimate aim of protecting limited social security resources, but concluded that disaffiliation was disproportionate in that there were other less restrictive means of achieving the state's purpose, such as excluding the months in which no contributions were made from the pension calculation.[119] The disproportionality of the sanction was further aggravated by the fact that the state did not have a noncontributory old-age pension benefit scheme that could serve as a safety net for the author.[120] It held that noncontributory pension schemes for persons who did not have other sources of retirement income constituted a minimum core obligation imposed by the right to social security.[121] Such schemes were of particular significance to women who were most affected by poverty and more likely to experience interruptions in their social insurance contributions due to the gendered burden of unpaid domestic work.[122]

Thus far, the Committee has examined communications in which the primary breach alleged is a violation of the negative duties imposed by Covenant rights, for example, the deprivation of housing arising from an eviction. However, an indication of the Committee's approach to assessing positive obligations be gleaned from the eviction cases discussed earlier. Following General Comment No. 7, it has held that in situations where evictions will lead to homelessness, the state is under an obligation to take reasonable measures to provide alternative accommodation.[123] In assessing whether this duty has been fulfilled, the Committee has applied a high threshold of scrutiny. Thus, it has held that the state party "must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned."[124] The state party must provide the necessary information to enable the Committee to assess the reasonableness of its measures.[125] Accordingly, the provision of alternative accommodation to those evicted from their homes is not an absolute requirement but an onerous burden of justification is placed on the state party to show that it has exhausted all reasonable means of providing such alternative accommodation.

This justificatory burden is intensified when the facts show that the lack of alternative accommodation is due to "retrogressive measures" adopted by state authorities, which have resulted in a reduction of the availability of alternative accommodation. This was illustrated in the *Djazia* communication in which the evidence showed that the Madrid Housing Institute had sold a substantial amount of its social housing stock to private companies so as to help balance its budget.[126] The Committee held that this constituted a "deliberately retrogressive measure," which, in terms of its existing doctrine, required the state to demonstrate that the decision "was based on the most thorough consideration possible" taking into account the rights in the

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Covenant and the utilization of all available resources.[127] In essence, such retrogressive measures must pass a strict proportionality test of necessity and be shown to be temporary and nondiscriminatory.[128] Spain was unable to demonstrate the necessity of the aforementioned retrogressive measures.[129] The Committee accordingly rejected its argument that it lacked the resources to provide alternative accommodation to the authors and their children following their eviction due to the large social housing backlog faced by the Madrid Housing Institute.[130]

This suggests that the Committee will not apply its doctrine of minimum core obligations (for example, the provision of basic shelter) as an absolute obligation. Instead it will apply a heightened standard of reasonableness review to the state's resource-based or other justifications for failing to provide alternative accommodation to those who face homelessness due to an eviction. This heightened review standard will be even stricter, incorporating a proportionality analysis, when the evidence reveals that the failure to provide alternative accommodation is due to the adoption of retrogressive measures.

The final area where the Committee has applied a reasonableness standard in has been in the context of assessing the justifications for distinctions between different groups alleged to constitute discrimination in violation of Article 2(2) of the Covenant. According to long-standing doctrine of the Committee, differential treatment will not amount to discrimination "if the criteria for such differential treatment are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[131]

In the *Calero* communication discussed earlier, the author also raised a discrimination claim based on Article 2(2) of the Covenant. The Committee held that it would apply "special or strict scrutiny" in this case as the author experienced intersectional discrimination on the grounds of gender, advanced age, and ill health.[132] The legislative conditions applicable to continued affiliation to the voluntary social security scheme, although neutrally formulated, had a disproportionate impact on woman as they were statistically the group bearing the overwhelming burden of unpaid domestic care work.[133] The penalty of terminating membership for a break in contributions would thus affect them more harshly. The Committee concluded that the state party had failed to provide "sufficient detail as to the reasonableness and proportionality" of the rules of the voluntary affiliation scheme and had failed to demonstrate that they did not give rise to indirect discrimination on the grounds of gender.[134] Thus, the author succeeded in her argument that the relevant law also amounted to a violation of Article 2(2) read with Article 9 of the Covenant.[135] The Committee did not elaborate on the concept of "strict scrutiny," but the proportionality assessment applied in *Calero* is reminiscent of the type of scrutiny applied under the Fifth and Fourteenth Amendments of the US Constitution to "suspect classifications" such as race.

This analysis of the Committee's jurisprudence demonstrates a preference for a two-stage model of review: the identification of the rights violation followed by the assessment of justifications. The second stage of assessing justifications occurs either without express reference to Article 4 of the Covenant,[136] or in terms of a structured limitations analysis under Article 4.[137] In either case, the burden of justification is generally on the state party concerned to demonstrate the reasonableness of its justifications. Within this broad model of review, certain circumstances trigger a less or more strict form of scrutiny along the spectrum of reasonableness review. A stricter from of proportionality reasonableness is applied when minimum-core-type interests are imperiled, [138] in cases of intersectional discrimination,[139] or when the deprivation is due to the adoption of retrogressive measures.[140]

The two-step model of review applied by the Committee is similar to that applied by the South African Constitutional Court to negative infringements of ESRs or the internally unqualified ESR in the bill of rights. As noted earlier, the Committee's preference for a two-step model may be attributable to the fact that communications it has considered have mainly entailed negative interferences in the relevant rights. These have included the eviction of persons from their homes, the termination or reduction of their social security benefits,[141] and the interference in a woman's reproductive integrity.[142] The Committee has not yet dealt with a

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communication in which the primary violation alleged is a breach of the positive duty to advance the progressive realization of the relevant rights.

The following section examines what the South African and OP-ICESCR jurisprudence reveals regarding the strengths and weaknesses of the reasonableness review for ESRs claims.

5. Evaluating Reasonableness Review

A major advantage of the reasonableness model of review in the context of ESRs claims is that it acknowledges that a variety of policy options are available to states in fulfilling these rights. There is no one correct, optimal solution to the contextual diversity and complexity of fulfilling ESRs.[143] In making the relevant choices, democratically elected legislatures, executive, and administrative bodies possess the institutional advantages of democratic legitimacy, experience, expertise, and information on the diverse claims on public resources. Reasonableness review is attuned to the plurality of policy choices available in the sphere of ESRs as well as to the institutional limitations and advantages of the different branches of government in making the relevant choices.[144]

At the same time, the open-textured nature of reasonableness as a review standard allows adjudicatory bodies to developflexible criteria or factors, on a case-by-case basis, that trigger heightened scrutiny of the state's justifications. The preceding analysis has demonstrated the kinds of factors and criteria that have been developed by the South African Constitutional Court and the UN CESCR under the reasonableness model of review. In the context of the South African jurisprudence, it has been argued that it is these contextual factors (such as responsiveness to desperate need and socioeconomic exclusion) that distinguish reasonableness review in the context of ESRs from purely administrative law reasonableness.[145] Through a combination of acknowledging a broad range of legitimate policy choices and specific indicators triggering enhanced scrutiny, reasonableness review allows adjudicatory bodies to manage their institutional relationship with the other branches of government or states parties (in the case of international treaty bodies). In an ideal world, reasonableness review would thus permit an optimal balance between securing accountability for ESRs violations without usurping the governance prerogatives of states.

However, the "one-step" nature of the reasonableness model of review for positive ESRs duties gives rise to its major shortcoming as a tool for ESRs adjudication. Thus, in applying this flat structure, the South African Constitutional Court tends to elide the customary first step of bill of rights analysis under the constitution, namely, determining whether the claim falls within the scope of the relevant right and if the challenged acts or omissions infringe the right. This has given rise to the criticism by scholars of the normative weakness at the heart of the South African ESR's jurisprudence.[146]

This failure to articulate the broad normative commitments of ESRs makes it difficult for courts to interrogate the link between the impugned policies and programmes and the outcomes that these rights are meant to achieve.[147] Indeed, the potential of a means-end analysis alluded to by the Constitutional Court in *Grootboom* when it noted that the relevant program "must be capable of facilitating the realisation of the right."[148] However, in practice, the courts have not engaged rigorously in this inquiry, most notably, in the *Mazibuko* judgment.

The one-stage reasonableness model also has implications for the burden of proof applied in cases involving breaches of the positive duties imposed by ESRs. The success of such claims depends on the claimants being able to show that relevant organs of state have not complied with one or more of the criteria for a reasonable program, rather than the burden resting on the state to show that it has taken all reasonable measures to realise the relevant right.

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Normative weakness is a general concern in models of judicial review relying on standards of reasonableness or procedural fairness.[149] However, as the jurisprudence of CESCR under the OP reveals, they need not be an inevitable feature of such models. In the jurisprudence of CESCR, the reasonableness model of review mandated by Section 8(4) is more closely linked to the normative content of the ESCRs in the Covenant as developed through General Comments, Statements and Letters to states parties, and Concluding Observations on states parties' periodic reports.[150] While applying an overarching reasonableness review model as mandated by Article 8(4) of the OP, the Committee integrates previously developed doctrinal concepts such as minimum core obligations, the adequacy and accessibility of benefits, and the retrogressive measures within this model.[151] Domestic courts such as the South African Constitutional Court do not have the advantage of companion processes of state reporting and the development of General Comments to serve as normative reference points in reviewing ESRs claims.[152] However, they do have the benefit of the localized contextual information that flows from domestic adversarial (or even inquisitorial) proceedings. They are also enjoined by the constitution to consider international law and they may consider comparative law in interpreted the rights in the bill of rights.[153] This historical and social contextual evidence combined with international and comparative standards could play a much more prominent role in developing the normative goals of ESRs and assessing public or private conduct and omissions in the light thereof.

In the absence of a normative account of the relevant rights and a close analysis of the impact of the challenged acts or omissions on the claimants, the state's vision of what is practicable and achievable tends to dominate in the application of the reasonableness review model. This in turn facilitates an overly deferential approach to evaluating the state's evidence and reasoning.[154]

Despites its appeals to universal, objective reason, reasonableness as a legal standard is infused with a range of contextually contingent values, assumptions, and worldviews. An explicit engagement with the normative implications of ESR does not necessarily mean that courts or treaty bodies will adopt interpretations of these rights that are responsive to the historical roots and contemporary contexts of poverty and inequality. However, a more explicit engagement with the purposes and values of ESRs as human rights, before engaging in the stage of a reasonableness assessment, has three primary advantages.

Firstly, it provides a clearer indication to both organs of state and private entities on the nature of the obligations which these rights generate, as well as providing claimants with better indications of their prospects of success in litigating. Secondly, it promotes more transparent and explicit judicial reasoning. As explained by Shanelle van der Berg drawing on Sen's account of public reasoning, explicitness in judicial reasoning "allows for open public scrutiny of value-laden judgments where prioritisation takes place in a context of diversity."[155] Substantive legal reasoning enables critical public engagement with adjudicators' articulation and application of the normative criteria applied to evaluate the facts and evidence of a case. Finally, a more substantive engagement with the normative content of ESRs will also help adjudicators to identify the nature of the considerations that will trigger a more intense standard of scrutiny from the court. Thus, for example, if minimum essential needs are regarded as integral to the normative content of socioeconomic rights, one can expect a court or the UN CESCR to apply a strict proportionality analysis to claims involving a deprivation of such essential needs.

As I have previously argued, the reasonableness model of review is capable of evolving into a substantive, human rights–orientated review model through incorporating an initial, distinct stage of analysis.[156] At this stage, adjudicators would engage explicitly with the normative content of the relevant right and determine whether the claims before them fall within the scope of the relevant right. Once it is decided that the claims fall within the scope of the right, the burden would shift to the respondent (state party or private entity) to demonstrate the reasonableness of its acts or omissions in the light of factors such as resource constraints and competing rights. In essence, reasonableness review would have to evolve from a one-step, flat structure of review into one resembling a two-step model of review. This would allow reasonableness review to retain its

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distinctive benefits of responsiveness to contextual factors, policy flexibility, and institutional dynamics, while advancing the normative commitments of ESRs.

6. Conclusion

This chapter has sought to identify the advantages and disadvantages of reasonableness review in the adjudication of ESRs claims. It has done so through tracing the broad historical trajectory of reasonableness review, and its application in the jurisprudence of the South African Constitutional Court and the UN CESCR.

It has drawn the distinction between the particular models of review in which reasonableness plays a role and reasonableness as a standard judicial scrutiny of state justifications. It has demonstrated the role of reasonableness both in a "flat" one-step, model of review and in a differentiated two-step model. The former is illustrated by the model of review applied by the South African Constitutional Court in cases of infringements of the positive duties imposed by ESRs. The latter model is applied by the Court in cases of infringements of the negative duties imposed by ESRs and, as this chapter has demonstrated, is also the general approach followed by the UN CESCR its jurisprudence to date under the OP.

As a standard of scrutiny, reasonableness varies in intensity between highly deferential rationality review to more demanding forms of proportionality review. In its examination of the jurisprudence of the South African Constitutional Court and the UN CESCR, the chapter sought to identify the kinds of factors that trigger different intensities of scrutiny.

The jurisprudential analysis demonstrates how reasonableness offers adjudicators a context-sensitive review standard, which recognize the plurality of policy choices available to realize ESRs. It is thus also responsive to the institutional relationships between adjudicators and implementers of ESRs. However, its open-ended, malleable character accords adjudicators a high degree of discretion in its application. Moreover, its appeal to shared, "common sense" values obscures the implicit worldviews and assumptions that determine what is perceived as reasonable or unreasonable in particular contexts.

Based on this analysis, the chapter has argued in favor of locating reasonableness in a two-stage, rather than a flat model of review. This would allow a more focused engagement with the normative values and goals of the particular ESR at the first stage of analysis before proceeding to an evaluation of the state (or non-state actor's) justifications for its acts or omissions. A two-stage model would also facilitate a synergy between reasonableness review and minimum core obligations. Thus when an adjudicator identifies at the first stage of analysis that the claimants' essential basic ESRs are imperiled, this circumstance should trigger a strict form of proportionality assessment of the state's justifications at the second stage.

The adjudication of ESRs will inevitably remain deeply inflected by institutional politics and constraints. The two-stage model of reasonable review proposed in this chapter does not purport to be a value-neutral standard. Instead, it offers a graduated structure for facilitating deeper adjudicative and public deliberation on the normative content of ESRs and the persuasiveness of the justifications proffered for their current level of realisation.

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Notes

1 See John A. Powell and Stephen M. Menendian, "Remaking Law: Moving beyond Enlightenment Jurisprudence," *Saint Louis University Law Journal* 54 (Summer 2010): 1035.

2 See generally Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini, eds., *Reasonableness and Law* (New York: Springer, 2009).

3 G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN GAOR, 63rd Sess., 66th plen. mtg., UN Doc A/RES/63/117 (Dec. 10, 2008).

4 See Katharine G. Young and Malcolm Langford "Introduction," this volume.

5 Other jurisdictions may follow broadly similar approaches without necessarily referring explicitly to reasonableness review. For example, Malcolm Langford has argued that the review standard applied by the Supreme Court of New Jersey in *Robinson v. Cahill*, 62 N.J. 473 (1973), in assessing whether the school financing system was consistent with the right to education in the state constitution was similar to the reasonableness standard adopted by the South African Constitutional Court in *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (hereinafter *Grootboom*). See Malcolm Langford, "Judicial Review in National Courts: Recognition and Responsiveness," in *Economic, Social and Cultural Rights in International* Law, eds. Eibe Riedel, Gilles Giacca, and Christophe Golay (Oxford: Oxford University Press, 2014), 417, at 432–433.

6 Michael Bobek, "Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence," in Bongiovanni, Sartor, and Valentini, *Reasonableness in Law*, 311, 314–315.

7 This manifestation of reasonableness review was famously articulated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (UK) (hereinafter *Wednesbury*). Stone Sweet and Mathews describe *Wednesbury* reasonableness as "a deference doctrine, a cousin of 'rational basis' inquiry in the United States." Alec Stone Sweet and Jud Mathews, "Proportionality, Judicial Review, and Global Constitutionalism," in Bongiovanni, Sartor, and Valentini, *Reasonableness in Law*, 176.

8 *R (on the application of Daly) v. Sec'y of State for the Home Dep't*, [2001] UKHL 26, [2001] 2 A.C. 532 (H.L.) at ¶ 27. The South African Constitutional Court adopted this more substantive application of the reasonableness standard in administrative law review in *Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at ¶ 45. See Geo Quinot

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and Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa," in *Law and Poverty: Perspectives from South Africa and Beyond*, eds. Sandra Liebenberg and Geo Quinot (Cape Town: Juta & Co., 2012), 200–206.

9 See Michal Bobek, "Reasonableness in Administrative Law," in Bongiovanni, Sartor, and Valentini, *Reasonableness in Law*, 316–323.

10 Bobek, "Reasonableness," 323.

11 Bobek, "Reasonableness," 323

12 Bobek, "Reasonableness," 324.

13 Bobek, "Reasonableness," 324.

14 Bobek, "Reasonableness," 324.

15 George P. Fletcher, "Comparative Law as a Subversive Discipline," *The American Journal of Comparative Law* 46, no. 4 (Autumn 1998): 699.

16 He also describes this as a "flat" structure of legal argumentation: George P. Fletcher, "The Right and the Reasonable," *Harvard Law Review* 98, no. 5 (Mar. 1995): 951.

17 Fletcher, "Comparative Law," 698.

18 Fletcher "Comparative Law," 698. See also Fletcher, "The Right and the Reasonable," 951.

19 Fletcher "Comparative Law," 698.

20 On rights inflation under the two-step model, see Kai Möller, *The Global Model of Constitutional Rights* (New York: Oxford University Press, 2012), 3–5.

21 Scholars have argued that the doctrine of proportionality in the context of fundamental rights adjudication in constitutional law emerged from the German model of administrative law that evolved at the end of the eighteenth century. See Alex Stone Sweet and Jud Mathews, "Proportionality, Judicial Review, and Global Constitutionalism," in Bongiovanni, Sartor, and Valentini, *Reasonableness in Law*, 173, 187–192; Moshe Cohen-Eliya and Iddo Porat, "The Administrative Origins of Constitutional Rights and Global Constitutionalism," in *Proportionality: New Frontiers, New Challenges*, ed. Vicki C. Jackson and Mark Tushnet (Cambridge: Cambridge University Press, 2017), 103, 113–122.

22 Yutaka Arai-Takahashi, "Proportionality," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (New York: Oxford University Press, 2013), 450–452; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), 243–370.

23 On the United States as a possible outlier, see Möller, *Global Model of Constitutional Rights*, 17–20. Bobek observes that proportionality as a standard of review has been imported and may be destined to displace reasonableness review of administrative action in the United Kingdom under the impetus of the 1998 Human Rights Act. Bobek, "Reasonableness," 324–325.

24 Robert Alexy, *A Theory of Constitutional Rights* (New York: Oxford University Press, 2010); Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice," *International Journal of Constitutional Law* 2, no. 3 (July 2004): 574. See also Robert Alexy, "Social Constitutional Rights and Proportionality," and Carlos Bernal Pulido, "Proportionality Analysis and Economic and Social Rights," both this volume.

25 Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review," *Law & Ethics of Human Rights* 4, no. 2 (Jan. 2010): 169.

26 Möller, *Global Model of Constitutional Rights*, 121–122.

27 See Julian Rivers, "Proportionality and Variable Intensity of Review," *The Cambridge Law Journal* 65, no. 1 (2006): 174; David Bilchitz, "Necessity and Proportionality: Towards a Balanced Approach," in *Reasoning Rights: Comparative Judicial*

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Engagement, eds. L. Lazarus et al. (Oxford: Hart Publishing, 2016), 41; Janneke Gerards, "How to Improve the Necessity Test of the European Court of Human Rights," *International Journal of Constitutional Law* 11, no. 2 (Apr. 2013): 466.

28 Young describes proportionality as "a subset of reasonableness." Katharine G. Young, "Proportionality, Reasonableness and Social Rights," in Jackson and Tushnet, *Proportionality* 248, 256. Sadurski refers to "weak" (rationality) and "strong" (proportionality) understandings of reasonableness. See Wojciech Sadurski, "Reasonableness and Value-pluralism in Law and Politics," in Bongiovanni, Sartor, and Valentini, *Reasonableness in Law*, 129, 131–132.

29 Danie Brand, "The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?,'" in *Rights and Democracy in a Transformative Constitution*, eds. Henk Botha, André Van Der Walt, and Johan Van Der Walt (Stellenbosch: SUN Press, 2004), 40 n.45.

30 For example, reasonableness is closely associated with the "due diligence" test applied to assess whether the state has taken reasonable steps to prevent or respond to human rights violations. See *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No.4. 17, ¶¶ 174–175; UN HRC, General Comment No. 36: On Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCP/C/GC/36, ¶ 21 (Oct. 30, 2018). The European Court of Human Rights applies a "fair balance" test to the positive obligations on Contracting Parties to protect Convention Rights. Gerards equates the "fair balance" test with a general reasonableness test. See Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), 111–116.

31 See, for example, David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press. 2007);

32 UN CESCR, General Comment No. 3: The Nature of State Parties' Obligations (art. 2, ¶ 1 of the Covenant), E/1991/23, ¶¶ 10–12 (Dec. 14, 1990) (hereinafter General Comment No. 3).

33 General Comment No. 3, ¶ 10. The CESCR has muddied the waters in subsequent General Comments by framing the concept of minimum core obligations in a more absolute, "non-derogable" form, and by incorporating other types of obligations within a broader concept of "core obligations." However, in General Comment No. 15, the CESCR returned to the "heightened justification" formulation used in General Comment No. 3: UN CESCR, General Comment No. 15: The Right to Water (arts. 11 and 12 of the Covenant), E/C.12/2002/11, ¶¶ 40–41 (Jan. 20, 2003). For an analysis and critique of these developments, see Malcolm Langford and Jeff A King, "Committee on Economic, Social and Cultural Rights: Past, Present and Future," in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge: Cambridge University Press, 2008), 477, 492–495.

34 BVerfG, Case No. 1 BvL 1/09, 125 BVerFGE 175 (Feb. 9, 2010) (hereinafter *Hartz IV*); BVerfG, Case No. 1 BvL 10/10, 132 BVerFGE 134 (July 18, 2012) (hereinafter *Asylum Seekers Benefits*). See Inga T. Winkler and Claudia Mahler, "Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?" *Human Rights Law Review* 13, no. 2 (2013): 388; Ingrid Leijten, "The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection," *German Law Journal* 16, no.1 (2015): 23.

35 See Magdalena Sepúlveda, "Colombia," in Langford, *Social Rights Jurisprudence* 144, 147–148; David Landau, "The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures," in *Economic and Social Rights after the Global Financial Crisis*, ed. Aoife Nolan (Cambridge: Cambridge University Press, 2014), 267.

36 On the distinction between rules and standards in this context, see Katharine G. Young, *Constituting Economic and Social Rights* (Cambridge: Cambridge University Press, 2012), 86–87.

37 See, for example, Landau's account of the role played by proportionality review in respect of government measures impacting on the *mínimo vital* in Colombia. Landau, "The Promise of a Minimum Core Approach," in Nolan *Economic and Social Rights after the Global Financial Crisis*, 281–285.

38 Leijten, "The German Right to an *Existenzminimum*," 37–42.

39 See Geo Quinot and Sandra Liebenberg, "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa," in *Law and Poverty: Perspectives from South Africa and Beyond*, eds. Sandra Liebenberg and Geo Quinot (Cape Town: Juta & Co., 2012), 197.

40 For a nuanced analysis, see Joie Chowdhury, "Unpacking the Minimum Core and Reasonableness Standards," in *Research*

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Handbook on Economic, Social and Cultural Rights as Human Rights, eds. Jackie Dugard et al. (Cheltenham: Edward Elgar, 2020), 251.

41 Reasonableness has also been used a standard for assessing compliance with the positive duties imposed by civil and political rights such the right to vote in Section 19 of the bill of rights. See *New National Party v. Government of the Republic of South Africa* 1999 (3) SA 191 (CC), ¶ 23. However, this standard is not the same as that developed by the Constitutional Court for the review of ESRs.

42 Other socioeconomic rights include an internally unqualified children's socioeconomic rights (§ 28(1)(c)), a right to basic education (§ 29(1)(a)); socioeconomic rights of those deprived of their liberty (§ 35(2)(e)). In addition, the bill of rights entrenches labor rights (§ 23) and environmental rights (§ 24).

43 Both Section 26 and Section 27 contain a third subsection. Section 26(3) provides safeguards against the eviction of persons from their homes, and Section 27(3) against the refusal of emergency medical treatment. These entitlements are not qualified by the phrases contained in the second subsections.

44 *Grootboom*, ¶ 21.

45 For an account of the drafting history of these provisions, see Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta & Co., 2010), 16–21. In the pre-constitutional era, reasonableness was a common law ground of judicial review. South Africa's administrative was strongly influenced by South Africa's British colonial heritage. Subsequently, administrative justice was incorporated in Section 33 of the bill of rights in the 1996 Constitution. It confers the right upon everyone to administrative action that is "lawful, reasonable and procedurally fair."

46 On the distinction between models of review and standards of scrutiny, see note 29 and accompanying text.

47 *Grootboom*, ¶ 34; *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC), at ¶ 46 (hereinafter *TAC*); *Governing Body of the Juma Musjid Primary School v*. *Essay NO* 2011 (8) BCLR 761 (CC), at ¶ 58 (hereinafter *Juma Musjid*).

48 *Jaftha v. Schoeman v. Van Rooyen v. Stoltz* 2005 (2) SA 140 (CC), at ¶ 34 (hereinafter *Jaftha*). Section 36 applies to limitations of all the rights in the bill of rights and requires such limitations to be in terms of "law of general application" as well as "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." A number of factors are stipulated in Section 36(1)(a) – (e) for determining whether the limitation meets this threshold. These factors resemble the general approach to assessing rights limitations under international and comparative law. See note 22 and accompanying text.

49 *Coetzee v*. *Government of the Republic of South Africa* 1995 (4) SA 631 (CC), at ¶ 9; *Ferreira v. Levin NO* 1996 (1) SA 984 (CC), at ¶ 44; *Moise v. Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC), at ¶ 7.

50 *Juma Musjid*, at ¶ 37; *Minister of Basic Education v. Basic Education for All* 2016 (4) SA 63 (SCA), at ¶¶ 35–36.

51 *Grootboom*, at ¶ 38.

52 In this regard, the Court expressly endorsed the meaning attributed to the phrase, "progressive realisation" by the UN CESCR in the context of Article 2(1) of the ICESCR in General Comment No. 3, ¶ 9. See *Grootboom*, at ¶ 45.

53 *Grootboom*, at ¶ 41.

54 2010 (4) SA 1 (CC) (hereinafter *Mazibuko*). The quantitative dimension of ESRs concerns whether the standards of "adequacy," "sufficiency," and "appropriateness" referred to in Section 26(1) and Section 27(1) have been met. See Lucy A. Williams, "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study," *Constitutional Court Review* 3, no. 1 (Jan. 2010): 142–143.

55 The notion of "minimum core obligations" was introduced through *amici curiae* submissions in *Grootboom* and *TAC*, relying on the doctrine of the UN CESCR. See, for example, General Comment No. 3, ¶ 10; UN CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (art. 12 of the Covenant), E/C.12/2000/4, ¶ 43 (Aug. 11, 2000).

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56 *Grootboom*, (1) SA, at ¶ 33; *TAC*, (5) SA, at ¶ 34.

57 *Grootboom*, (1) SA, at ¶¶ 44, 64–69.

58 *Khosa v. Minister of Social Development*; *Mahlaule v. Minister of Social Development* 2004 (6) SA 505 (CC), at ¶¶ 53–57 (hereinafter *Khosa*).

59 *Mazibuko*, at ¶¶ 90–97, 162–163.

60 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg* 2008 (3) SA 208 (CC), at ¶¶ 17–18.

61 *Mazibuko*, at ¶ 61.

62 Grootboom, at ¶ 46; *Khosa*, at ¶¶ 58–62; *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd.* 2012 (2) SA 104 (CC), at ¶¶ 68–75.

63 *TAC*, at ¶ 35.

64 *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), at ¶ 28 (hereinafter *Soobramoney*).

65 Liebenberg, *Socio-Economic Rights*, 131–227.

66 *Mazibuko*, at ¶¶ 90–97.

67 *Mazibuko*, at ¶¶ 98–102.

68 See *supra* note 49.

69 *Khosa*, at ¶¶ 83, 84 (unnecessary to decide the issue). In *Dladla v. City of Johannesburg* 2018 (2) SA 327 (CC), at ¶¶ 75–77, Cameron, J. in a minority judgment express the view that reasonableness in Section 26(2) means the same as reasonableness in Section 36 or "or at least entail the same interpretative process."

70 *Khosa*, at ¶ 67.

71 *Soobramoney*, ¶ 25.

72 *Soobramoney*, ¶¶ 21–31. For example, the Court noted that the consequential implications of requiring the state to provide dialysis and other tertiary forms of medical treatment to all patients would be a dramatic increase of the health budget, which would prejudice the meeting of other health needs (at ¶¶ 28–29).

73 See Brand, "Proceduralisation," 40–41.

74 *Soobramoney*, at ¶ 29.

75 See *supra* note 22 and accompanying text.

76 See *supra* note 22 and accompanying text.

77 *Khosa*, at ¶¶ 64 – 65.

78 *Khosa*, at ¶¶ 79–82.

79 *Khosa*, at ¶¶ 61–62.

80 Young, *"Proportionality, Reasonableness and Economic and Social Rights,"* 268–271.

81 Sandra Liebenberg and Beth Goldblatt, "The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution," *South African Journal on Human Rights* 23 (2007): 335, at 344–348 and 359. For another judgment in which a similar strong standard of scrutiny was applied to intersecting claims of unfair discrimination and lack of access to social security, see *Mahlangu v. Minister of Labour* 2021 (2) SA 54 (CC).

82 *Grootboom*, *TAC*, and *Khosa*, respectively.

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83 *Soobramony*, and *Mazibuko*, respectively.

84 Section 8(2) read with Section 8(3) of the bill of rights. Section 39(2) also requires the normative value system of the constitution to influence the development of common law customary law. On horizontal application in the context of ESR, see Mark Tushnet, "Constitutional Law, Private Law and Economic and Social Rights," this volume.

85 *Grootboom*, at ¶ 34; *Jaftha*, at ¶ 31; *Juma Musjid*, at ¶¶ 57–58.

86 2016.

87 *Daniels v. Scribante* 2017 (4) SA 341, at ¶¶ 38–49.

88 *Maphango v. Aengus Lifestyle Properties* 2012(3) SA 531 (CC), ¶¶ 32–34.

89 Sandra Liebenberg, "Socio-Economic Rights Beyond the Public-Private Law Divide," in *Socio-Economic Rights in South Africa: Symbols or Substance?*, eds. Malcolm Langford et al. (Cambridge: Cambridge University Press, 2014), 63.

90 On the history of the OP, see Catarina de Albuquerque, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights," *Human Rights Quarterly* 32, no. 1 (Jan. 2009): 144–178. As of November 24, 2022, there were twenty-six states parties to the OP-ICESCR.

91 Arts 1 – 9, OP-ICESCR. It also provides for an "opt-in" inter-state communications procedure (art. 10) and an inquiry procedure (arts. 11–12).

92 For example, the doctrine of "non-retrogression" has been elaborated in the Letter to all states parties by Chairperson Ariranga G. Pillay, UN CESCR, HRC/NONE/2012/76 (May 16, 2012); and UN CESCR, Statement, "Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights," E/C.12/2016/1 (June 24, 2016) (hereinafter "CESCR's 2012 Letter" and "2016 Statement on Austerity Measures").

93 On the factors for assessing adequacy, see, for example, UN CESCR General Comment No. 4: The Right to Adequate Housing (art. 11, ¶ 1 of the Covenant), E/1992/23, ¶ 8 (Dec. 13, 1991) (hereinafter General Comment No. 4). The CESCR has also applied the "AAAQ" (availability; accessibility; acceptability; and quality) framework in this context. See, for example, General Comment No. 15, ¶ 12.

94 See UN CESCR, General Comment No. 7: The Right to Adequate Housing (art. 11.1 of the Covenant): Forced Evictions, E/1998/22, ¶ 1 (May 20, 1997) (hereinafter General Comment No. 7).

95 General Comment No. 7, ¶ 1. See also the references to "reasonableness and proportionality" in ¶ 15.

96 See *supra* note 22.

97 UN CESCR, Statement, "An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant," E/C.12/2007/1, (Sept. 21, 2007) (hereinafter "CESCR's 2007 Statement").

98 CESCR, 2007 Statement, at ¶¶ 8, 11, and 12. The Committee noted that it would always respect "the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances." (¶ 11).

99 A similar review provision was included in the subsequently adopted Optional Protocol to the United Nations Convention on the Rights of the Child, 2011 on a communications procedure in Article 10(4).

100 Bruce Porter, "Reasonableness and Article 8(4)," in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, eds. Malcolm Langford et al. (Pretoria: Pretoria University Law Press, 2016), 177–187

101 Porter, "Reasonableness," 186.

102 For an analysis of this jurisprudence up to and including the 64th session of the Committee, see Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol," *Human Rights Quarterly* 42, no. 1 (Feb. 2020): 48–84.

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103 See *supra* note 80.

104 See *supra* notes 93 and 94 and accompanying text.

105 UN CESCR, *López Albán v. Spain*, Communication No. 37/2018, E/C.12/66/D/37/2018, ¶¶ 11.1–11.7 (Nov. 29, 2019) (hereinafter *López Albán*). Earlier communications such as UN CESCR, *I.D.G v. Spain*, Communication No. 2/2014, E/C.12/55/D/2/2014 (Oct. 13, 2015) (hereinafter *I.D.G.*); UN CESCR, *Djazia and Bellili v. Spain*, Communication No. 5/2015, E/C.12/61/D/5/2015 (July 21, 2017) (hereinafter *Djazia*), did not refer expressly to Article 4. In later eviction-related decisions such as *López Albán* and UN CESCR *Pardo v. Spain*, Communication No. 52 of 2018, E/C.12/67/D/52/2018, ¶ 9.4 (Apr. 14, 2020) (hereinafter *Pardo*), the CESCR relied expressly on Article 4 of the Covenant.

106 The Committee has held that, although the right to private property is not a Covenant right, a state party "has a legitimate interest in ensuring protection for all rights established in its legal system so long as this does not conflict with the rights contained in the Covenant" *López Albán*, ¶ 11.5; *Pardo*, ¶ 9.2.

107 *Djazia*, ¶ 15.1 (eviction may be justified in cases of "persistent non-payment of rent or of damage to the rented property without just cause"); *López Albán*, ¶ 11.5 (protection of legal owners against the "unlawful appropriation" of their property).

108 *López Albán*, ¶ 11.5.

109 *Pardo*, ¶ 9.5.

110 *Djazia*, ¶¶ 16.4–16.5; *López Albán*, ¶ 11.5; *Pardo*, ¶ 9.5.

111 *López Albán*, ¶ 11.7; *Pardo*, ¶ 9.5.

112 *Djazia*, ¶ 15.1.

113 *López Albán*, ¶ 11.5; *Pardo*, ¶ 9.6.

114 In *Djazia*, ¶ 16.5, the Committee criticized that the fact that the there was no legal duty on judges to suspend an eviction until alternative accommodation could be made available, or to order other authorities, such as social services, "to take coordinated measures to prevent an evicted person from becoming homeless." See also *López Albán*, ¶ 11.5; *Pardo*, ¶¶ 9.5–9.6.

115 *Djazia*, ¶ 15.1.

116 UN CESCR, *Calero v. Ecuador*, Communication No. 10/2015, E/C.12/63/D/10/2015 (Nov. 14, 2018) (hereinafter *Calero*).

117 Calero, ¶¶ 16.1–16.4.

118 *Calero*, ¶ 17.1.

119 *Calero*, ¶ 17.1.

120 *Calero*, ¶ 18.

121 *Calero*, ¶¶ 14.1–14.3, 11.1–11.2. The Committee cited its General Comment No. 19: The Right to Social Security (art. 9 of the Covenant), E/C.12/GC/19, ¶¶ 59–60 (Feb. 4, 2008).

122 *Calero*, ¶ 14.2.

123 *Djazia*, ¶¶ 15.2–15.3. See General Comment No. 7, ¶ 17.

124 *Djazia*, ¶ 15.5.

125 *Djazia*, ¶ 15.5.

126 *Djazia*, ¶ 17.5.

127 *Djazia*, ¶ 17.6.

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128 *Djazia*, ¶ 17.6, The Committee cited General Comment No. 3, ¶ 9, its 2012 Letter to States Parties, and its 2007 Statement.

129 *Djazia*, ¶ 17.6.

130 *Djazia*, ¶¶ 17.4–17.5.

131 UN CESCR, General Comment Note 20: Non-discrimination in Economic, Social and Cultural Rights (art 2.2 of the Covenant), E/C.12/GC/20, ¶ 13 (July 2, 2009). For an application of this model, see *López Rodríguez*, ¶¶ 14.1–14.9.

132 *Calero*, ¶ 19.2.

133 *Calero*, ¶ 19.4.

134 *Calero*, ¶ 19.5.

135 *Calero*, ¶¶ 19.6, 21.

136 See, for example, the *Calero* communication.

137 See, for example, *Pardo*, ¶ 9.4.

138 Compare the Views of the Committee in *López Rodríguez v. Spain*, Communication No. 1/2013, E/C.12/57/D/1/2013 (Apr. 20, 2016) (hereinafter *López Rodríguez*) in which it found that the replacement of a prisoner's cash social security benefits with in-kind services was not disproportionate in that the author had not demonstrated that "it impaired the satisfaction of his own or his family's basic needs" or that the measure affected him particularly because of his disability (¶ 13.4).

139 See, for example, the *Calero* communication.

140 See, for example, the *Djazia* communication.

141 In addition to the *Calero* communication, see the *López Rodríguez v. Spain* communication.

142 UN CESCR, *S.C. and G.P. v. Italy,* Communication No. 22/2017, E/C. 12/65/D/22/2017 (Mar. 28, 2019) (hereinafter *S.C. and G.P.*).

143 In this regard, reasonableness bears a resemblance to Sen's description of the parametric ethical duty to give reasonable consideration to assist others whose human rights are violated. See Amartya Sen "Obligations and Economic and Social Rights," in this volume.

144 See *supra* notes 15–17 and accompanying text.

145 Carol Steinberg, "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence," *South African Law Journal* 123, no. 2 (Jan. 2006): 264.

146 David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007), 159–162; Brand, *Proceduralisation*, 43–51; Liebenberg, *Socio-Economic Rights*, 173–179; Marius Pieterse, "Coming to Terms with the Judicial Enforcement of Socio-Economic Rights," *South African Journal on Human Rights* 20, no. 3 (June 2004): 410–411.

147 This is what Brand describes as a "means-end" inquiry. Brand, *Proceduralisation*, 44.

148 *Grootboom*, ¶ 41.

149 On normative weakness in the context of democratic experimentalist models of review, see Sandra Liebenberg and Katharine G. Young, "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, eds. Helena Aliviar García, Karl Klare, and Lucy A. Williams (London and New York: Routledge, 2015), 247–251.

150 See *supra* note 93.

151 See Katharine G. Young and Malcolm Langford "Introduction," this volume.

152 This fact was alluded to by Justice Yacoob in the *Grootboom* judgment in the context of rejecting the notion of a minimum

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core obligation as an independent ground of review as argued for by the *amici curaie* in the case. See *Grootboom*, ¶ 32.

153 Section 39(1).

154 See the comparison of the more deferential approach of the SA Constitutional Court to the evaluation of the evidence in the *Mazibuko* judgment compared with that adopted by the German Federal Constitutional Court in the *Hartz IV* judgment by Lucy Williams, *Quantitative-Implementation*, 141–199.

155 Shanelle van der Berg, "Ensuring Proportionate State Resource Allocation in Socio-Economic Rights Cases," *South African Law Journal* 134, no. 3 (Aug. 2017): 589. She draws on the work of Amartya Sen *Development as Freedom* (Oxford: Oxford University Press, 1999), 30, 75.

156 Liebenberg, *Socio-Economic Rights*, 173–203.

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