International Organizations

* Outline

Legal instruments and documents

1. Charter of the United Nations, 1945
   For text, see Charter of the United Nations and Statute of the International Court of Justice
2. Articles on the Responsibility of International Organizations (United Nations General Assembly resolution 60/100 of 9 December 2011, Annex)
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 494
4. Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012

Case Law

8. Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, International Court of Justice, Advisory Opinion of 1 February 2012

Diplomatic and Consular Relations

* Outline

Legal instruments and documents

1. Vienna Convention on Diplomatic Relations and Optional Protocols, 1961
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 43
2. Vienna Convention on Consular Relations and Optional Protocols, 1963  
3. Convention on Special Missions and Optional Protocol, 1969  

Case Law

   Request for the Indication of Provisional Measures, Order, I.C.J. Reports 1979, p. 7  
   102
7. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*,  
   Judgment, I.C.J. Reports 1980, p. 3  
   112
   paras. 11-34, pp. 489-498, paras. 65-91  
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   I.C.J. Reports 2002, pp. 9-14, paras. 13-28, pp. 16-34, paras. 37-78  
   164
10. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Request for the  
    Indication of Provisional Measures, Order, I.C.J. Reports 2003, p. 77  
    182
11. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J.  
    Reports 2004, p. 12 (excerpts)  
    194
12. *Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena  
    and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*,  
    Request for the Indication of Provisional Measures, Order, I.C.J. Reports 2008, p. 311  
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    and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*,  
    Judgment, I.C.J. Reports 2009, p. 3  
    222
The Hague, The Netherlands
31 July – 1 August 2013

INTERNATIONAL ORGANIZATIONS
PROFESSOR PIERRE BODEAU-LIVINEC

Codification Division of the United Nations Office of Legal Affairs

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Outline

Legal instruments and documents

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Selected issues

1. The Legal Status of International Organizations: Elements of Unity within Diversity

- The legal personality of international organizations
  - The Bernadotte Advisory Opinion (1949)

- Immunities of international organizations
  - The Special Rapporteur Advisory Opinion (1999)

2. Constitution and Competences of International Organizations

- Admission to international organizations
  - Palestine and the United Nations: a case-study

- Types of organizations: institutionalization, cooperation and integration

3. Responsibility of International Organizations

- The ILC Articles on Responsibility of International Organizations (2011), a brief overview

- Sharing the burden: issues of responsibility between States and organizations and/or between organizations
  - The Behrami and Saramati case (2007)
Note by the Secretary-General

In accordance with rule 135 of the rules of procedure of the General Assembly and rule 59 of the provisional rules of procedure of the Security Council, the Secretary-General has the honour to circulate herewith the attached application of Palestine for admission to membership in the United Nations, contained in a letter received on 23 September 2011 from its President (see annex I). He also has the honour to circulate a further letter, dated 23 September 2011, received from him at the same time (see annex II).

Annex I

Letter received on 23 September 2011 from the President of Palestine to the Secretary-General

Application of the State of Palestine for admission to membership in the United Nations

I have the profound honour, on behalf of the Palestinian people, to submit this application of the State of Palestine for admission to membership in the United Nations.

This application for membership is being submitted based on the Palestinian people’s natural, legal and historic rights and based on United Nations General Assembly resolution 181 (II) of 29 November 1947 as well as the Declaration of Independence of the State of Palestine of 15 November 1988 and the acknowledgement by the General Assembly of this Declaration in resolution 43/177 of 15 December 1988.

In this connection, the State of Palestine affirms its commitment to the achievement of a just, lasting and comprehensive resolution of the Israeli-Palestinian conflict based on the vision of two States living side by side in peace and security, as endorsed by the United Nations Security Council and General Assembly and the international community as a whole and based on international law and all relevant United Nations resolutions.

For the purpose of this application for admission, a declaration made pursuant to rule 58 of the provisional rules of procedure of the Security Council and rule 134 of the rules of procedure of the General Assembly is appended to this letter (see enclosure).

I should be grateful if you would transmit this letter of application and the declaration to the Presidents of the Security Council and the General Assembly as soon as possible.

(Signed) Mahmoud Abbas
President of the State of Palestine
Chairman of the Executive Committee of the Palestine Liberation Organization
In connection with the application of the State of Palestine for admission to membership in the United Nations, I have the honour, in my capacity as the President of the State of Palestine and as the Chairman of the Executive Committee of the Palestine Liberation Organization, the sole legitimate representative of the Palestinian people, to solemnly declare that the State of Palestine is a peace-loving nation and that it accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfill them.

(Signed) Mahmoud Abbas
President of the State of Palestine
Chairman of the Executive Committee of the Palestine Liberation Organization

Letter dated 23 September 2011 from the President of Palestine to the Secretary-General

After decades of displacement, dispossession and the foreign military occupation of my people and with the successful culmination of our State-building program, which has been endorsed by the international community, including the Quartet of the Middle East Peace Process, it is with great pride and honour that I have submitted to you an application for the admission of the State of Palestine to full membership in the United Nations.

On 15 November 1988, the Palestine National Council (PNC) declared the Statehood of Palestine in exercise of the Palestinian people’s inalienable right to self-determination. The Declaration of Independence of the State of Palestine was acknowledged by the United Nations General Assembly in resolution 43/177 of 15 December 1988. The right of the Palestinian people to self-determination and independence and the vision of a two-State solution to the Israeli-Palestinian conflict have been firmly established by General Assembly in numerous resolutions, including inter alia, resolutions 181 (II) (1947), 3236 (XXIX) (1974), 2649 (XXV) (1970), 2672 (XXV) (1970), 65/16 (2010) and 65/202 (2010) as well as by United Nations Security Council resolutions 242 (1967), 338 (1973) and 1397 (2002) and by the International Court of Justice Advisory Opinion of 9 July 2004 (on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory). Furthermore, the vast majority of the international community has stood in support of our inalienable rights as a people, including to statehood, by according bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital, and the number of such recognitions continues to rise with each passing day.

Palestine’s application for membership is made consistent with the rights of the Palestine refugees in accordance with international law and the relevant United Nations resolutions, including General Assembly resolution 194 (III) (1948), and with the status of the Palestine Liberation Organization (PLO) as the sole legitimate representative of the Palestinian people.

The Palestinian leadership reaffirms the historic commitment of the Palestine Liberation Organization of 9 September 1993. Further, the Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestinian refugees, settlements, borders, security and water — on the basis of the internationally endorsed terms of reference, including the relevant United Nations resolutions, the Madrid principles, including the principle of land for peace, the Arab Peace Initiative and the Quartet Roadmap, which specifically require a freeze of all Israeli settlement activities.

At this juncture, we appeal to the United Nations to recall the instructions contained in General Assembly resolution 181 (II) (1947) and that “sympathetic consideration” be given to application of the State of Palestine for admission to the United Nations.

Accordingly, I have had the honour to present to Your Excellency the application of the State of Palestine to be a full member of the United Nations as well as a declaration made pursuant to rule 58 of the provisional rules of procedure...
of the Security Council and rule 134 of the rules of procedure of the General
Assembly. I respectfully request that this letter be conveyed to the Security Council
and the General Assembly without delay.

(Signed) Mahmoud Abbas
President of the State of Palestine
Chairman of the Executive Committee of the
Palestine Liberation Organization
Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012
Situation in Palestine

1. On 22 January 2009, pursuant to article 12(3) of the Rome Statute, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for “acts committed on the territory of Palestine since 1 July 2002.”

2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League’s Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views. In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.

3. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).

4. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a “State” (article 12) provide jurisdiction. Article 12 establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court’s jurisdiction (article 12(3)).

5. The issue that arises, therefore, is who defines what is a “State” for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by “all States”, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State”, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a “State”. Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(3)(g) of the Statute.

6. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).

7. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.

8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

EMBARGOED UNTIL DELIVERY 3 April 2012

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1 The declaration can be accessed at: http://www.icc-cpi.int/NR/rdonlyres/74EE301-0FED-4451-95D4- C8071087102C/270777/2010122 PALESTINIANDECLARATION2.pdf

2 For a summary of submissions see http://www.icc-cpi.int/Menus/ICC/Structure-of-the-Court/Office-of-the-Prosecutor/Comm-and-Ref/Palestine/

3 This position is set out in the understanding adopted by the General Assembly at its 2202nd plenary meeting on 14 December 1973, see Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, ST/LEG/7/Rev. 1, paras 81-83; http://untreaty.un.org/ilc-internet/Assistance/Summary.htm
International Court of Justice

Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion

I.C.J. Reports 1949
Le présent avis doit être cité comme suit:

- Réparation des dommages subis au service des Nations Unies, 

This Opinion should be cited as follows:

"Reparation for injuries suffered in the service of the United Nations, 
INTERNATIONAL COURT OF JUSTICE

YEAR 1949.
April 11th, 1949.

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

Injuries suffered by agents of United Nations in course of performance of duties.—Damage to United Nations.—Damage to agents.
—Capacity of United Nations to bring claims for reparation due in respect of both.—International personality of United Nations.
—Capacity as necessary implication arising from Charter and activities of United Nations.—Functional protection of agents.—Claim against a Member of the United Nations.—Claim against a non-member.—Reconciliation of claim by national State and claim by United Nations.
—Claim by United Nations against agent’s national State.

ADVISORY OPINION.

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Fabela, Hackworth, Winarski, Zoricic, de Visscher, Sir Arnold McNair, Klaesstad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo.

THE COURT,
composed as above,
gives the following advisory opinion:

On December 3rd, 1948, the General Assembly of the United Nations adopted the following Resolution:

"Whereas the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties raises, with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered; and

Whereas it is highly desirable that the Secretary-General should be able to act without question as efficaciously as possible with a view to obtaining any reparation due; therefore

The General Assembly
Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?

II. In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?

Instructs the Secretary-General, after the Court has given its opinion, to prepare proposals in the light of that opinion, and to submit them to the General Assembly at its next regular session."

In a letter of December 4th, 1948, filed in the Registry on December 7th, the Secretary-General of the United Nations forwarded to the Court a certified true copy of the Resolution of the General Assembly. On December 10th, in accordance with paragraph 1 of Article 66 of the Statute, the Registrar gave notice of the Request to all States entitled to appear before the Court. On December 11th, by means of a special and direct communication as provided in paragraph 2 of Article 66, he informed these States that, in an Order made on the same date, the Court had
stated that it was prepared to receive written statements on the questions before February 14th, 1949, and to hear oral statements on March 7th, 1949.

Written statements were received from the following States: India, China, United States of America, United Kingdom of Great Britain and Northern Ireland, and France. These statements were communicated to all States entitled to appear before the Court and to the Secretary-General of the United Nations. In the meantime, the Secretary-General of the United Nations, having regard to Articles 63 of the Statute (paragraph 2 of which provides that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it), had sent to the Registrar the documents which are enumerated in the list annexed to this Opinion.

Furthermore, the Secretary-General of the United Nations and the Governments of the French Republic, of the United Kingdom and of the Kingdom of Belgium informed the Court that they had designated representatives to present oral statements.

In the course of public sittings held on March 7th, 8th and 9th, 1949, the Court heard the oral statements presented

on behalf of the Secretary-General of the United Nations by Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department as his Representative, and by Mr. A. H. Feller, Principal Director of that Department, as Counsel;

on behalf of the Government of the Kingdom of Belgium, by M. Georges Kaeckenbeuck, D.C.L., Minister Plenipotentiary of His Majesty the King of the Belgians, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

on behalf of the Government of the French Republic, by M. Charles Chaumont, Professor of Public International Law at the Faculty of Law, Nancy; Legal Adviser to the Ministry for Foreign Affairs;

on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland by Mr. G. G. Fitzmaurice, Second Legal Adviser to the Foreign Office.

The first question asked of the Court is as follows:

"In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the repair due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him?"

It will be useful to make the following preliminary observations:

(a) The Organization of the United Nations will be referred to usually, but not invariably, as "the Organization".

(b) Questions (a) and (b) refer to "an international claim against the responsible de jure or de facto government". The Court understands that these questions are directed to claims against a State, and will, therefore, in this opinion, use the expression "State" or "defendant State".

(c) The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.

(d) As this question assumes an injury suffered in such circumstances as to involve a State's responsibility, it must be supposed, for the purpose of this Opinion, that the damage results from a failure by the State to perform obligations of which the purpose is to protect the agents of the Organization in the performance of their duties.

(e) The position of a defendant State which is not a member of the Organization is dealt with later, and for the present the Court will assume that the defendant State is a Member of the Organization.

* * *

The questions asked of the Court relate to the "capacity to bring an international claim"; accordingly, we must begin by defining what is meant by that capacity, and consider the characteristics of the Organization, so as to determine whether, in general, these characteristics do, or do not, include for the Organization a right to present an international claim.

Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal or to the Court in so far as this may be authorized by the Statute.

This capacity certainly belongs to the State: a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar
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in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

When the Organization brings a claim against one of its Members, this claim will be presented in the same manner, and regulated by the same procedure. It may, when necessary, be supported by the political means at the disposal of the Organization. In these ways the Organization would find a method for securing the observance of its rights by the Member against which it has a claim.

But, in the international sphere, has the Organization such a nature as involves the capacity to bring an international claim? In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality? This is no doubt a doctrinal expression, which has sometimes given rise to controversy. But it will be used here to mean that if the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its Members.

To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended thereby to give to the Organization.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.

The Charter has not been content to make the Organization created by it merely a centre “for harmonizing the actions of nations in the attainment of these common ends” (Article I, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council; by authorizing the General Assembly to make recommendations to the Members; by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. The “Convention on the Privileges and Immunities of the United Nations” of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is “a super-State”, whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the
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damage caused by the injury of an agent of the Organization in the
course of the performance of his duties. Whereas a State
possesses the totality of international rights and duties recognized
by international law, the rights and duties of an entity such as
the Organization must depend upon its purposes and functions
as specified or implied in its constituent documents and developed
in practice. The functions of the Organization are of such a
character that they could not be effectively discharged if they
involved the concurrent action, on the international plane, of
fifty-eight or more Foreign Offices, and the Court concludes that
the Members have endowed the Organization with capacity to
bring international claims when necessitated by the discharge of
its functions.

What is the position as regards the claims mentioned in the
request for an opinion? Question I is divided into two points,
which must be considered in turn.

* * *

Question I (a) is as follows:

"In the event of an agent of the United Nations in the perfor-
mance of his duties suffering injury in circumstances involving
the responsibility of a State, has the United Nations, as an
Organization, the capacity to bring an international claim against
the responsible de jure or de facto government with a view to
obtaining the reparation due in respect of the damage caused
(a) to the United Nations...?"

The question is concerned solely with the reparation of damage
causé to the Organization when one of its agents suffers injury at
the same time. It cannot be doubted that the Organization has the
capacity to bring an international claim against one of its Mem-
bers which has caused injury to it by a breach of its international
obligations towards it. The damage specified in Question I (a)
means exclusively damage caused to the interests of the Organiza-
tion itself, to its administrative machine, to its property and
assets, and to the interests of which it is the guardian. It is clear
that the Organization has the capacity to bring a claim for this
damage. As the claim is based on the breach of an international
obligation on the part of the Member held responsible by the Organ-
ization, the Member cannot contend that this obligation is governed
by municipal law, and the Organization is justified in giving its
claim the character of an international claim.

When the Organization has sustained damage resulting from a
breach by a Member of its international obligations, it is impossible
to see how it can obtain reparation unless it possesses capacity to
bring an international claim. It cannot be supposed that in such
an event all the Members of the Organization, save the defendant

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State, must combine to bring a claim against the defendant for the
damage suffered by the Organization.

The Court is not called upon to determine the precise extent of
the reparation which the Organization would be entitled to recover.
It may, however, be said that the measure of the reparation should
depend upon the amount of the damage which the Organization
has suffered as the result of the wrongful act or omission of the
defendant State and should be calculated in accordance with the
rules of international law. Amongst other things, this damage
would include the reimbursement of any reasonable compensation
which the Organization had to pay to its agent or to persons entitled
through him. Again, the death or disablement of one of its agents
engaged upon a distant mission might involve very considerable
expenditure in replacing him. These are mere illustrations, and
the Court cannot pretend to forecast all the kinds of damage which
the Organization itself might sustain.

* * *

Question I (b) is as follows:

"..."has the United Nations, as an Organization, the capacity to
bring an international claim... in respect of the damage caused
... (b) to the victim or to persons entitled through him?"

In dealing with the question of law which arises out of Question
I (b), it is unnecessary to repeat the considerations which led to an
affirmative answer being given to Question I (a). It can now be
assumed that the Organization has the capacity to bring a claim on
the international plane, to negotiate, to conclude a special agreement
and to prosecute a claim before an international tribunal. The only
legal question which remains to be considered is whether, in the
course of bringing an international claim of this kind, the Organiza-
tion can recover "the reparation due in respect of the damage caused
... to the victim...".

The traditional rule that diplomatic protection is exercised by
the national State does not involve the giving of a negative answer
to Question I (b).

In the first place, this rule applies to claims brought by a State.
But here we have the different and new case of a claim that would
be brought by the Organization.

In the second place, even in inter-State relations, there are impor-
tant exceptions to the rule, for there are cases in which protection
may be exercised by a State on behalf of persons not having its
nationality.

In the third place, the rule rests on two bases. The first is that
the defendant State has broken an obligation towards the national
State in respect of its nationals. The second is that only the party
to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organization, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organization has the right to bring a claim for the damage referred to in Question I (b). On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organization, when the Organization invokes, as the ground of its claim, a breach of an obligation towards itself.

Nor does the analogy of the traditional rule of diplomatic protection of nationals abroad justify itself in its affirmative reply. It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.

The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.

The question lies within the limits already established; that is to say it presupposes that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organization in the performance of his duties. It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organization.

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B., No. 13, p. 18), and must be applied to the United Nations.

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and in fact find it necessary, to entrust its agents with important missions to be performed in troubled parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.

This need of protection for the agents of the Organization, as a condition of the performance of its functions, has already been realized, and the Preamble to the Resolution of December 3rd, 1948 (supra, p. 175), shows that this was the unanimous view of the General Assembly.

For this purpose, the Members of the Organization have entered into certain undertakings, some of which are in the Charter and others in complementary agreements. The content of these undertakings need not be described here; but the Court must stress the importance of the duty to render to the Organization “every assistance” which is accepted by the Members in Article 2, paragraph 5, of the Charter. It must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents—require that these undertakings be strictly observed. For that purpose, it is necessary that, when an infringement occurs, the Organization should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused to its agent.

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that—
whether the agent belongs to a powerful or to a weak State; to one more affected or less affected, by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.

The obligations entered into by States to enable the agents of the Organization to perform their duties are undertaken not in the interest of the agents, but in that of the Organization. When it claims redress for a breach of these obligations, the Organization is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered, for 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'; as was stated by the Permanent Court in its Judgment No. 8 of July 26th, 1927 (Series A., No. 9, p. 21). In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization.

Having regard to the foregoing considerations, and to the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization, the Court is of the opinion that, in the case of a breach of these obligations, the Organization has the capacity to claim adequate reparation, and that in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him.

* * *

The question remains whether the Organization has "the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him" when the defendant State is not a member of the Organization.

In considering this aspect of Question I (a) and (b), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international plane, and that it possesses a right of functional protection in respect of its agents. Here again the Court is authorized to assume that the damage suffered involves the responsibility of a State, and it is not called upon to express an opinion upon the various ways in which that responsibility might be engaged. Accordingly the question is whether the Organization has capacity to bring a claim against the defendant State to recover reparation in respect of that damage or whether, on the contrary, the defendant State, not being a member, is justified in raising the objection that the Organization lacks the capacity to bring an international claim. On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.

Accordingly, the Court arrives at the conclusion that an affirmative answer should be given to Question I (a) and (b) whether or not the defendant State is a Member of the United Nations.

* * *

Question II is as follows:

"In the event of an affirmative reply on point I (b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national?"

The affirmative reply given by the Court on point I (b) obliges it now to examine Question II. When the victim has a nationality, cases can clearly occur in which the injury suffered by him may engage the interest both of his national State and of the Organization. In such an event, competition between the State's right of diplomatic protection and the Organization's right of functional protection might arise, and this is the only case with which the Court is invited to deal.

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.
The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render “every assistance” provided by Article 2, paragraph 5, of the Charter.

Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case.

The risk of competition between the Organization and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already certain States whose nationals have been injured in the performance of missions undertaken for the Organization have shown a reasonable and co-operative disposition to find a practical solution.

* * *

The question of reconciling action by the Organization with the rights of a national State may arise in another way; that is to say, when the agent bears the nationality of the defendant State.

The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organization for a breach of obligations towards it occurring in relation to the performance of his mission by that agent.

For these reasons,

The Court is of opinion

On Question I (a):

(i) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

(ii) unanimously,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.

On Question I (b):

(i) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a Member State, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.

(ii) by eleven votes against four,

That, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which is not a member, the United Nations as an Organization has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage caused to the victim or to persons entitled through him.
On Question II:

By ten votes against five,

When the United Nations as an Organization is bringing a claim for reparation of damage caused to its agent, it can only do so by basing its claim upon a breach of obligations due to itself; respect for this rule will usually prevent a conflict between the action of the United Nations and such rights as the agent's national State may possess, and thus bring about a reconciliation between their claims; moreover, this reconciliation must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States, either generally or in each case.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this eleventh day of April, one thousand nine hundred and forty-nine, 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) BASDEVANT,
President.

(Signed) E. HAMBRO,
Registrar.

Judge Winiarski states with regret that he is unable to concur in the reply given by the Court to Question I (b). In general, he shares the views expressed in Judge Hackworth's dissenting opinion.

Judges ÁLVAREZ and AZEVEDO, whilst concurring in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their individual opinion.

Judges HACKWORTH, BADAWI PASHA and KRYLOV, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.
(Initialled) E. H.
International Court of Justice

Competence of the General Assembly for the Admission of a State to the United Nations Advisory Opinion

I.C.J. Reports 1950
Le présent avis doit être cité comme suit :
"Compétence de l'Assemblée pour l'admission aux Nations Unies,
Avis consultatif : C. I. J. Recueil 1950, p. 4."

This Opinion should be cited as follows:
"Competence of Assembly regarding admission to the United Nations,
Advisory Opinion : I.C.J. Reports 1950, p. 4."
INTERNATIONAL COURT OF JUSTICE

YEAR 1950
March 3rd, 1950

COMPETENCE OF THE GENERAL ASSEMBLY
FOR THE ADMISSION OF A STATE
TO THE UNITED NATIONS

Competence of the Court to interpret Article 4, paragraph 2, of the
Charter.—Character of the question.—Absence of recommendation from
the Security Council regarding admission to the United Nations.—
Power of the General Assembly regarding admission to membership
in the United Nations in the absence of a recommendation of the Security
Council.—Meaning of the term “upon the recommendation of the Security
Council”—Interpretation of a treaty provision according to its natural
and ordinary meaning in its context.—Travaux préparatoires.—Inter-
pretation in the light of the general structure of the Charter.—Appli-
cation of Article 4, paragraph 2, by the General Assembly and the
Security Council.

ADVISORY OPINION

Present: President Basdevant; Vice-President Guerrero;
Judges Alvarez, Hackworth, Winiarski, Zorčić, De Visscher, Sir Arnold McNa
r, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo; Registrar
Mr. Hambro.

The Court,
composed as above,
gives the following Advisory Opinion:

On November 22nd, 1949, the General Assembly of the United
Nations adopted the following Resolution:

"The General Assembly,
Keeping in mind the discussion concerning the admission of new
Members in the Ad Hoc Political Committee at its fourth regular
session,
Requests the International Court of Justice to give an advisory
opinion on the following question:

'Can the admission of a State to membership in the United
Nations, pursuant to Article 4, paragraph 2, of the Charter,
be effected by a decision of the General Assembly when the
Security Council has made no recommendation for admission
by reason of the candidate failing to obtain the requisite majority
or of the negative vote of a permanent Member upon a resolution
so to recommend?'"

By a letter of November 25th, 1949, filed in the Registry on
November 28th, the Secretary-General of the United Nations
transmitted to the Registrar a copy of the Resolution of the
General Assembly.

On December 2nd, 1949, the Registrar gave notice of the
Request for an Opinion to all States entitled to appear before the
Court, in accordance with paragraph 1 of Article 66 of the Statute.
Furthermore, the Registrar informed the Governments of Members
of the United Nations by means of a special and direct com-
munication, as provided in paragraph 2 of Article 66, that the
Court was prepared to receive from them written statements on
the question before January 24th, 1950, the date fixed by an
Order of the Court made on December 2nd, 1949.

By the date thus fixed, written statements were received from
the following States: Byelorussian Soviet Socialist Republic,
Czechoslovakia, Egypt, Ukrainian Soviet Socialist Republic,
Union of Soviet Socialist Republics, United States of America.
A written statement from the Secretary-General of the United
Nations was also received within the time-limit. Furthermore,
the Registrar received written statements from the Governments
of the Republic of Argentina on January 26th, 1950, and of
Venezuela on February 2nd, 1950, i.e., after the expiration of
the time-limit fixed by the Order of December 2nd, 1949. They
were accepted by a decision of the President, as the Court was
not sitting, in accordance with the provisions of paragraphs 4
and 5 of Article 37 of the Rules of Court. The written statements
were communicated to all Members of the United Nations, who were informed that the President had fixed February 16th, 1950, as the opening date of the oral proceedings.

In accordance with Article 65 of the Statute of the Court, the Secretary-General sent to the Registry the documents which are enumerated in the list annexed to the present Opinion1. These documents reached the Registry on January 23rd, 1950. The Assistant Secretary-General in charge of the Legal Department also announced by a letter of January 23rd, 1950, that he did not intend to take part in the oral proceedings, unless the Court so desired.

The Government of the French Republic and the Government of the Republic of Argentina, by letters of January 14th and February 3rd, 1950, respectively, announced their intention to make oral statements before the Court. On February 14th, 1950, the Argentine delegation in Geneva informed the Registrar that the Government of the Republic of Argentina abandoned its intention to take part in the oral proceedings.

In the course of a public sitting held on February 16th, 1950, the Court heard an oral statement presented on behalf of the Government of the French Republic by M. Georges Scelle, Honorary Professor in the Faculty of Law of the University of Paris, member of the United Nations International Law Commission.

* * *

The Request for an Opinion calls upon the Court to interpret Article 4, paragraph 2, of the Charter. Before examining the merits of the question submitted to it, the Court must first consider the objections that have been made to its doing so, either on the ground that it is not competent to interpret the provisions of the Charter, or on the ground of the alleged political character of the question.

So far as concerns its competence, the Court will simply recall that, in a previous Opinion which dealt with the interpretation of Article 4, paragraph 1, it declared that, according to Article 96 of the Charter and Article 65 of the Statute, it may give an Opinion on any legal question and that there is no provision which prohibits it from exercising, in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function falling within the normal exercise of its judicial powers (I.C.J. Reports 1947-1948, p. 61).

With regard to the second objection, the Court notes that the General Assembly has requested it to give the legal interpretation of paragraph 2 of Article 4. As the Court stated in the same Opinion, it "cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision".

Consequently, the Court, in accordance with its previous declarations, considers that it is competent on the basis of Articles 96 of the Charter and 65 of its Statute, and that there is no reason why it should not answer the question submitted to it.

This question has been framed by the General Assembly in the following terms:

"Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?"

The Request for an Opinion envisages solely the case in which the Security Council, having voted upon a recommendation, has concluded from its vote that the recommendation was not adopted because it failed to obtain the requisite majority or because of the negative vote of a permanent Member. Thus the Request refers to the case in which the General Assembly is confronted with the absence of a recommendation from the Security Council.

It is not the object of the Request to determine how the Security Council should apply the rules governing its voting procedure in regard to admissions or, in particular, that the Court should examine whether the negative vote of a permanent Member is effective to defeat a recommendation which has obtained seven or more votes. The question, as it is formulated, assumes in such a case the non-existence of a recommendation.

The Court is, therefore, called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it.

Article 4, paragraph 2, is as follows:

"The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

The Court has no doubt as to the meaning of this text. It requires two things to effect admission: a "recommendation" of the Security Council and a "decision" of the General Assembly. It is in the nature of things that the recommendation should come before the decision. The word "recommendation", and the word "upon" preceding it, imply the idea that the recommendation is the foundation of the decision to admit, and that the latter rests upon the recommendation. Both these acts are indispensable to form the judgment of the Organization to which the previous

1 See p. 35.
paragraph of Article 4 refers. The text under consideration means that the General Assembly can only decide to admit upon the recommendation of the Security Council; i t determines the respective roles of the two organs whose combined action is required before admission can be effected: in other words, the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected.

In one of the written statements placed before the Court, an attempt was made to attribute to paragraph 2 of Article 4 a different meaning. The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. As the Permanent Court said in the case concerning the Polish Postal Service in Danzig (P.C.I.J., Series B, No. 11, p. 39):

"It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."

When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the travaux préparatoires of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to travaux préparatoires.

The conclusions to which the Court is led by the text of Article 4, paragraph 2, are fully confirmed by the structure of the Charter, and particularly by the relations established by it between the General Assembly and the Security Council.

The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 4 confers upon it "primary responsibility for the maintenance of international peace and security", and the Charter grants it for this purpose certain powers of decision. Under Articles 4, 5, and 6, the Security Council co-operates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organization. It has power, without the concurrence of the General Assembly, to reinstate the Member which was the object of the suspension, in its rights and privileges.

The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only "if the Security Council recommends the applicant State for membership" (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 206 (IV), the very one that embodies this Request for an Opinion.

To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organization. It would mean that the Security Council would have merely to study the case, present a report, give advice, and express an opinion. This is not what Article 4, paragraph 2, says.

The Court cannot accept the suggestion made in one of the written statements submitted to the Court, that the General Assembly, in order to try to meet the requirement of Article 4, paragraph 2, could treat the absence of a recommendation as equivalent to what is described in that statement as an "unfavourable recommendation", upon which the General Assembly could base a decision to admit a State to membership.

Reference has also been made to a document of the San Francisco Conference, in order to put the possible case of an unfavourable recommendation being voted by the Security Council: such a recommendation has never been made in practice. In the opinion of the Court, Article 4, paragraph 2, envisages a favourable recommendation of the Security Council and that only. An unfavourable recommendation would not correspond to the provisions of Article 4, paragraph 2.

While keeping within the limits of a Request which deals with the scope of the powers of the General Assembly, it is enough for
OPIN. OF 3 III 50 (ADMISSION TO THE UNITED NATIONS) II

the Court to say that nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council.

In consequence, it is impossible to admit that the General Assembly has the power to attribute to a vote of the Security Council the character of a recommendation when the Council itself considers that no such recommendation has been made.

For these reasons,

THE COURT,

by twelve votes to two,

is of opinion that the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and fifty, 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) Basdevant,
President.

(Signed) E. Hambro,
Registrar.

OPIN. OF 3 III 50 (ADMISSION TO THE UNITED NATIONS) II

Judges Alvarez and Azevedo, declaring that they are unable to concur in the Opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Opinion statements of their dissenting opinion.

(Initialled) J. B.
(Initialled) E. H.
International Court of Justice

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights Advisory Opinion

I.C.J. Reports 1999
DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

ADVISORY OPINION OF 29 APRIL 1999

1999

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND RELATIF À L'IMMUNITÉ DE JURIDICTION D'UN RAPPORTEUR SPÉCIAL DE LA COMMISSION DES DROITS DE L'HOMME

AVIS CONSULTATIF DU 29 AVRIL 1999

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DIFFERENCE RELATING TO IMMUNITY FROM LEGAL PROCESS OF A SPECIAL RAPPORTEUR OF THE COMMISSION ON HUMAN RIGHTS

Article 96, paragraph 2, of the Charter and Article 65, paragraph 1, of the Statute — Resolution 89 (1) of the General Assembly authorizing the Economic and Social Council to request advisory opinions — Article VIII, Section 30, of the Convention on the Privileges and Immunities of the United Nations — Existence of a “difference” between the United Nations and one of its Members — Opinion “accepted as decisive by the parties” — Advisory nature of the Court’s function and particular treaty provisions — “Legal question” — Question arising “within the scope of [the] activity” of the body requesting it.

Jurisdiction and discretionary power of the Court to give an opinion — “Absence of compelling reasons” to decline to give such opinion.

Question on which the opinion is requested — Divergence of views — Formulation adopted by the Council as the requesting body.

Special Rapporteur of the Commission on Human Rights — “Expert on mission” — Applicability of Article VI, Section 22, of the General Convention — Specific circumstances of the case — Question whether words spoken by the Special Rapporteur during an interview were spoken “in the course of the performance of his mission” — Pivotal role of the Secretary-General in the process of determining whether, in the prevailing circumstances, an expert on mission is entitled to the immunity provided for in Section 22 (b) — Interview given by Special Rapporteur to International Commercial Litigation — Contacts with the media by Special Rapporteurs of the Commission on Human Rights — Reference to Special Rapporteur’s capacity in the text of the interview — Position of the Commission itself.

Legal obligations of Malaysia in this case — Point in time from which the question must be answered — Authority and responsibility of the Secretary-General to inform the Government of a member State of his finding on the immunity of an agent — Finding creating a presumption which can only be set aside by national courts for the most compelling reasons — Obligation on the governmental authorities to convey that finding to the national courts concerned — immunity from legal process “of every kind” within the meaning of Section 22 (b) of the Convention — Preliminary question which must be expeditiously decided in limine litis.

Holding the Special Rapporteur financially harmless.

Obligation of the Malaysian Government to communicate the advisory opinion to the national courts concerned.

Claims for any damage incurred as a result of acts of the Organization or its agents — Article VIII, Section 29, of the General Convention — Conduct expected of United Nations agents.

ADVISORY OPINION

Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDOAU, GUILLAUME, RANJEA, HERCZEGH, SHI, FLEISCHHAUSER, KOROMA, VEERESCHICHT, HIGGINS, PARRA-ARANGUREN, KOKUMANS, REZK; Registrar VALENCIA-OSPINA.

Concerning the difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights,

The Court,

composed as above,

gives the following Advisory Opinion:

1. The question on which the Court has been requested to give an advisory opinion is set forth in decision 1998/297 adopted by the United Nations Economic and Social Council (hereinafter called the “Council”) on 5 August 1998. By a letter dated 7 August 1998, filed in the Registry on 10 August 1998, the Secretary-General of the United Nations officially communicated to the Registrar the Council’s decision to submit the question to the Court for an advisory opinion. Decision 1998/297, certified copies of the English and French texts of which were enclosed with the letter, reads as follows:

“The Economic and Social Council,

Having considered the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers1,

Considering that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers,

Recalling General Assembly resolution 89 (1) of 11 December 1946,

1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly
resolution 89 (1), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 13 of the note by the Secretary-General,¹ and on the legal obligations of Malaysia in this case:

2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.


Also enclosed with the letter were certified copies of the English and French texts of the note by the Secretary-General dated 28 July 1998 and entitled “Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers” and of the addendum to that note (E/1998/94/Add.1), dated 3 August 1998.

2. By letters dated 10 August 1998, the Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court. A copy of the bilingual printed version of the request, prepared by the Registry, was subsequently sent to those States.

3. By an Order dated 10 August 1998, the senior judge, acting as President of the Court under Article 13, paragraph 3, of the Rules of Court, decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called the “General Convention”) were likely to be able to furnish information on the question in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the senior judge, considering that, in fixing time-limits for the proceedings, it was “necessary to bear in mind that the request for an advisory opinion was expressly made ‘on a priority basis’”, fixed 7 October 1998 as the time-limit within which written statements on the question might be submitted to the Court, in accordance with Article 66, paragraph 2, of the Statute, and 6 November 1998 as the time-limit for written comments on written statements, in accordance with Article 66, paragraph 4, of the Statute.

On 10 August 1998, the Registrar sent to the United Nations and to the States parties to the General Convention the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

4. By a letter dated 22 September 1998, the Legal Counsel of the United Nations communicated to the President of the Court a certified copy of the amended French version of the note by the Secretary-General which had been enclosed with the request. Consequently, a corrigendum to the printed French version of the request for an advisory opinion was communicated to all States entitled to appear before the Court.

5. The Secretary-General communicated to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 5 October 1998 onwards.

6. Within the time-limit fixed by the Order of 10 August 1998, written statements were filed by the Secretary-General of the United Nations and by Costa Rica, Germany, Italy, Malaysia, Sweden, the United Kingdom and the United States of America; the filing of a written statement by Greece on 12 October 1998 was authorized. A related letter was also received from Luxembourg on 29 October 1998. Written comments on the statements were submitted, within the prescribed time-limit, by the Secretary-General of the United Nations and by Costa Rica, Malaysia, and the United States of America. Upon receipt of those statements and comments, the Registrar communicated them to all States having taken part in the written proceedings.

The Registrar also communicated to those States the text of the introductory note to the dossier of documents submitted by the Secretary-General. In addition, the President of the Court granted Malaysia’s request for a copy of the whole dossier; on the instructions of the President, the Deputy Registrar also communicated a copy of that dossier to the other States having taken part in the written proceedings, and the Secretary-General was so informed.

7. The Court decided to hold hearings, opening on 7 December 1998, at which oral statements might be submitted to the Court by the United Nations and the States parties to the General Convention.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held on 7 and 8 December 1998, the Court heard oral statements in the following order by:

for the United Nations: Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

for Costa Rica: H.E. Mr. José de J. Conejo, Ambassador of Costa Rica to the Netherlands;

for Italy: Mr. Umberto Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

for Malaysia: Dato’ Heliah bt Mohd Yusof, Solicitor General of Malaysia,

Sir Elihu Lauterpacht, C.B.E., Q.C., Honorary Professor of International Law, University of Cambridge.

The Court having decided to authorize a second round of oral statements, the United Nations, Costa Rica and Malaysia availed themselves of this option; at a public hearing held on 10 December 1998, Mr. Hans Corell, H.E. Mr. José de J. Conejo, Mr. Charles N. Brower, Dato’ Heliah bt Mohd Yusof and Sir Elihu Lauterpacht were successively heard.
Members of the Court put questions to the Secretary-General's representative, who replied both orally and in writing. Copies of the written replies were communicated to all the States having taken part in the oral proceedings; Malaysia submitted written comments on these replies.

* * *

10. In its decision 1998/297, the Council asked the Court to take into account, for purposes of the advisory opinion requested, the “circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General” (E/1998/94). Those paragraphs read as follows:

“1. In its resolution 22 A (I) of 13 February 1946, the General Assembly adopted, pursuant to Article 105 (3) of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations (the Convention). Since then, 137 Member States have become parties to the Convention, and its provisions have been incorporated by reference into many hundreds of agreements relating to the headquarters or seats of the United Nations and its organs, and to activities carried out by the Organization in nearly every country of the world.

2. That Convention is, inter alia, designed to protect various categories of persons, including ‘Experts on Mission for the United Nations’, from all types of interference by national authorities. In particular, Section 22 (b) of Article VI of the Convention provides:

‘Section 22: Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.’

3. In its Advisory Opinion of 14 December 1989, on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (the so-called ‘Maziu case’), the International Court of Justice held that a Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights was an ‘expert on mission’ within the meaning of Article VI of the Convention.


5. In November 1995 the Special Rapporteur gave an interview to International Commercial Litigation, a magazine published in the United Kingdom of Great Britain and Northern Ireland but circulated also in Malaysia, in which he commented on certain litigations that had been carried out in Malaysian courts. As a result of an article published on the basis of that interview, two commercial companies in Malaysia asserted that the said article contained defamatory words that had ‘brought them into public scandal, odium and contempt’. Each company filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), ‘including exemplary damages for slander’.

6. Actings on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato’ Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur’s United Nations global mandate to investigate allegations concerning the independence of the judiciary and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur’s immunity from legal process with respect to that particular complaint. On 20 January 1997, the Special Rapporteur filed an application in the High Court of Kuala Lumpur (the trial court in which the said suit had been filed) to set aside and/or strike out the plaintiffs’ writ, on the ground that the
words that were the subject of the suits had been spoken by him in the course of performing his mission for the United Nations as Special Rapporteur on the Independence of Judges and Lawyers. The Secretary-General issued a note on 7 March 1997 confirming that 'the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission’ and that the Secretary-General ‘therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto’. The Special Rapporteur filed this note in support of his above-mentioned application.

7. After a draft of a certificate that the Minister for Foreign Affairs proposed to file with the trial court had been discussed with representatives of the Office of Legal Affairs, who had indicated that the draft set out the immunities of the Special Rapporteur incompletely and inadequately, the Minister nevertheless on 12 March 1997 filed the certificate in the form originally proposed: in particular the final sentence of that certificate in effect invited the trial court to determine at its own discretion whether the immunity applied, by stating that this was the case ‘only in respect of words spoken or written and acts done by him in the course of the performance of his mission’ (emphasis added). In spite of the representations that had been made by the Office of Legal Affairs, the certificate failed to refer in any way to the note that the Secretary-General had issued a few days earlier and that had in the meantime been filed with the court, nor did it indicate that in this respect, i.e. in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court. In spite of repeated requests by the Legal Counsel, the Minister for Foreign Affairs refused to amend his certificate or to supplement it in the manner urged by the United Nations.

8. On 28 June 1997, the competent judge of the Malaysian High Court for Kuala Lumpur concluded that she was 'unable to hold that the Defendant is absolutely protected by the immunity he claims', in part because she considered that the Secretary-General's note was merely 'an opinion' with scant probative value and no binding force upon the court and that the Minister for Foreign Affairs' certificate ‘would appear to be no more than a bland statement as to a state of fact pertaining to the Defendant's status and mandate as a Special Rapporteur and appears to have room for interpretation'. The Court ordered that the Special Rapporteur's motion be dismissed with costs, that costs be taxed and paid forthwith by him and that he file and serve his defence within 14 days. On 8 July, the Court of Appeal dismissed Mr. Cumaraswamy's motion for a stay of execution.

9. On 30 June and 7 July 1997, the Legal Counsel thereupon sent notes verbales to the Permanent Representative of Malaysia, and also held meetings with him and his Deputy. In the latter note, the Legal Counsel, inter alia, called on the Malaysian Government to intervene in the current proceedings so that the burden of any further defence, including any expenses and taxed costs resulting therefrom, be assumed by the Government; to hold Mr. Cumaraswamy harmless in respect of the expenses he had already incurred or that were being taxed to him in respect of the proceedings so far; and, so as to prevent the accumulation of additional expenses and costs and the further need to submit a defence until the matter of his immunity was definitively resolved between the United Nations and the Government, to support a motion to have the High Court proceedings stayed until such resolution. The Legal Counsel referred to the provisions for the settlement of differences arising out of the interpretation and application of the 1946 Convention that might arise between the Organization and a Member State, which are set out in Section 30 of the Convention, and indicated that if the Government decided that it cannot or does not wish to protect and to hold harmless the Special Rapporteur in the indicated manner, a difference within the meaning of those provisions might be considered to have arisen between the Organization and the Government of Malaysia.

10. Section 30 of the Convention provides as follows:

'Section 30: All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

11. On 10 July yet another lawsuit was filed against the Special Rapporteur by one of the lawyers mentioned in the magazine article referred to in paragraph 5 above, based on precisely the same passages of the interview and claiming damages in an amount of M$60 million (US$24 million). On 11 July, the Secretary-General issued a note corresponding to the one of 7 March 1997 (see para. 6 above) and also communicated a note verbales with essentially the same text to the Permanent Representative of Malaysia with the request that it be presented formally to the competent Malaysian court by the Government.

12. On 23 October and 21 November 1997, new plaintiffs filed
a third and fourth lawsuit against the Special Rapporteur for M$100 million (US$40 million) and M$60 million (US$24 million) respectively. On 27 October and 22 November 1997, the Secretary-General issued identical certificates of the Special Rapporteur’s immunity.

13. On 7 November 1997, the Secretary-General advised the Prime Minister of Malaysia that a difference might have arisen between the United Nations and the Government of Malaysia and about the possibility of resorting to the International Court of Justice pursuant to Section 30 of the Convention. Nonetheless on 19 February 1998, the Federal Court of Malaysia denied Mr. Cumaraswamy’s application for leave to appeal stating that he is neither a sovereign nor a full-fledged diplomat but merely ‘an unpaid, part-time provider of information’.

14. The Secretary-General then appointed a Special Envoy, Maitre Yves Fortier of Canada, who, on 26 and 27 February 1998, undertook an official visit to Kuala Lumpur to reach an agreement with the Government of Malaysia on a joint submission to the International Court of Justice. Following that visit, on 13 March 1998 the Minister for Foreign Affairs of Malaysia informed the Secretary-General Special Envoy of his Government’s desire to reach an out-of-court settlement. In an effort to reach such a settlement, the Office of Legal Affairs proposed the terms of such a settlement on 23 March 1998 and a draft settlement agreement on 26 May 1998. Although the Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998, no final settlement agreement was concluded. During this period, the Government of Malaysia insisted that, in order to negotiate a settlement, Maitre Fortier must return to Kuala Lumpur. While Maitre Fortier preferred to undertake the trip once a preliminary agreement between the parties had been reached, nonetheless, based on the Prime Minister of Malaysia’s request that Maitre Fortier return as soon as possible, the Secretary-General requested his Special Envoy to do so.

15. Maitre Fortier undertook a second official visit to Kuala Lumpur, from 25 to 28 July 1998, during which he concluded that the Government of Malaysia was not going to participate either in settling this matter or in preparing a joint submission to the current session of the Economic and Social Council. The Secretary-General’s Special Envoy therefore advised that the matter should be referred to the Council to request an advisory opinion from the International Court of Justice. The United Nations had exhausted all efforts to reach either a negotiated settlement or a joint submission through the Council to the International Court of Justice. In this connection, the Government of Malaysia has acknowledged the Organization’s right to refer the matter to the Council to request an advisory opinion in accordance with Section 30 of the Convention, advised the Secretary-General’s Special Envoy that the United Nations should proceed to do so, and indicated that, while it will make its own presentations to the International Court of Justice, it does not oppose the submission of the matter to that Court through the Council.”

11. The dossier of documents submitted to the Court by the Secretary-General (see paragraph 5 above) contains the following additional information that bears on an understanding of the request to the Court.

12. The article published in the November 1995 issue of International Commercial Litigation, which is referred to in paragraph 5 of the foregoing note by the Secretary-General, was written by David Samuels and entitled “Malaysian Justice on Trial”. The article gave a critical appraisal of the Malaysian judicial system in relation to a number of court decisions. Various Malaysian lawyers were interviewed; as quoted in the article, they expressed their concern that, as a result of these decisions, foreign investors and manufacturers might lose the confidence they had always had in the integrity of the Malaysian judicial system.

13. It was in this context that Mr. Cumaraswamy, who was referred to in the article more than once in his capacity as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, was asked to give his comments. With regard to a specific case (the Ayer Molek case), he said that it looked like “a very obvious, perhaps even glaring example of judge-choosing”, although he stressed that he had not finished his investigation.

Mr. Cumaraswamy is also quoted as having said:

“Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice.”

He added: “But I do not want any of the people involved to think I have made up my mind.” He also said:

“It would be unfair to name any names, but there is some concern about this among foreign businessmen based in Malaysia, particularly those who have litigation pending.”

14. On 18 December 1995, two commercial firms and their legal counsel addressed letters to Mr. Cumaraswamy in which they maintained that they were defamed by Mr. Cumaraswamy’s statements in the article, since it was clear, they claimed, that they were being accused of corruption in the Ayer Molek case. They informed Mr. Cumaraswamy that they had “no choice but to issue defamation proceedings against him” and added
“It is important that all steps are taken for the purpose of mitigating the continuing damage being done to [our] business and commercial reputations which is worldwide, as quickly and effectively as possible.”

15. On 28 December 1995, in view of the foregoing letters, the Secretariat of the United Nations issued a Note Verbale to the Permanent Mission of Malaysia in Geneva, requesting that the competent Malaysian authorities be advised, and that they in turn advise the Malaysian courts, of the Special Rapporteur’s immunity from legal process. This was the first in a series of similar communications, containing the same finding, sent by or on behalf of the Secretary-General — some of which were sent once court proceedings had been initiated (see paragraphs 6 et seq. of the note by the Secretary-General, reproduced in paragraph 10 above).

16. On 12 December 1996, the two commercial firms issued a writ of summons and statement of claim against Mr. Cumaraswamy in the High Court of Kuala Lumpur. They claimed damages, including exemplary damages, for slander and libel, and requested an injunction to restrain Mr. Cumaraswamy from further defaming the plaintiffs.

17. As stated in the note of the Secretary-General, quoted in paragraph 10 above, three further lawsuits flowing from Mr. Cumaraswamy’s statements to International Commercial Litigation were brought against him.

The Government of Malaysia did not transmit to its courts the texts containing the Secretary-General’s finding that Mr. Cumaraswamy was entitled to immunity from legal process.

The High Court of Kuala Lumpur did not pass upon Mr. Cumaraswamy’s immunity in limine litis, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity. This decision was upheld by both the Court of Appeal and the Federal Court of Malaysia.

18. As indicated in paragraph 4 of the above note by the Secretary-General, the Special Rapporteur made regular reports to the Commission on Human Rights (hereinafter called the “Commission”).

In his first report (E/CN.4/1995/39), dated 6 February 1995, Mr. Cumaraswamy did not refer to contacts with the media. In resolution 1995/36 of 3 March 1995, the Commission welcomed this report and took note of the methods of work described therein in paragraphs 63 to 93.

In his second report (E/CN.4/1996/37), dated 1 March 1996, the Special Rapporteur referred to the Ayer Molek case and to a critical press statement made by the Bar Council of Malaysia on 21 August 1995. The report also included the following quotation from a press statement issued by Mr. Cumaraswamy on 23 August 1995:

“Complaints are rife that certain highly placed personalities in Malaysia including those in business and corporate sectors are manipulating the Malaysian system of justice and thereby undermining the due administration of independent and impartial justice by the courts.

Under the mandate entrusted to me by the United Nations Commission on Human Rights, I am duty bound to investigate these complaints and report to the same Commission, if possible at its fifty-second session next year. To facilitate my inquiries I will seek the cooperation of all those involved in the administration of justice, including the Government which, under my mandate, is requested to extend its cooperation and assistance.”

In resolution 1996/34 of 19 April 1996, the Commission took note of this report and of the Special Rapporteur’s working methods.

In his third report (E/CN.4/1997/32), dated 18 February 1997, the Special Rapporteur informed the Commission of the article in International Commercial Litigation and the lawsuits that had been initiated against him, the author, the publisher, and others. He also referred to the notifications of the Legal Counsel of the United Nations to the Malaysian authorities. In resolution 1997/23 of 11 April 1997, the Commission took note of the report and the working methods of the Special Rapporteur, and extended his mandate for another three years.

In his fourth report (E/CN.4/1998/39), dated 12 February 1998, the Special Rapporteur reported on further developments with regard to the lawsuits initiated against him. In its resolution 1998/35 of 17 April 1998, the Commission similarly took note of this report and of the working methods reflected therein.

19. As indicated above (see paragraph 1), the note by the Secretary-General was accompanied by an addendum (E/1998/94/Add.1) which reads as follows:

“In paragraph 14 of the note by the Secretary-General on the privileges and immunities of the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers (E/1998/94), it is reported that the ‘Government of Malaysia succeeded in staying proceedings in the four lawsuits until September 1998’. In this connection, the Secretary-General has been informed that on 1 August 1998, Dato’ Param Cumaraswamy was served with a Notice of Taxation and Bill of Costs dated 28 July 1998 and signed by the Deputy Registrar of the Federal Court notifying him that the
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20. The Council considered the note by the Secretary-General (E/1998/94) at the forty-seventh and forty-eighth meetings of its substantive session of 1998, held on 31 July 1998. At that time, the Observer for Malaysia disputed certain statements in paragraphs 7, 14 and 15 of the note. The note concluded with a paragraph 21 containing the Secretary-General’s proposal for two questions to be submitted to the Court for an advisory opinion:

“21. . . .

‘Considering the difference that has arisen between the United Nations and the Government of Malaysia with respect to the immunity from legal process of Mr. Dato’ Param Cumaraswamy, the United Nations Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, in respect of certain words spoken by him:

1. Subject only to Section 30 of the Convention on the Privileges and Immunities of the United Nations, does the Secretary-General of the United Nations have the exclusive authority to determine whether words were spoken in the course of the performance of a mission for the United Nations within the meaning of Section 22 (b) of the Convention?

2. In accordance with Section 34 of the Convention, once the Secretary-General has determined that such words were spoken in the course of the performance of a mission and has decided to maintain, or not to waive, the immunity from legal process, does the Government of a Member State party to the Convention have an obligation to give effect to that immunity in its national courts and, if failing to do so, to assume responsibility for, and any costs, expenses and damages arising from, any legal proceedings brought in respect of such words?”

On 5 August 1998, at its forty-ninth meeting, the Council considered and adopted without a vote a draft decision submitted by its Vice-President following informal consultations. After referring to Section 30 of the General Convention, the decision requested the Court to give an advisory opinion on the question formulated therein, and called upon the Government of Malaysia to ensure that

“all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the . . . Court . . . which shall be accepted as decisive by the parties” (E/1998/L.49/Rev.1).

At that meeting, the Observer for Malaysia reiterated his previous criticism of paragraphs 7, 14 and 15 of the Secretary-General’s note, but made no comment on the terms of the question to be put to the Court as now formulated by the Council. On being so adopted, the draft became decision 1998/297 (see paragraph 1 above).

21. As regards events subsequent to the submission of the request for an advisory opinion, and more precisely, the situation with regard to the proceedings pending before the Malaysian courts, Malaysia has provided the Court with the following information:

“the hearings on the question of stay in respect of three of the four cases have been deferred until 9 February 1999 when they are due again to be mentioned in court, and when the plaintiff will join in requesting further postponements until this Court’s advisory opinion has been rendered, and sufficient time has been given to all concerned to consider its implications.

The position in the first of the four cases is the same, although it is fixed for mention on 16 December [1998]. However, it will then be treated in the same way as the other cases. As to cost, the requirement for the payment of costs by the defendant has also been stayed, and that aspect of the case will be deferred and considered in the same way.”

22. The Council has requested the present advisory opinion pursuant to Article 96, paragraph 2, of the Charter of the United Nations. This paragraph provides that organs of the United Nations, other than the General Assembly or the Security Council,

“which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities”.

Article 65, paragraph 1, of the Statute of the Court states that

“[t]he Court 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."

23. In its decision 1998/297, the Council recalls that General Assembly resolution 89 (I) gave it authorization to request advisory opinions, and it expressly makes reference to the fact:

"that a difference has arisen between the United Nations and the Government of Malaysia, within the meaning of Section 30 of the Convention on the Privileges and Immunities of the United Nations, with respect to the immunity from legal process of Dato’ Param Cumaraswamy, the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers."

24. This is the first time that the Court has received a request for an advisory opinion that refers to Article VIII, Section 30, of the General Convention, which provides that:

"all differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

25. This section provides for the exercise of the Court’s advisory function in the event of a difference between the United Nations and one of its Members. In this case, such a difference exists, but that fact does not change the advisory nature of the Court’s function, which is governed by the terms of the Charter and of the Statute. As the Court stated in its Advisory Opinion of 12 July 1973:

"the existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it. . . ." (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 171, para. 14).

Paragraph 2 of the Council’s decision requesting the advisory opinion repeats expressis verbis the provision in Article VIII, Section 30, of the General Convention that the Court’s opinion “shall be accepted as decisive by the parties”. However, this equally cannot affect the nature of the function carried out by the Court when giving its advisory opinion. As the Court said in its Advisory Opinion of 23 October 1956, in a case involving similar language in Article XII of the Statute of the Administr-
“to inquire into substantial allegations concerning, and to identify and record attacks on, the independence of the judiciary, lawyers and court officials”.

Mr. Cumaraswamy’s activities as Rapporteur and the legal questions arising therefrom are pertinent to the functioning of the Commission; accordingly they come within the scope of activities of the Council, since the Commission is one of its subsidiary organs. The same conclusion was reached by the Court in an analogous case, in its Advisory Opinion of 15 December 1989, also given at the request of the Council, regarding the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (I.C.J. Reports 1989, p. 187, para. 28).

* *

28. As the Court held in its Advisory Opinion of 30 March 1950, the permissive character of Article 65 of the Statute “gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 72). Such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request, for example because it is not a “legal question”. In such a case, “the Court has no discretion in the matter; it must decline to give the opinion requested” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; cf. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996 (1), p. 73, para. 14). However, the Court went on to state, in its Advisory Opinion of 20 July 1962, that “even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so” (I.C.J. Reports 1962, p. 155).

29. In its Advisory Opinion of 30 March 1950, the Court made it clear that, as an organ of the United Nations, 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); moreover, in its Advisory Opinion of 20 July 1962, citing its Advisory Opinion of 23 October 1956, the Court stressed that “only ‘compelling reasons’ should lead it to refuse to give a requested advisory opinion” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155). (See also, for example, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, pp. 190-191, para. 37; and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (1), p. 255, para. 14.)

30. In the present case, the Court, having established its jurisdiction, finds no compelling reasons not to give the advisory opinion requested by the Council. Moreover, no participant in these proceedings questioned the need for the Court to exercise its advisory function in this case.

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31. Article 65, paragraph 2, of the Statute provides that

“[t]he questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required”.

In compliance with this requirement, the Secretary-General transmitted to the Court the text of the Council’s decision, paragraph 1 of which reads as follows:

“1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato’ Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case.”

32. Malaysia has asserted to the Court that it had “at no time approved the text of the question that appeared in E/1998/L.49 or as eventually adopted by ECOSOC and submitted to the Court” and that it “never did more than ‘take note’ of the question as originally formulated by the Secretary-General and submitted to the ECOSOC in document E/1998/94’. It contends that the advisory opinion of the Court should be restricted to the existing difference between the United Nations and Malaysia. In Malaysia’s view, this difference relates to the question (as formulated by the Secretary-General himself (see paragraph 20 above)) of whether the latter has the exclusive authority to determine whether acts of an expert (including words spoken or written) were performed in the course of his or her mission. Thus, in the conclusion to the revised version of its written statement, Malaysia states, inter alia, that it

“considers that the Secretary-General of the United Nations has not been vested with the exclusive authority to determine whether words
were spoken in the course of the performance of a mission for the
United Nations within the meaning of Section 22 (b) of the Convention”.

In its oral pleadings, Malaysia maintained that

“in implementing Section 30, ECOSOC is merely a vehicle for
placing a difference between the Secretary-General and Malaysia
before the Court. ECOSOC does not have an independent posi-
tion to assert as it might have had were it seeking an opinion on
some legal question other than in the context of the operation of
Section 30. ECOSOC . . . is no more than an instrument of reference,
it cannot change the nature of the difference or alter the content
of the question.”

33. In the written statement presented on behalf of the Secretary-
General, the Legal Counsel of the United Nations requested the Court

“to establish that, subject to Article VIII, Sections 29 and 30 of the
Convention, the Secretary-General has exclusive authority to deter-
mine whether or not words or acts are spoken, written or done in the
course of the performance of a mission for the United Nations and
whether such words or acts fall within the scope of the mandate
entrusted to a United Nations expert on mission”.

In this submission, it has also been argued

“that such matters cannot be determined by, or adjudicated in, the
national courts of the Member States parties to the Convention. The
latter position is coupled with the Secretary-General’s right and
duty, in accordance with the terms of Article VI, Section 23, of the
Convention, to waive the immunity where, in his opinion, it would
impede the course of justice and it can be waived without prejudice
to the interests of the United Nations.”

34. The other States participating in the present proceedings have
expressed varying views on the foregoing issue of the exclusive authority
of the Secretary-General.

* *

35. As the Council indicated in the preamble to its decision 1998/297,
that decision was adopted by the Council on the basis of the note
submitted by the Secretary General on “Privileges and Immunities of the
Special Rapporteur of the Commission on Human Rights on the Inde-
pendence of Judges and Lawyers” (see paragraph 1 above). Paragraph I
of the operative part of the decision refers expressly to paragraphs 1 to 15
of that note but not to paragraph 21, containing the two questions that
the Secretary-General proposed submitting to the Court (see para-

36. Participants in these proceedings have advanced differing views as
to what is the legal question to be answered by the Court. The Court
observes that it is for the Council — and not for a member State nor for
the Secretary-General — to formulate the terms of a question that the
Council wishes to ask.

37. The Council adopted its decision 1998/297 without a vote. The
Council did not pass upon any proposal that the question to be sub-
mitted to the Court should include, still less be confined to, the issue of
the exclusive authority of the Secretary-General to determine whether or not
acts (including words spoken or written) were performed in the course of
a mission for the United Nations and whether such words or acts fall
within the scope of the mandate entrusted to an expert on mission for the
United Nations. Although the Summary Records of the Council do not
expressly address the matter, it is clear that the Council, as the organ
entitled to put the request to the Court, did not adopt the questions set
forth at the conclusion of the note by the Secretary-General, but instead
formulated its own question in terms which were not contested at that
time (see paragraph 20 above). Accordingly, the Court will now answer
the question as formulated by the Council.

* * *

38. The Court will initially examine the first part of the question laid
before the Court by the Council, which is:

"the legal question of the applicability of Article VI, Section 22, of
the Convention on the Privileges and Immunities of the United
Nations in the case of Dato' Param Cumaraswamy as Special Rap-
porteur of the Commission on Human Rights on the independence
of judges and lawyers, taking into account the circumstances set out
in paragraphs 1 to 15 of the note by the Secretary-General . . .”

39. From the deliberations which took place in the Council on the
content of the request for an advisory opinion, it is clear that the refer-
ence in the request to the note of the Secretary-General was made in
order to provide the Court with the basic facts to which to refer in mak-
ing its decision. The request of the Council therefore does not only pertain
to the threshold question whether Mr. Cumaraswamy was and is an
expert on mission in the sense of Article VI, Section 22, of the General
Convention but, in the event of an affirmative answer to this question, to
the consequences of that finding in the circumstances of the case.

*
40. Pursuant to Article 105 of the Charter of the United Nations:

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

Acting in accordance with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. Malaysia became a party to the General Convention, without reservation, on 28 October 1957.

41. The General Convention contains an Article VI entitled "Experts on Missions for the United Nations". It is comprised of two Sections (22 and 23). Section 22 provides:

"Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular they shall be accorded:

\( (b) \) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

42. In its Advisory Opinion of 14 December 1989 on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, the Court examined the applicability of Section 22 ratione personae, ratione temporis and ratione loci.

In this context the Court stated:

"The purpose of Section 22 is ... evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them such privileges and immunities as are necessary for the independent exercise of their functions' . . . . The essence of the matter lies not in their administrative position but in the nature of their mission." (I.C.J. Reports 1989, p. 194, para. 47.)

In that same Advisory Opinion, the Court concluded that a Special Rapporteur who is appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and is entrusted with a research mission must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the General Convention (ibid., p. 197, para. 55).

43. The same conclusion must be drawn with regard to Special Rapporteurs appointed by the Human Rights Commission, of which the Sub-Commission is a subsidiary organ. It may be observed that Special Rapporteurs of the Commission usually are entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting on them. But what is decisive is that they have been entrusted with a mission by the United Nations and are therefore entitled to the privileges and immunities provided for in Article VI, Section 22, that safeguard the independent exercise of their functions.

44. By a letter of 21 April 1994, the Chairman of the Commission informed the Assistant Secretary-General for Human Rights of Mr. Cumaraswamy's appointment as Special Rapporteur. The mandate of the Special Rapporteur is contained in resolution 1994/41 of the Commission entitled "Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers". This resolution was endorsed by the Council in its decision 1994/251 of 22 July 1994. The Special Rapporteur's mandate consists of the following tasks:

\( (a) \) to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;

\( (b) \) to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;

\( (c) \) to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers".

45. The Commission extended by resolution 1997/23 of 11 April 1997 the Special Rapporteur's mandate for a further period of three years.

In the light of these circumstances, the Court finds that Mr. Cumaraswamy must be regarded as an expert on mission within the meaning of Article VI, Section 22, as from 21 April 1994, that by virtue of this capa-
city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

46. The Court observes that Malaysia has acknowledged that Mr. Cumaraswamy, as Special Rapporteur of the Commission, is an expert on mission and that such experts enjoy the privileges and immunities provided for under the General Convention in their relations with States parties, including those of which they are nationals or on the territory of which they reside. Malaysia and the United Nations are in full agreement on these points, as are the other States participating in the proceedings.

47. The Court will now consider whether the immunity provided for in Section 22 (b) applies to Mr. Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in the interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.

48. During the oral proceedings, the Solicitor General of Malaysia contended that the issue put by the Council before the Court does not include this question. She stated that the correct interpretation of the words used by the Council in its request

"does not extend to inviting the Court to decide whether, assuming the Secretary-General to have had the authority to determine the character of the Special Rapporteur's action, he had properly exercised that authority"

and added:

"Malaysia observes that the word used was 'applicability' not 'application'. 'Applicability' means 'whether the provision is applicable to someone' not 'how it is to be applied'."

49. The Court does not share this interpretation. It follows from the terms of the request that the Council wishes to be informed of the Court's opinion as to whether Section 22 (b) is applicable to the Special Rapporteur, in the circumstances set out in paragraphs 1 to 15 of the note of the Secretary-General and whether, therefore, the Secretary-General's finding that the Special Rapporteur acted in the course of the performance of his mission is correct.

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (b), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:
had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

55. As noted in paragraph 18 above, in its various resolutions the Commission took note of the Special Rapporteur’s reports and of his methods of work. In 1997, it extended his mandate for another three years (see paragraphs 18 and 45 above). The Commission presumably would not have so acted if it had been of the opinion that Mr. Cumaraswamy had gone beyond his mandate and had given the interview to International Commercial Litigation outside the course of his functions. Thus the Secretary-General was able to find support for his findings in the Commission’s position.

56. The Court is not called upon in the present case to pass upon the aptness of the terms used by the Special Rapporteur or his assessment of the situation. In any event, in view of all the circumstances of this case, elements of which are set out in paragraphs 1 to 15 of the note by the Secretary-General, the Court is of the opinion that the Secretary-General correctly found that Mr. Cumaraswamy, in speaking the words quoted in the article in International Commercial Litigation, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22 (b), of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.

* * *

57. The Court will now deal with the second part of the Council’s question, namely, “the legal obligations of Malaysia in this case”.

58. Malaysia maintains that it is premature to deal with the question of its obligations. It is of the view that the obligation to ensure that the requirements of Section 22 of the Convention are met is an obligation of result and not of means to be employed in achieving that result. It further states that Malaysia has complied with its obligation under Section 34 of the General Convention, which provides that a party to the Convention must be “in a position under its own law to give effect to [its] terms”, by enacting the necessary legislation; finally it contends that the Malaysian courts have not yet reached a final decision as to Mr. Cumaraswamy’s entitlement to immunity from legal process.

59. The Court wishes to point out that the request for an advisory opinion refers to “the legal obligations of Malaysia in this case”. The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authorities of the Secretary-General’s finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

60. As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.

61. When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.

The governmental authorities of a party to the General Convention are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information.

Failure to comply with this obligation, among others, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.

62. The Court concludes that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General. According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule, which is of a customary character, is reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the International Law Commission on first reading, which provides:

“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.” (Yearbook of the International Law Commission, 1973, Vol. II, p. 193.)
Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided in limine liti. This is a generally recognized principle of procedural law, and Malaysia was under an obligation to respect it. The Malaysian courts did not rule in limine liti on the immunity of the Special Rapporteur (see paragraph 17 above), thereby nullifying the essence of the immunity rule contained in Section 22 (b). Moreover, costs were taxed to Mr. Cumaraswamy while the question of immunity was still unresolved. As indicated above, the conduct of an organ of a State — even an organ independent of the executive power — must be regarded as an act of that State. Consequently, Malaysia did not act in accordance with its obligations under international law.

64. In addition, the immunity from legal process to which the Court finds Mr. Cumaraswamy entitled entails holding Mr. Cumaraswamy financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs.

65. According to Article VIII, Section 30, of the General Convention, the opinion given by the Court shall be accepted as decisive by the parties to the dispute. Malaysia has acknowledged its obligations under Section 30.

Since the Court holds that Mr. Cumaraswamy is an expert on mission who under Section 22 (b) is entitled to immunity from legal process, the Government of Malaysia is obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected.

66. Finally, the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.

Furthermore, it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.

***

67. For these reasons,

THE COURT

Is of the opinion:

(1) (a) By fourteen votes to one,

That Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchegin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(b) By fourteen votes to one,

That Dato' Param Cumaraswamy is entitled to immunity from legal process of every kind for the words spoken by him during an interview as published in an article in the November 1995 issue of International Commercial Litigation;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchegin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(2) (a) By thirteen votes to two,

That the Government of Malaysia had the obligation to inform the Malaysian courts of the finding of the Secretary-
General that Dato’ Param Cumaraswamy was entitled to immunity from legal process;

**IN FAVOUR:** President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshcheghin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

**AGAINST:** Judges Oda, Koroma;

(b) By fourteen votes to one,

That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*;

**IN FAVOUR:** President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshcheghin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

**AGAINST:** Judge Koroma;

(3) Unanimously,

That Dato’ Param Cumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs;

(4) By thirteen votes to two,

That the Government of Malaysia has the obligation to communicate this Advisory Opinion to the Malaysian courts, in order that Malaysia’s international obligations be given effect and Dato’ Param Cumaraswamy’s immunity be respected;

**IN FAVOUR:** President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshcheghin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

**AGAINST:** Judges Oda, Koroma.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-ninth day of April, one thousand nine hundred and ninety-nine, 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)* Stephen M. Schwebel,
President.

*(Signed)* Eduardo Valencia-Ospina,
Registrar.
International Court of Justice

Judgment No. 2876 of the Administrative Tribunal of the International Labour Organization upon a Complain Filed against the International Fund for Agricultural Development Advisory Opinion of 1 February 2012
1 FEBRUARY 2012
ADVISORY OPINION

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JUDGMENT No. 2867 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION UPON A COMPLAINT FILED AGAINST THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT

JUGEMENT No 2867 DU TRIBUNAL ADMINISTRATIF DE L'ORGANISATION INTERNATIONALE DU TRAVAIL SUR REQUÊTE CONTRE LE FONDS INTERNATIONAL DE DÉVELOPPEMENT AGRICOLE

1 FRÈVEIR 2012
AVIS CONSULTATIF
INTERNATIONAL COURT OF JUSTICE

1 February 2012

JUDGMENT No. 2867 OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION UPON A COMPLAINT FILED AGAINST THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT

Jurisdiction of the Court to give advisory opinion requested.

Article XII of Annex to Statute of Administrative Tribunal of International Labour Organization (ILOAT) — Power of Executive Board of International Fund for Agricultural Development (IFAD) to request an advisory opinion — Jurisdiction of the Court to give opinion founded on Charter of United Nations and Statute of the Court, not only on Article XII of Annex to ILOAT Statute — Request presents “legal questions” which “arise within the scope of the Fund’s activities” — The Court has jurisdiction to give the advisory opinion.

Scope of jurisdiction of the Court.

Binding character attributed to opinion of the Court by ILOAT Statute does not affect the way in which the Court functions — Power of the Court to review a judgment of ILOAT limited to two grounds: that Tribunal wrongly confirmed its jurisdiction or that decision is vitiated by fundamental fault in procedure followed — The Court’s review not in the nature of an appeal on merits of judgment.

*
Discretion of the Court to decide whether it should give an opinion.

The Court as principal organ of the United Nations and as judicial body — the Court’s exercise of its advisory jurisdiction represents its participation in the activities of the Organization — refusal only justified for “compelling reasons” — principle of equality before the Court of organization and official.

Inequality of access to the Court — comparison with former procedure for review of judgments of the United Nations Administrative Tribunal — relevant general comments of the Human Rights Committee — comparison with equality of the parties in investment disputes — requirements of good administration of justice include access on an equal basis to available appellate or similar remedies.

Inequality in proceedings before the Court has been substantially alleviated by decisions of the Court, on the one hand, to require that IFAD transmit any statement setting forth the views of Ms Saez García and, on the other hand, not to hold oral proceedings.

Reasons to decline to give advisory opinion not sufficiently compelling.

* *

Merits.

Question of whether Ms Saez García was a staff member of IFAD or of the Global Mechanism of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Convention) — relationship between IFAD, Global Mechanism and Conference of the Parties to the Convention — relationship under the Convention — relationship under the Memorandum of Understanding between the Conference of the Parties and IFAD regarding modalities and administrative operations of Global Mechanism — respective powers of IFAD, Global Mechanism, Conference of the Parties and Permanent Secretariat of the Convention — range of different hosting arrangements exist between international organizations — neither the Convention nor Memorandum of Understanding expressly confer legal personality on Global Mechanism or otherwise endow it with capacity to enter into legal arrangements — Global Mechanism has no power to enter into contracts, agreements or “arrangements”, internationally or nationally.

Response to Question I.

Questions put to the Court for an advisory opinion should be asked in neutral terms — ILOAT competent, under Article II, paragraph 5, of its Statute, to hear complaints alleging non-observance of either "terms of appointment of officials" of an organization that has accepted its jurisdiction or of "provisions of the Staff Regulations" of such organization.

Jurisdiction ratione personae of ILOAT — terms of Ms Saez Garcia’s letters of appointment and renewals of contract — the Court finds that employment relationship was established between Ms Saez Garcia and IFAD, and that she was a staff member of Fund — IFAD did not object to Ms Saez Garcia engaging the facilitation process and lodging a complaint with the Joint Appeals Board — Memorandum of President of Fund rejecting recommendations of Joint Appeals Board contains no indication that Ms Saez Garcia was not staff member of Fund — terms of President’s Bulletin of IFAD further evidence of applicability of staff regulations and rules of Fund to fixed-term contracts of Ms Saez Garcia — fact that neither Global Mechanism nor Conference of the Parties has recognized jurisdiction of ILOAT not relevant — status of Managing Director of Global Mechanism has no relevance to Tribunal’s jurisdiction ratione personae — ILOAT was competent ratione personae to consider complaint brought by Ms Saez Garcia against IFAD.

Jurisdiction ratione materiae of ILOAT — terms of Human Resources Procedures Manual of IFAD — Tribunal was competent to examine decision of Managing Director of Global Mechanism — Ms Saez Garcia’s complaint to Tribunal contained allegations of non-observance of “terms of appointment of an official” — link between Ms Saez Garcia’s complaint to Tribunal and staff regulations and rules of IFAD — ILOAT was competent ratione materiae to consider complaint brought by Ms Saez Garcia against Fund.

The Court finds that ILOAT was competent to hear complaint introduced against IFAD.

Response to Questions II to VIII.

The Court considers that its answer to first question covers also all issues on jurisdiction of ILOAT raised by Fund in Questions II to VIII — the Court has no power of review with regard to reasoning of ILOAT or merits of its judgments — the Fund has not established that ILOAT committed a "fundamental fault in the procedure" — no further answers required from the Court.

Response to Question IX.

The Court finds that the decision given by ILOAT in Judgment No. 2867 is valid.
ADVISORY OPINION

Present: President Owada; Vice-President Tomka; Judges Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Registrar Couvreur.

In the matter of Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development.

The Court,

composed as above,

gives the following Advisory Opinion:

1. By a letter dated 23 April 2010, which reached the Registry on 26 April 2010, the President of the International Fund for Agricultural Development (hereinafter “IFAD” or the “Fund”) informed the Court that the Executive Board of IFAD, acting within the framework of Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization (hereinafter the “ILOAT” or the “Tribunal”), had decided to challenge the decision rendered by the Tribunal on 3 February 2010 in Judgment No. 2867, and to refer the question of the validity of that Judgment to the Court. Certified true copies of the English and French versions of the resolution adopted by the Executive Board of IFAD for that purpose at its ninety-ninth session, on 22 April 2010, were enclosed with the letter. The resolution reads as follows:

“The Executive Board of the International Fund for Agricultural Development, at its ninety-ninth session held on 21-22 April 2010:

Whereas, by its Judgment No. 2867 of 3 February 2010, the Administrative Tribunal of the International Labour Organization (ILOAT) confirmed its jurisdiction in the complaint introduced by Ms A.T.S.G. against the International Fund for Agricultural Development,

Whereas Article XII of the Annex to the Statute of the Administrative Tribunal of the International Labour Organization provides as follows:

1. In any case in which the Executive Board of an international organization which has made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The opinion given by the Court shall be binding.”

Whereas the Executive Board, after consideration, wishes to avail itself of the provisions of the said Article,

Decides to submit the following legal questions to the International Court of Justice for an advisory opinion:

I. Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?

II. Given that the record shows that the parties to the dispute underlying the ILOAT’s Judgment No. 2867 were in agreement that the Fund and the Global Mechanism are separate legal entities and that the Complainant was a member of the staff of the Global Mechanism, and considering all the relevant documents, rules and principles, was the ILOAT’s statement, made in support of its decision confirming its jurisdiction, that ‘the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes’ and that the ‘effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund’ outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

III. Was the ILOAT’s general statement, made in support of its decision confirming its jurisdiction, that ‘the personnel of the Global Mechanism are staff members of the Fund’ outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IV. Was the ILOAT’s decision confirming its jurisdiction to entertain the Complainant’s plea alleging an abuse of authority by the Global Mechanism’s Managing Director outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

V. Was the ILOAT’s decision confirming its jurisdiction to entertain the Complainant’s plea that the Managing Director’s decision not to renew the Complainant’s contract constituted an error of law outside its jurisdiction

1Note of the Court: According to the preamble of the Annex to the Statute of the ILOAT, that Statute “applies in its entirety to . . . international organizations [having made the declaration specified in Article II, paragraph 5, of the Statute of the Tribunal] subject to . . . provisions which, in cases affecting any one of these organizations, are applicable as [set out in this Annex].” With respect to Article XII of the Statute, it should be noted that only its first paragraph is modified by the Annex. Its second paragraph is not set out in the Annex and thus remains unchanged as applicable to those organizations. In this regard, the text of Article XII of the Annex to the Statute quoted by IFAD contains both paragraphs. When the Court in the present Advisory Opinion refers to Article XII of the Annex to the Statute of the ILOAT, it is understood that this includes both the modified paragraph 1 and the original paragraph 2 of Article XII of the Statute.
and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VI. Was the ILOAT’s decision confirming its jurisdiction to interpret the Memorandum of Understanding between the Conference of the Parties to the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertiﬁcation, Particularly in Africa and IFAD (hereby the MoU), the Convention, and the Agreement Establishing IFAD beyond its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VII. Was the ILOAT’s decision confirming its jurisdiction to determine that by discharging an intermediary and supporting role under the MoU, the President was acting on behalf of IFAD outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

VIII. Was the ILOAT’s decision confirming its jurisdiction to substitute the discretionary decision of the Managing Director of the Global Mechanism with its own outside its jurisdiction and/or did it constitute a fundamental fault in the procedure followed by the ILOAT?

IX. What is the validity of the decision given by the ILOAT in its Judgment No. 2867?‘

2. On 26 April 2010, in accordance with Article 66, paragraph 1, of the Statute of the Court, notice of the request for an advisory opinion was given to all States entitled to appear before the Court.

3. By an Order dated 29 April 2010, in accordance with Article 66, paragraph 2, of its Statute, the Court decided that IFAD and its member States entitled to appear before the Court, the States parties to the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertiﬁcation, particularly in Africa (hereinafter the “UNCCD” or the “Convention”) entitled to appear before the Court and those specialized agencies of the United Nations which had made a declaration recognizing the jurisdiction of the ILOAT pursuant to Article II, paragraph 5, of the Statute of the Tribunal were likely to be able to furnish information on the questions submitted to the Court for an advisory opinion. By that same Order, the Court decided that the President of IFAD should transmit to the Court, within the same time-limits, any statement setting forth the views of Ms Ana Teresa Saez Garcia, the complainant in the proceedings against the Fund before the ILOAT, which she might wish to bring to the attention of the Court, as well as any possible comments she might have on the other written statements.

The Court also decided that the President of IFAD should transmit to the Court, within the same time-limits, any statement setting forth the views of Ms Ana Teresa Saez Garcia, the complainant in the proceedings against the Fund before the ILOAT, which she might wish to bring to the attention of the Court, as well as any possible comments she might have on the other written statements.

4. By letters dated 3 May 2010, pursuant to Article 66, paragraph 2, of the Statute of the Court, the Registrar notified the above-mentioned States and organizations of the Court’s decisions and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute of the Court, IFAD communicated to the Court a dossier of documents likely to throw light upon the questions; these documents reached the Registry on 2 August 2010. The dossier was subsequently placed on the Court’s website.

6. Within the time-limit fixed by the Court for that purpose, written statements were presented, in order of their receipt, by IFAD and by the Plurinational State of Bolivia. Also within that time-limit, the General Counsel of IFAD transmitted a statement setting forth the views of Ms Saez Garcia. On 1 November 2010, the Registrar communicated to IFAD a copy of the written statement of the Plurinational State of Bolivia, a second copy of which was included to be provided to Ms Saez Garcia. On the same date, the Registrar communicated to the Plurinational State of Bolivia copies of the written statement of IFAD and of the statement of Ms Saez Garcia.

7. By a letter dated 21 January 2011 and received in the Registry on the same day, the General Counsel of IFAD, referring to forthcoming consultations between the Fund and the Bureau of the Conference of the Parties to the UNCCD (hereinafter the “COP”) relating to the very subject-matter of the proceedings before the Court, requested that the time-limit for the submission of written comments be extended, in order that comments on behalf of the Fund might be submitted “immediately following such consultations and after the thirty-fourth session of the IFAD Governing Council . . . and the first session of the Consultation for the Ninth Replenishment of the Resources of the Fund . . .”. Accordingly, the President of the Court, by Order of 24 January 2011, extended to 11 March 2011 the time-limit within which written comments might be submitted on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court, and within which any possible comments by Ms Saez Garcia might be presented to the Court.

8. Within the time-limit so extended, the General Counsel of IFAD communicated to the Court the written comments of IFAD and transmitted to the Court the comments of Ms Saez Garcia. In the letter dated 9 March 2011 accompanying the first of these documents, the General Counsel also requested that the Court make the written statements and comments accessible to the public, that the Court seek the views of the COP and that the Court hold oral proceedings.

On 14 March 2011, the Registrar transmitted to the Plurinational State of Bolivia a copy of the written comments of IFAD and of Ms Saez Garcia.

9. In a letter dated 24 March 2011 addressed to the Registrar, the counsel for Ms Saez Garcia stated, with respect to the requests made by the General Counsel of IFAD in his above-mentioned letter dated 9 March 2011 (see paragraph 8), that her client had no objection to the Court making the written statements and comments accessible to the public, but that she wished to express her disagreement with the other two requests expressed by the General Counsel in that letter.
10. By a letter dated 30 March 2011, the Registrar informed counsel for Ms Saez Garcia that, in proceedings concerning the review of judgments of administrative tribunals, it was not possible for the complainant before such a tribunal to address directly to the Court communications for its consideration, and that any communication coming from Ms Saez Garcia in the case should be transmitted to the Court through IFAD.

11. By letters from the Registrar dated 13 April 2011, the General Counsel of IFAD and counsel for Ms Saez Garcia were informed that, in accordance with normal practice in such cases, the Court did not intend to hold public hearings. In the letter to the General Counsel of IFAD, the Registrar, on the instructions of the Court, also requested the former to transmit to him documents that were attached both to the complaint of Ms Saez Garcia submitted to the ILOAT on 8 July 2008 and to IFAD’s Reply dated 12 September 2008, and which had not already been transmitted to the Court. The Registrar further requested the General Counsel to provide the Court with a copy of the employment contract of the Managing Director of the Global Mechanism of the UNCCD (hereinafter the “Global Mechanism”) for the years 2005 and 2006.

12. By another letter dated 13 April 2011, on the instructions of the Court, the Registrar also requested that the General Counsel of IFAD duly provide to the Court, without any control being exercised over their content, any communications from Ms Saez Garcia relating to the request for an advisory opinion that she might wish to submit to it. In his letter to counsel for Ms Saez Garcia, mentioned in the previous paragraph, the Registrar reiterated that any further communications directed to the Court were to be transmitted to it through IFAD.

13. By a letter dated 6 May 2011, the General Counsel of IFAD communicated to the Court a set of documents, attesting that those documents, combined with the documents which had been submitted by IFAD on 2 August 2010 (see paragraph 5 above), “comprise[d] the entire procedure before the Administrative Tribunal of the International Labour Organization”. The employment contract of the Managing Director of the Global Mechanism for the years 2005 and 2006 was not transmitted as requested by the Court, the General Counsel stating in his letter that IFAD, as the housing entity of the Global Mechanism, was not authorized to disclose the employment contract of the latter’s Managing Director, and that even if IFAD had such authority, it could not disclose such a document without the authorization of the person concerned.

14. By a letter of 28 June 2011 to the General Counsel of IFAD, the Registrar indicated that, after an examination of the materials received relating to the procedure before the ILOAT, it appeared that 24 documents were still missing. Under cover of a letter dated 7 July 2011, the General Counsel of IFAD provided these 24 documents.

15. By a letter dated 20 July 2011, the Registrar informed the General Counsel of IFAD that the Court, in application of its powers under Article 49 of its Statute, called upon the Fund to produce copies of the employment contract for the years 2005 and 2006 of the Managing Director of the Global Mechanism. Under cover of a letter dated 29 July 2011, the General Counsel of IFAD communicated to the Court that employment contract, as well as subsequent employment contracts of the Managing Director, accompanied by a letter from the Managing Director authorizing the disclosure of those employment contracts for use by the Court. By this same letter, the General Counsel requested the Court to authorize IFAD to present additional observations and documents to the Court relating to those contracts.

16. By letter dated 21 July 2011, on the instructions of the President, the Registrar communicated to the General Counsel of IFAD a question addressed by a Member of the Court to the Fund and, through it, to Ms Saez Garcia. By letters dated 26 August 2011, the General Counsel of IFAD communicated to the Court the response of the Fund to that question, transmitted to the Court the response of Ms Saez Garcia to that question and reinserted the Fund’s request that the Court hold oral proceedings in the case. Under cover of a letter also dated 26 August 2011, the General Counsel of IFAD communicated to the Court a copy of Judgment No. 3003 of the ILOAT, delivered on 6 July 2011, whereby the Tribunal dismissed IFAD’s application for suspension of the execution of Judgment No. 2867 pending the delivery of the advisory opinion of the Court.

17. By a letter dated 1 September 2011, the General Counsel of IFAD requested the Court to authorize the Fund to produce other additional documents.

18. By a letter dated 23 September 2011, the Registrar informed the General Counsel of IFAD that, with regard to the requests made on behalf of IFAD in his letter dated 9 March 2011 accompanying the written comments of the Fund (see paragraph 8 above) and in his letters dated 29 July 2011 (see paragraph 15 above), 26 August 2011 (see paragraph 16 above), and 1 September 2011 (see paragraph 17 above), the Court had reconfirmed that no oral proceedings would be held, had decided that IFAD should not be authorized to present additional observations or documents to the Court, and had decided to make the written statements and comments, with annexed documents, accessible to the public, with immediate effect. Accordingly, under cover of letters dated 28 September 2011, electronic copies (on CD-ROM) of those documents were provided to all States and international organizations having been considered by the Court likely to be able to furnish information on the questions submitted to it. The written statements and comments (without annexes) were also placed on the website of the Court.

I. The Court’s Jurisdiction

19. The resolution of the Executive Board of IFAD requesting an advisory opinion in this case quotes Article XII of the Annex to the Statute of the ILOAT and states that it “wishes to avail itself of the provisions of the said Article”. That Article is in the following terms:
The General Assembly, by resolution 32/107 of 15 December 1977, approved the Relationship Agreement between the United Nations and the International Fund for Agricultural Development (hereinafter the “Relationship Agreement”). Under Article I of the Relationship Agreement, the United Nations and the International Fund for Agricultural Development (hereinafter the “Relationship Agreement”) established the Fund, in accordance with Articles 5 and 6 of the Charter and Article 7 of the Statute of the Fund, to carry out all the powers of the Council. The General Assembly authorized the Fund to request advisory opinions:

“The General Assembly of the United Nations authorizes the Fund to request advisory opinions of the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Criminal Court, the International Criminal Tribunal for Rwanda, and the International Criminal Court for Central Africa.”

The Relationship Agreement came into force on 15 December 1977, the date of its approval by the General Assembly. The General Assembly notes that the record before it does not include any communication from IFAD informing the Economic and Social Council of its request for an advisory opinion.

24. On the following day, 16 December 1977, the Governing Council of the Fund, in exercise of the power conferred on it by Article 6, Section 2 (c), of the Agreement establishing the Fund, authorized the Executive Board to exercise all the powers of the Council. That delegation was amended by Council resolution 86/XVIII of 26 January 1995 with effect from 20 February 1997. The power to request advisory opinions was not excluded from the delegation. No issue arises in respect of the delegation of that power by the Council to the Executive Board.

25. As already noted (see paragraph 19), the Executive Board of IFAD, in its resolution requesting an advisory opinion in this case, expresses its wish to avail itself of Article XII of the Annex to the Statute of the ILOAT. While the resolution does not also refer to the authorization given by the General Assembly under Article 12 of the Statute, the Court is not precluded from examining both powers of the Executive Board.

26. The terms of Article 96, paragraph 1, of the Charter of the United Nations and the Statute of the Court authorize the Court to give an advisory opinion on any legal question at the request of the General Assembly or the Security Council. Other organs of the United Nations and specialized agencies, which may at any time be authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

The Court notes that the record before it does not include any communication from IFAD informing the Economic and Social Council of its request for an advisory opinion.

The Court first considers whether it has jurisdiction to reply to the request. While its jurisdiction was not challenged, the Court notes that Ms Saez García contended that some of the questions posed by IFAD in its request do not fall within the scope of Article XII of the Annex to the Statute of the ILOAT. The Court observes that the power of the Executive Board to request an advisory opinion and the jurisdiction of the Court to give the opinion are founded on the Charter of the United Nations and the Statute of the Court and not on Article XII of the Annex to the Statute of the ILOAT alone. Under Article 65, paragraph 1, of its Statute, the Court may give an advisory opinion on any legal question at the request of the General Assembly or the Security Council. Other organs of the United Nations and specialized agencies, which may at any time be authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

The Court notes that the record before it does not include any communication from IFAD informing the Economic and Social Council of its request for an advisory opinion.

The Court therefore notes that the record before it is silent as to whether the Assembly has authorized the Fund to request an advisory opinion on any legal question. The Court also notes that the record before it does not include any communication from IFAD informing the Economic and Social Council of its request for an advisory opinion. The Court therefore concludes that it does not have jurisdiction to reply to the request.
The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the rights of the parties, is no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question: whether the complaint was one of the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. The distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal.

Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law are not to be corrected by the Court, for this purpose, in the ordinary course of the proceedings. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal, which provides that its judgments shall be 'final and without appeal'. (I.C.J. Reports 1956, p. 87.)

The review, the Court said later in the same Opinion, is not in the nature of an appeal on the merits of the case. The challenge cannot give rise to that procedure. The only provision concerning the procedure and not the substance of the judgment which can be taken as being in the nature of an appeal on the merits is Article XII of the Statute of the ILOAT, which provides that its judgments shall be 'final and without appeal'.

The power of the Court to review a judgment of the ILOAT by reference to Article XII of the Statute of the ILOAT to the request of the relevant specialized agency is limited to two grounds: that the Tribunal wrongly confirmed its jurisdiction or the decision is vitiated by a fundamental fault in the procedure followed. In the 1956 Advisory Opinion, the Court emphasized the limits of the scope of this ground, which is invoked in Questions VIII and IX of that Opinion (see paragraph 98).
32. Having determined that it has jurisdiction to answer the present request for an advisory opinion and indicated in a preliminary way the limits on the scope of its power of review in terms of Article XII of the Annex to the Statute of the ILOAT, the Court now considers whether in exercise of its discretion there is reason to refuse to answer that request.

III. The Court’s Discretion

33. Article 65 of the Statute of the Court makes it clear that it has a discretion whether to reply to a request for an advisory opinion: “The Court may give an advisory opinion on any legal question . . .” That discretion exists for good reasons. In exercising that discretion, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body. The Court early declared that the exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, in principle, a request should not be refused (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, pp. 71-72). That indication of a strong inclination to reply is also reflected in the Court’s later statement, in the only other challenge to a decision of the ILOAT brought to it, that “compelling reasons” would be required to justify a refusal (1956 Advisory Opinion, I.C.J. Reports 1956, p. 86).

34. The Court and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies. The Permanent Court of International Justice as long ago as 1923, in recognizing that it had discretion to refuse a request, made an important statement of principle: “The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court.” (Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J. Series B, No. 5, p. 29; for the most recent statement on this matter see Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion of 22 July 2010, para. 29, and the authorities referred to there.)

35. In the particular context of the four requests (i.e, the 1956 Advisory Opinion; Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 166; Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 325; Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987, p. 18) brought to this Court by way of applications for review of judgments of the UNAT and the ILOAT, concerns have been raised about a central aspect of the good administration of justice: the principle of equality before the Court of the organization on the one hand and the official on the other.

36. Two issues arising from Article XII of the Tribunal’s Statute and its Annex providing for review of the ILOAT judgments were addressed by the Court in its 1956 Advisory Opinion: inequality of access to the Court and inequalities in the proceedings before the Court. With regard to the first point, it is only the employing agencies which have access to the Court. By contrast, the provisions for the review by the Court of judgments of the UNAT, in force from 1955 to 1995, gave officials, along with the employer and Member States of the United Nations, access to the process which could lead to a request to the Court for review. When that review procedure was being established, the Secretary-General identified as a fundamental principle that the staff member should have the right to initiate the review and to participate in it. Further, any review procedure should enable the staff member to participate on an equitable basis in such procedure, which should ensure substantial equality (United Nations document A/2909 of 10 June 1955, paras. 13 and 17).

37. In its 1956 Advisory Opinion, the Court said this about equality of access:

“According to generally accepted practice, legal remedies against a judgment are equally open to either party. In this respect each possesses equal rights for the submission of its case to the Court and there is no difference in the origin or in the progress of those proceedings . . . The Executive Board availed itself of a legal remedy which was open to it alone. Officials have no such remedy against the judgments of the Administrative Tribunal . . . However, the inequality thus stated does not in fact constitute an inequality before the Court. It is antecedent to the examination of the question by the Court. It does not affect the manner in which the Court undertakes that examination. Also, in the present case, that absence of equality between the parties to the judgments is somewhat nominal since the officials were successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part.” (I.C.J. Reports 1956, p. 85.)

38. After considering inequality before the Court, it concluded that not to respond to the request for an advisory opinion “would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials” (ibid., p. 86). The Court, addressing this matter 50 years later, has two observations to make, one particular, about the use actually made of the review processes in respect of the two Tribunals — that of the United Nations and that of the ILO — and one general, about the development of the concept of equality before courts and tribunals over that period. On the review process, the critical element for the judicial protection of officials was the creation of the right of officials to challenge decisions taken against them by their employer before an independent judicial body which follows fair procedures. Next, reviews have been sought in only a handful of cases; and when the General Assembly decided in 1995 to remove the provision for review of UNAT decisions by this Court, it stated that the procedure that had existed since 1955 had “not proved to be a constructive or useful element in the
In its reply, IFAD emphasizes that "the sole function" of Article XII of the Annex to the Statute of the ILOAT, when a specialized agency is invoking it, is to interpret the agreement between the ILO and the specialized agency. The questions submitted to the Court, it maintains, "deal exclusively with the application of Article XII, and are, therefore, stand outside the institutional relationship that forms the subject-matter of Article XII procedures. It concludes this part of its answer as follows:

"The Fund respectfully submits that, given that the Complainant in ILOAT Judgment No. 2867 is not a party to the ILO, and that the Court is called upon to perform the function envisaged by Article 96, paragraph 2, of the UN Charter on account of a third party that stands outside the relationship that forms the subject-matter of the proceedings before the Court."

Further, IFAD states that:

"the Fund's request for an advisory opinion pertains, not to any dispute between the Fund and Ms Saez García, but to the relationship between the Fund and the ILO as it relates to the ILOAT, a subsidiary body of the ILO."

40. The Fund and Ms Saez García answered a question from a Member of the Court (see paragraph 16 above) about the significance, if any, of the developments relating to the equality of the parties before courts and tribunals over the past few years, including the High Court of Victoria’s decision in the case of the newly established United Nations Appeals Tribunal to order interim measures for the protection of either party. The lack of such a power, in her view, provided a compelling reason for this Court to refuse to exercise its advisory jurisdiction to review judgments of the ILOAT. Ms Saez García also referred to problems, as she saw it, in the equality of the parties in the present proceedings before the Court, and to her concerns, on the one hand, about the application of the ILOAT and on the other hand, about the enforcement of the Tribunal’s decisions which favor the employer to the disadvantage of the dismissed member.

41. To turn to the general question of the concept of equality, the development of the principle of equality may be seen in the significant differences between the two General Comments by the Human Rights Committee on Article 14, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR) of 1966. The first Comment, adopted in 1994, requires that "persons claiming to be victims of discrimination within the meaning of Article 2, paragraph 2, of the UN Charter in order to apply Article XII of the Statute of the ILOAT, shall be required to show that the discriminatory act is the result of an institutional relationship rather than the application of the Statute of the ILOAT..."

42. The Court’s Opinion, this argument faces two insurmountable hurdles. In the first place, the real dispute underlying the request for an advisory opinion was between Ms Saez García and the Fund. She brought proceedings before the Tribunal against a decision attributed to the Fund and was successful. The Fund then invoked the procedure under the Statute of the ILOAT, as amended, to seek advisory opinions, under Article 96, paragraph 2, of the Charter, it expressly excluded from the authorization given by the General Assembly for the purpose of finding that a question arises between the Fund and the ILO. In the second place, the Fund in any event would not be able to bring a matter that stands outside the relationship that forms the subject-matter of the proceedings before the Court: when the General Assembly authorized IFAD to challenge the decision in her favor. In that regard, the Court cannot see that a question arises between the Fund and the ILO. Therefore, the request for an advisory opinion cannot be entertained.

43. In replying to the question about equality of access, the Fund emphasized what it saw as a parallel with investor-State arbitration. First, it pointed out that investor-State arbitration, in which the process is initiated in response to a matter in its relationship with the ILO, as it relates to the ILOAT, a subsidiary body of the ILO. The Court also notes that between 1995 and 2009 the United Nations system contained no provision for review of, or appeal against, the judgments of the UNAT.
process. It is comparable to the proceeding brought in the ILOAT by the staff member against the agency. In the case of investment arbitrations brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations Treaty Series (UNTS), Vol. 575, p. 159), both parties — and not just one — are able to seek interpretation, revision or annulment of the award: it is that situation which is analogous to the present one. The Fund, secondly, refers to a number of provisions in bilateral free trade and investment treaties which enable the State parties to those treaties, by joint decision, at the request of one of them, to declare their interpretation of a provision of the treaty. That interpretation is binding on the tribunal hearing an investment dispute including those brought by the investor. That situation bears little resemblance to the present one: parties to treaties are in general free to agree on their interpretation, while in the present case the Court is concerned with the initiation of a review process to be carried out by an independent tribunal.

44. As the Court said, on the only other occasion in which a specialized agency sought an opinion in terms of Article XII of the Annex to the Statute of the ILOAT, “[the principle of equality of the parties follows from the requirements of good administration of justice” (1956 Advisory Opinion, I.C.J Reports 1956, p. 86). That principle must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds (see paragraph 39 above). For the reasons given, questions may now properly be asked whether the system established in 1946 meets the present-day principle of equality of access to courts and tribunals. While the Court is not in a position to reform this system, it can attempt to ensure, so far as possible, that there is equality in the proceedings before it. The Court now turns to that question.

45. In the present case, as in the four earlier applications for review of judgments of administrative tribunals, the unequal position before the Court of the employing institution and its official, arising from provisions of the Court’s Statute, has been substantially alleviated by two decisions of the Court. First, in an Order of 29 April 2010, the Court decided that the President of the Fund was to transmit to the Court any statement setting forth the views of Ms Saez García which she might wish to bring to the attention of the Court and fixed the same time-limits for her as for the Fund for the filing of written statements in the first round of written argument and comments in the second round. The second step the Court took was to decide that there would be no oral proceedings; when the Fund reiterated its request that the Court should hold hearings, it confirmed its previous decision of principle. As has been clear since 1956 when the Court first addressed the matter of procedure in cases involving reviews of judgments of administrative tribunals, the Court’s Statute does not allow individuals to appear in hearings in such cases, by contrast to international organizations concerned (1956 Advisory Opinion, I.C.J Reports 1956, p. 86; see also Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, para. 34).

46. The process was not without its difficulties. The Court mentions three matters. The first relates to the documentary record: the filing of “all documents likely to throw light upon the question” in terms of Article 65, paragraph 2, of the Court’s Statute was not completed until July 2011 and following three requests from the Court — that is, fully 15 months after the submission of the request for the Advisory Opinion (see paragraphs 13-15 above). The second is the failure of IFAD to inform Ms Saez García in a timely way of the procedural requests it was making to the Court. And the third is IFAD’s initial failure to transmit to the Court certain communications from Ms Saez García. That last position was based on the proposition that the matter before the Court was not a matter between the Fund and Ms Saez García but between the Fund and the ILO. The Court has already commented on this proposition (see paragraphs 41-42 above).

47. Notwithstanding these difficulties, the Court concludes that, by the end of the process, it does have the information it requires to decide on the questions submitted; that both the Fund and Ms Saez García have had adequate and in large measure equal opportunities to present their case and to answer that made by the other; and that, in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met.

48. In light of the analysis above, the Court maintains its concern about the inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT. In addition, the Court remains concerned about the length of time it took the Fund to comply with the procedures aimed at ensuring equality in the present proceedings. Nevertheless, taking the circumstances of the case as a whole, and in particular the steps it has taken to reduce the inequality in the proceedings before it, the Court considers that the reasons that could lead it to decline to give an advisory opinion are not sufficiently compelling to require it to do so.

IV. Merits

49. The request for an advisory opinion from the Court concerns the validity of the Judgment given by the ILOAT relating to Ms Saez García’s contract of employment. The Court notes that that contract of employment, as extended, was governed by the Personnel Policies Manual (hereinafter “PPM”) and the Human Resources Handbook, until 22 July 2005. From that date, the PPM and Human Resources Handbook were replaced by a document entitled “IFAD Human Resources Policy” and the Human Resources Procedures Manual (hereinafter “HRPM”), respectively. Accordingly, subsequent events, such as the facilitation process and the convening of the Joint Appeals Board referred to in paragraphs 70 and 77 below, were governed by the latter documents. The Court will refer hereinafter to the titles of the documents in force at the time of events being considered.
53. Part IV of the Convention, entitled "Institutions", follows immediately the provisions of Article 21 which have just been discussed. It provides for the establishment by United Nations General Assembly resolution 47/188 of 22 December 1992 and referred to in Article 53 of the UNCDD, a Permanent Secretariat (replacing an interim Secretariat established by United Nations General Conference and Technology and a Committee of Experts to advise the Permanent Secretariat. The functions of the Committee of Experts include the preparation of a draft of the Convention and the Committee of Experts, which has the power to enter, under the guidance of the Conference of the Parties, into such administrative arrangements as may be required for the effective discharge of its functions (Art. 33).

54. So far as the arrangements for the housing of the Global Mechanism are concerned, the Conference and the Fund signed a "Memorandum of Understanding . . . regarding the Modalities and Administrative Operations of the Global Mechanism" (hereinafter the "MOU"). The MOU within the Fund, it will be an organic part of the structure of the Fund directly under the President of the Fund. It also provides, under Section II.D, that the Managing Director of the Global Mechanism shall be nominated by the President of the United Nations Development Programme and appointed by the President of the Fund and that, in discharging his or her responsibilities, the Managing Director shall report directly to the President of IFAD. Under paragraph (1) of Section III A, headed "Relationship of the Global Mechanism to the Conference", the Global Mechanism functions under the authority of the Conference and the COP and is fully accountable to it. Under paragraph (2) of the same section, the chain of accountability runs directly from the COP to the President of the Fund, Under Section II.A, paragraph (6) the Managing Director submits reports to the COP on behalf of the President of the Fund. Under Section II.III, paragraph (6) the Global Mechanism shall be located at the headquarters of the Fund in Rome, where the Global Mechanism will enjoy full access to all the administrative infrastructure available to the Fund offices, including appropriate office space. The terms of that provision reflect those of paragraph 6 of Article 21 of the UNCDD set from the provisions of the Convention concerning the COP and its Permanent Secretariat.

55. For its Permanent Secretariat, the COP made an arrangement with the United Nations. The Fund contends, as it did before the Tribunal, that Ms Saez Garcia was a staff member of the Fund and not of IFAD. The Tribunal, in its judgment of 3 February 2010, decided that "the President of the Fund and the COP. The Court first considers the powers of, and relationships between, those various bodies. It will then turn to the documents relating specifically to Ms Saez Garcia's employment.

56. For its Permanent Secretariat, the COP made an arrangement with the United Nations. In 1999, the Conference and the Fund signed a Memorandum of Understanding ("MOU") regarding the "Modalities and Administrative Operations of the Global Mechanism". The MOU establishes that the Global Mechanism shall be located at the headquarters of the Fund in Rome, where it "shall enjoy full access to all the administrative infrastructure available to the Fund offices, including appropriate office space. The terms of that provision reflect those of paragraph 6 of Article 21 of the UNCDD set from the provisions of the Convention concerning the COP and its Permanent Secretariat."
The position of the Global Mechanism may also be contrasted with that of IFAD, its housing body. The Agreement establishing IFAD expressly provides that “[t]he Fund shall possess international legal personality” (Art. 10, Sec. 1). Its privileges and immunities are defined by reference to the Convention on the Privileges and the Immunities of the Specialized Agencies of 21 November 1947 (Art. 10, Sec. 2, of the Agreement establishing IFAD). Under Article II, Section 3, of that Convention, specialized agencies subject to it, which include IFAD, are given the express capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings in those States, including Italy, which are parties to the Convention.

The Court recalls a point made by the Fund in its response to a question put by a Member of the Court to IFAD and through it to Ms Saez García. According to the Fund, should the international community by clarifying how the rules concerning the ILOAT’s jurisdiction should operate in respect of entities hosted by international organizations”. The Fund contends that this phenomenon of “hosting” arrangements is “one of the most significant developments since the adoption of Article XII of the ILOAT Statute in 1946”.

The Court is aware that there exists a range of hosting arrangements between international organizations which are concluded for a variety of reasons. Each arrangement is distinct and has different characteristics. There are hosting arrangements between two entities having separate legal personalities, and there are others concluded for the benefit of an entity without legal personality. An example of the former is the arrangement between the World Intellectual Property Organization — as the hosting organization — and the International Union for the Protection of New Varieties of Plants — as the hosted organization — which has legal personality under Article 24, paragraph 1, of its constituent instrument, the International Convention for the Protection of New Varieties of Plants of 2 December 1961.

By contrast, with regard to the Global Mechanism, the Court notes that the Convention directs the COP to identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations. It was for this reason that a Memorandum of Understanding was signed between the Global Mechanism and other entities, including international organizations and private entities. We intend to provide this list as part of our submission to the ICJ in order to show that the GM is recognized as having the capacity to enter into agreements.” (United Nations document ICCD/COP(10)/INF.3 of 11 August 2011, p. 30.)

The written statement of IFAD submitted five months later includes no such list.
A. Response to Question I

62. The Court now turns to the questions put to it for an advisory opinion and notes that such questions should be asked in neutral terms rather than assuming conclusions of law that are in dispute. They should not include reasoning or argument. The questions asked in this case depart from that standard as reflected in normal practice. The Court will nevertheless address them.

63. The first question put to the Court is formulated as follows:

“Was the ILOAT competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development (hereby the Fund) on 8 July 2008 by Ms A.T.S.G., an individual who was a member of the staff of the Global Mechanism of the United Nations Convention to combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization?”

64. The Court is requested to give its opinion on the competence of the ILOAT to hear the complaint brought against the Fund by Ms Saez García on 8 July 2008. The competence of the Tribunal regarding complaints filed by staff members of organizations other than the ILO is based on Article II, paragraph 5, of its Statute, according to which

“[t]he Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex”

to the Statute of the ILOAT and having made a declaration recognizing the jurisdiction of the Tribunal.

65. The Fund recognized the jurisdiction of the Tribunal and accepted its Rules of Procedure with effect from 1 January 1989 (see paragraph 20 above). However, as implied in the formulation of its first question to the Court, the Fund considers Ms Saez García

“a member of the staff of the Global Mechanism of the United Nations Convention to combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (hereby the Convention) for which the Fund acts merely as housing organization”.

The Fund therefore objected to the jurisdiction of the Tribunal with respect to the complaint filed by Ms Saez García, and in particular her pleas alleging that the Managing Director of the Global Mechanism exceeded his authority in deciding not to renew her contract and that the approved core budget of the Global Mechanism did not require the elimination of her post.

66. Before the Tribunal, the Fund contended that its acceptance of the jurisdiction of the ILOAT did not extend to entities that are hosted by it pursuant to international agreements. It maintained that the Global Mechanism was not an organ of the Fund, and that, even if the Fund administered the Global Mechanism, this did not make the complainant a staff member of the Fund; nor did it make the actions of the Managing Director of the Global Mechanism attributable to the Fund. According to the Fund, despite the fact that the staff regulations, rules and policies of IFAD were applied to the complaint, she was not a staff member of the Fund. Conversely, the complainant submitted that she was a staff member of IFAD throughout the relevant period until her separation on 15 March 2006, and that her letters of appointment and renewal of contract all offered her an appointment with the Fund.

67. In its Judgment No. 2867 of 3 February 2010, the Tribunal rejected the jurisdictional objections made by the Fund and declared itself competent to entertain all the pleas set out in the complaint submitted by Ms Saez García. After examining the Fund’s argument that the Tribunal did not have jurisdiction because the Fund and the Global Mechanism had separate legal identities, the Tribunal observed that:

“The fact that the Global Mechanism is an integral part of the Convention and is accountable to the Conference does not necessitate the conclusion that it has its own legal identity . . . Nor does the stipulation in the MOU that the Global Mechanism is to have a ‘separate identity’ indicate that it has a separate legal identity, or more precisely for present purposes, that it has separate legal personality.” (Judgment No. 2867, p. 11, para. 6.)

The Tribunal then referred to the provisions of the MOU, and stated that:

“[I]t is clear that the words ‘an organic part of the structure of the Fund’ indicate that the Global Mechanism is to be assimilated to the various administrative units of the Fund for all administrative purposes. The effect of this is that administrative decisions taken by the Managing Director in relation to staff in the Global Mechanism are, in law, decisions of the Fund.” (Ibid., p. 12, para. 7.)

Following this analysis, the Tribunal concluded as follows:

“Given that the personnel of the Global Mechanism are staff members of the Fund and that the decisions of the Managing Director relating to them are, in law, decisions of the Fund, adverse administrative decisions affecting them are subject to internal review and appeal in the same way and on the same grounds as are decisions relating to other staff members of the Fund. So too, they may be the subject of a complaint to this Tribunal in the same way and on the same grounds as decisions relating to other staff members.” (Ibid., p. 14, para. 11.)

68. It is this confirmation by the Tribunal of its “competence to hear” the complaint filed by Ms Saez García that is challenged by the Executive Board of the Fund, under Article XII of the Annex to the Statute of the ILOAT and is the object of the first question put to the Court as
reproduced in paragraph 63 above. To answer this question, the Court has to consider whether the Tribunal had the competence to hear the complaint submitted by Ms Saez García in accordance with Article II, paragraph 5, of its Statute. According to this provision, for the Tribunal to exercise its jurisdiction it is necessary that there should be a complaint alleging non-observance of the “terms of appointment of officials” of an organization that has accepted its jurisdiction or “of provisions of the Staff Regulations” of such an organization. It follows from this that the Tribunal could hear the complaint only if the complainant was an official of an organization that has recognized the jurisdiction of the Tribunal, and if the complaint related to the non-observance of the terms of appointment of such an official or the provisions of the staff regulations of the organization. The first set of conditions has to be examined with reference to the competence ratione personae of the Tribunal, while the second has to be considered within the context of its competence ratione materiae.

69. The Court will examine these two sets of conditions below. However, before doing so, a brief overview of the factual background to the case decided by the Tribunal is warranted.

1. Factual background

70. Ms Saez García, a national of Venezuela, was offered by IFAD on 1 March 2000 a two-year fixed-term contract at P-4 level to serve as a Programme Officer in the Global Mechanism. She accepted this offer on 17 March 2000. Subsequently, her contract was twice extended, to 15 March 2004 and 15 March 2006, respectively. In addition, her title changed to “Programme Manager, Latin America Region”, from 22 March 2002, and is subsequently referred to, in the notice of non-renewal of her contract from the Managing Director of the Global Mechanism, as “[P]rogramme [M]anager for GM’s regional desk for Latin America and the Caribbean”. By a memorandum of 15 December 2005, the Managing Director of the Global Mechanism informed her that the COP had decided to cut the Global Mechanism’s budget for 2006-2007 by 15 per cent. As a result, the number of staff paid through the core budget had to be reduced. Her post would therefore be abolished and her contract would not be renewed upon expiry on 15 March 2006. He offered her a six-month contract as consultant from 26 March to 15 September 2006 as “an attempt to relocate her and find a suitable alternative employment”. Ms Saez García did not accept that contract.

On 10 May 2006, Ms Saez García requested a facilitation process, which ended with no settlement on 22 May 2007. She then filed an appeal with the JAB on 27 June 2007, challenging the Managing Director’s decision of 15 December 2005. In its report of 13 December 2007, the JAB unanimously recommended that Ms Saez García be reinstated within the Global Mechanism under a two-year fixed-term contract and that the Global Mechanism pay her an amount equivalent to all the salaries, allowances and entitlements she had lost since March 2006.

By a memorandum of 4 April 2008, the President of the Fund informed Ms Saez García that he had decided to reject the recommendations of the JAB. It is this decision of the President of the Fund that was impugned before ILOAT and set aside by it (see paragraph 50 above).

2. Jurisdiction ratione personae of the Tribunal in relation to the complaint submitted by Ms Saez García

71. Since recourse to the ILOAT is open to staff members of IFAD, the Court will now consider whether Ms Saez García was an official of the Fund, or of some other entity that did not recognize the jurisdiction of the Tribunal. The Court notes that the word “official”, used in the ILO Staff Regulations, as well as in the Statute of the Tribunal, and the words “staff member”, used in the staff regulations and rules of many other organizations, may be considered to have the same meaning in the present context; the Court thus will use both terms interchangeably. The document entitled “IFAD Human Resources Policy” defines a staff member as “a person or persons holding a regular, career, fixed-term, temporary or indefinite contract with the Fund”. To qualify as a staff member of the Fund, Ms Saez García would have to hold one of the above-mentioned contracts with the Fund.

72. The Court notes that on 1 March 2000, Ms Saez García received an offer of employment, written on the Fund letterhead, for “a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)”. The letter stated that the appointment “[would] be made in accordance with the general provisions of the IFAD Personnel Policies Manual... [and] with such Administrative Instructions as may be issued... regarding the application of the Manual”. The offer of appointment also noted that her contract might be terminated by IFAD with one month’s written notice and that she was subject to a probationary period as prescribed in Section 4.8.2 of the PPM. Moreover, under the terms of the offer, she was required to give written notice of at least one month to IFAD of any desire to terminate her contract. The renewals of her contract to March 2004 and to March 2006, respectively, referred to an “extension of [her] appointment with the International Fund for Agricultural Development”. It was also said in the letters of renewal that all other conditions of her employment would remain unchanged and that her appointment would “continue to be governed by the Personnel Policies Manual, together with the provisions of the Human Resources Handbook regarding the application of the Manual”.

73. The above-mentioned facts are not contested by the Fund. In its Written Statement to the Court, the Fund makes the following observations:

“It is true that the offer and extension letters in the case of the Complainant were all issued on IFAD letterhead by IFAD officials and all of them refer to an appointment with the International Fund for Agricultural Development. The initial offer letter dated 1 March 2000, which was signed by the Director of the Fund’s Personnel Division, also stated that the Complainant’s ‘employment may be terminated by IFAD’ and that she ‘will be required to give written notice of at least one month to IFAD’ should she wish to terminate her employment during the probationary period. While the two extension letters are silent on termination and resignation, both state that ‘[a]ll other conditions of employment will remain unchanged’.”
74. Notwithstanding the above, the Fund maintains that Ms Saez García was not an IFAD official, but a staff member of the Global Mechanism which has not recognized the jurisdiction of the Tribunal. In this connection, it refers to the fact that the 1 March 2000 contract also contained the following statement: “The position you are being offered is that of Programme Officer in the Global Mechanism of the Convention to Combat Desertification, Office of the President (OP) ...” It also argues that throughout her employment with the Global Mechanism, Ms Saez García “was never charged with performing any of the functions of the Fund, nor had she been employed by the Fund or performed functions for the Fund prior to being employed by the Global Mechanism”. Moreover, the Fund contends that IFAD and the Global Mechanism are separate legal entities, and that the Tribunal should have taken into account the consequences of this separation for its jurisdiction with respect to the complaint filed by Ms Saez Garcia.

75. Ms Saez García submits that she was a staff member of the Fund and that the staff regulations and rules of the Fund applied to her. She further contends that the Managing Director of the Global Mechanism was an officer of the Fund and that his actions were, in law, the actions of the Fund.

76. The Court observes that a contract of employment entered into between an individual and an international organization is a source of rights and duties for the parties to it. In this context, the Court notes that the offer of appointment accepted by Ms Saez García on 17 March 2000 was made on behalf of the Fund by the Director of its Personnel Division, and that the subsequent renewals of this contract were signed by personnel officers of the same Division of the Fund. The Fund does not question the authority vested in these officials to act on its behalf on personnel matters. These offers were made in accordance with the general provisions of the PPM, which then contained the general conditions and terms of employment with the Fund, as well as the respective duties and obligations of the Fund and the staff. As the Court stated in its 1956 Advisory Opinion, staff regulations and rules of the organization in question “constitute the legal basis on which the interpretation of the contract must rest” (I.C.J. Reports 1956, p. 94). It follows from this that an employment relationship, based on the above-mentioned contractual and statutory elements, was established between Ms Saez García and the Fund. This relationship qualified her as a staff member of the Fund. The fact that she was assigned to perform functions related to the mandate of the Global Mechanism does not mean that she could not be a staff member of the Fund. The one does not exclude the other. In this context, reference may also be made to the fact that IFAD included Ms Saez García’s name on the list of IFAD officials for whom the Organization claimed privileges and immunities in the host country in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies.

77. Ms Saez García’s legal relationship with the Fund as a staff member is further evidenced by the facts surrounding her appeal against the decision to abolish the post of Programme Manager for the Global Mechanism’s regional desk for Latin America and the Caribbean, and the consequent non-renewal of her fixed-term appointment. Her appeals were initially lodged with the internal machinery established by the Fund for handling staff grievances, namely the facilitation process and the JAB. The record before the Court includes no evidence that the Fund objected to the use of these procedures by Ms Saez García. The facilitation process was conducted by a facilitator appointed by the IFAD administration and in accordance with Chapter 10 of the HRPM. That process was terminated in accordance with paragraph 10.21.1(b) of the HRPM. Similarly, the JAB was convened under the terms of the HRPM and its report and recommendations were submitted to the President of IFAD for consideration in accordance with the procedures established by Chapter 10 (Sec. 10.38) of the HRPM. In a memorandum dated 4 April 2008, the President of IFAD rejected the recommendations of the JAB to reinstate Ms Saez García to a position in the Global Mechanism with a two-year fixed-term contract from the date of reinstatement. However, the President’s memorandum does not contain any indication that Ms Saez García was not a staff member of the Fund. On the contrary, it is stated in the memorandum that “the non-renewal of your fixed-term contract was in accordance with section 1.21.1 of the IFAD HRPM”. There is also nothing to suggest that, in rejecting the recommendation of the JAB, the President was acting otherwise than in his capacity as the President of IFAD.

78. The Court turns now to the other arguments submitted by the Fund to support its contention that Ms Saez García was not a staff member of the Fund. First, the Fund refers to an administrative instruction issued by IFAD in the form of a President’s Bulletin on 21 January 2004 which, according to the Fund, was meant “to refine and clarify the legal position of the personnel working for the Global Mechanism”, and quotes paragraph 11 of the Bulletin in which it is stated that:

“IFAD’s rules and regulations on the provision of career contracts for fixed-term staff shall not apply to the staff of the Global Mechanism, except for those that have already received a career contract as a result of their earlier employment with IFAD.”

For the Fund, this stipulation makes clear that “while Global Mechanism staff are not IFAD staff, some of IFAD’s rules and regulations apply mutatis mutandis to Global Mechanism staff”.

Secondly, the Fund asserts that, although the Tribunal acknowledged that IFAD took the position that “neither the COP nor the GM has recognized the jurisdiction of the Tribunal”, it did not address this point explicitly in its ruling and proceeded to exercise jurisdiction. Therefore, the Fund invites the Court to take note of the fact that neither the Global Mechanism nor the COP has recognized the jurisdiction of the Tribunal, and that consequently the Tribunal lacked jurisdiction.

Thirdly, the Fund argues that the Tribunal did not have jurisdiction to review the decision not to renew Ms Saez García’s contract which was taken by the Managing Director of the Global Mechanism as he was not “a member of IFAD’s staff in his dealings with the complainant” (ibid., para. 189). According to the Fund, the Tribunal had, therefore, no jurisdiction to examine the decision of the Managing Director to abolish the post of Ms Saez García or the budgetary reasons underlying that decision.
The Court first notes that staff members of the Global Mechanism are not eligible, under the terms of the IFAD President’s Bulletin mentioned above, for career appointments under the staff regulations and rules of the Fund. This does not however put them outside the purview of such provisions, nor deprive them of the possibility of being appointed on the basis of renewable fixed-term contracts. In this connection, the Court recalls that the complaint filed by Ms Saez García was made before the Global Mechanism had ever been formally constituted in accordance with paragraph 10 of the same Bulletin. Furthermore, the Court notes that the complaint does not concern the alleged failure of either the Managing Director, Saez García, and provides additional indication of the existence of an employment relationship between her and the Fund.

Paragraph 4 of the complaint alleges “non-observance of the provisions of the Staff Regulations.” The Fund argues that this paragraph is defective because it does not indicate which provisions of the Staff Regulations are alleged to have been non-observed.

The Court first notes that the Tribunal’s judgment rendered on 8 July 2008 shows that it decided to exercise jurisdiction ratione materiae over the complaint submitted by Ms Saez García. The Tribunal’s decision is not only consistent with the complainant’s claims, but also with the requirements of the IFAD President’s Bulletin.

The Fund also contends that the Tribunal was not competent to entertain the complainant’s arguments as derived from the MOU, the UNCCD or the COP’s decisions, as these are outside the scope of Article III, paragraph 5, of the Tribunal’s Statute. According to the Fund, the Tribunal’s jurisdiction ratione materiae over the complaint is limited to claims arising from the IFAD staff regulations and rules, and does not extend to claims based on the MOU, the UNCCD or the COP’s decisions.

Finally, the Fund argues that the Tribunal was not competent to entertain the complainant’s arguments as derived from the MOU, the UNCCD or the COP’s decisions, as these are outside the scope of Article III, paragraph 5, of the Tribunal’s Statute. According to the Fund, the Tribunal’s jurisdiction ratione materiae over the complaint is limited to claims arising from the IFAD staff regulations and rules, and does not extend to claims based on the MOU, the UNCCD or the COP’s decisions.

3. Jurisdiction

ratione materiae of the Tribunal

The Fund’s arguments are not persuasive. The Tribunal’s jurisdiction ratione materiae is not limited to claims arising from the IFAD staff regulations and rules. The Tribunal’s jurisdiction ratione materiae includes claims arising from the MOU, the UNCCD or the COP’s decisions, as these are within the scope of Article III, paragraph 5, of the Tribunal’s Statute. Moreover, the Fund’s arguments are not consistent with the complainant’s claims, which concern the non-renewal of her fixed-term contract, as well as her claims for non-observance of the Staff Regulations. Therefore, the Tribunal’s jurisdiction ratione materiae over the complaint is not limited to claims arising from the IFAD staff regulations and rules, but includes claims arising from the MOU, the UNCCD or the COP’s decisions.

The Fund also contends that the Tribunal was not competent to entertain the complainant’s arguments as derived from the MOU, the UNCCD or the COP’s decisions, as these are outside the scope of Article III, paragraph 5, of the Tribunal’s Statute. According to the Fund, the Tribunal’s jurisdiction ratione materiae over the complaint is limited to claims arising from the IFAD staff regulations and rules, and does not extend to claims based on the MOU, the UNCCD or the COP’s decisions. The Fund’s arguments are not persuasive. The Tribunal’s jurisdiction ratione materiae is not limited to claims arising from the IFAD staff regulations and rules. The Tribunal’s jurisdiction ratione materiae includes claims arising from the MOU, the UNCCD or the COP’s decisions, as these are within the scope of Article III, paragraph 5, of the Tribunal’s Statute. Therefore, the Tribunal’s jurisdiction ratione materiae over the complaint is not limited to claims arising from the IFAD staff regulations and rules, but includes claims based on the MOU, the UNCCD or the COP’s decisions.
to which the non-renewal of her appointment was not based on valid reasons, or that it suffered from other substantive or procedural flaws, falls within the category of allegations of non-observance of the 'terms of appointment of an official' as specified in Article II, paragraph 5, of the Statute of the Tribunal. As was emphasized by the Court in its 1956 Advisory Opinion:

"there is a relationship, a legal relationship, between the renewal and the original appointment and, consequently, between the renewal and the legal position of an official at the moment when his claim to renewal is granted or denied . . . Thus the complainant, in claiming to possess a right to renewal of his contract and in claiming that that right had been infringed, was placing himself on the ground of non-observance of the terms of appointment." (I.C.J. Reports 1956, p. 94.)

90. Thirdly, the letters of appointment and renewal of contract of Ms Saez García clearly stipulate that her appointment was made in accordance with the general provisions of the PPM and any amendments thereto, as well as such administrative instructions as may be issued from time to time regarding the application of the PPM. The non-observance of the provisions of these instruments or those adopted subsequently to replace them (see paragraph 49 above), could, in this context, impinge on the substantive and procedural rights of Ms Saez García to seek the restoration of her contract. This, however, is further evidenced by the link between her complaint to the Tribunal and the staff regulations and rules of the Fund.

91. The Court, therefore, concludes that Ms Saez García's complaint to the ILOAT, following the decision of the Fund not to renew her contract, falls within the scope of allegations of non-observance of the terms of appointment of an official as specified in Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Tribunal is competent ratione materiae to consider the complaint to the Tribunal and the staff regulations and rules of the Fund.

87. The Court reiterates that the decision impugned before the Administrative Tribunal was that of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008 in which he rejected the recommendations of the JAB in respect of the appeal by Ms Saez García. The JAB unanimously found that:

‘the Managing Director’s decision not to renew the Appellant’s fixed-term contract was beyond his authority and contrary to the rules and practices of the PPM. In the notice of non-renewal of Ms Saez García’s contract dated 15 December 2005, the President of IFAD, it was not based on valid reasons, or that it suffered from other substantive or procedural flaws, falls within the category of allegations of non-observance of the ‘terms of appointment of an official’ as specified in Article II, paragraph 5, of the Statute of the Tribunal. As was emphasized by the Court in its 1956 Advisory Opinion:

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B. Response to Questions II to VIII

96. The Court, having decided to give an affirmative answer to the first question, and having concluded that the Tribunal was justified in confirming its jurisdiction, is of the view that its answer to the first question does not prejudice its consideration of the remaining questions. 

Questions II to VIII are framed in such a manner as to seek the opinion of the Court on the reasoning underlying the conclusions reached by the Tribunal either on its jurisdiction or on the merits of the complaint brought before it. Secondly, they contain references to the possible existence of a fundamental fault in the procedure followed by the Tribunal. The Court will briefly address these two sets of issues.

97. The Court reiterates that, under the terms of Article XII of the Annex to the Statute of the ILOAT, a request for an advisory opinion seeking review of a judgment of the Tribunal is limited to cases where a decision of the Tribunal or the Inter-American Court of Justice concerning jurisdiction is challenged or where a fundamental fault in the procedure followed by the Tribunal is alleged. The Court has already addressed the IFAD Executive Board\'s challenge to the decision of the Tribunal confirming its jurisdiction. Not having a power of review with regard to the reasoning of the Tribunal or the merits of its judgment, the Court cannot give its opinion on those matters. As the Court observed in its 1956 Advisory Opinion, \"the reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal\" (Judgment No. 2867, p. 9, para. 1). The Tribunal then analysed the IFAD Executive Board\'s challenge to the decision of the Tribunal confirming its jurisdiction. Not having a power of review with regard to the reasoning of the Tribunal or the merits of its judgment, the Court cannot give its opinion on those matters. As the Court observed in its 1956 Advisory Opinion, \"the reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal\" (Judgment No. 2867, p. 99).

98. Regarding the \"fundamental fault in the procedure followed\", the Court recalls that this concept was explained by the Court in its Advisory Opinion of 1973 on the Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal as set out in paragraphs 30 to 31 above.

C. Response to Question IX

99. Question IX put by the IFAD Executive Board in its request for an advisory opinion is formulated as follows: \"What is the validity of the decision given by the ILOAT in its Judgment No. 2867?\"
The Court, having answered in the affirmative the first question of IFAD, and having therefore decided that the Tribunal was entirely justified in confirming its jurisdiction, and not having found any fundamental fault in the procedure committed by the Tribunal, finds that the decision given by the ILOAT in its Judgment No. 2867 is valid.

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) Is of the opinion:

(a) with regard to Question I,

Unanimously,

That the Administrative Tribunal of the International Labour Organization was competent, under Article II of its Statute, to hear the complaint introduced against the International Fund for Agricultural Development on 8 July 2008 by Ms Ana Teresa Saez García;

(b) with regard to Questions II to VIII,

Unanimously,

That these questions do not require further answers from the Court;

(c) with regard to Question IX,

Unanimously,

That the decision given by the Administrative Tribunal of the International Labour Organization in its Judgment No. 2867 is valid.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of February, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Secretary-General of the United Nations and the President of the International Fund for Agricultural Development, respectively.

(Signed) Hisashi Owada,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge Cançado Trindade appends a separate opinion to the Advisory Opinion of the Court; Judge Greenwood appends a declaration to the Advisory Opinion of the Court.

(Initialled) H. O.

(Initialled) Ph. C.
European Court of Human Rights

Agim Behrami and Bekir Behrami v. France
and
Ruzdhi Saramati v. France, Germany and Norway

Judgment of 2 May 2007
Having regard to the decision of 13 June 2006 by which the Chamber of the Second Section to which the cases had originally been assigned relinquished its jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court),

Having regard to the agreement of the parties to the Saramati case to the appointment of a common interest judge (Judge Costa) pursuant to Rule 30 of the Rules of Court,

Having regard to the parties' written and oral submissions and noting the agreement of Germany not to make oral submissions following the applicant's request to withdraw his case against that State (paragraphs 64-65 of the decision below),

Having regard to the written submissions of the United Nations requested by the Court, the comments submitted by the Governments of the Denmark, Estonia, Greece, Poland, Portugal and of the United Kingdom as well as those of the German Government accepted as third party submissions, all under Rule 44(2) of the Rules of Court,

Having regard to the oral submissions in both applications at a hearing on 15 November 2006,

Having decided to join its examination of both applications pursuant to Rule 42 § 1 of the Rules of Court,

Having deliberated on 15 November 2006 and on 2 May 2007, decides as follows:

THE FACTS

1. Mr Agim Behrami, was born in 1962 and his son, Mr Bekir Behrami, was born in 1990. Both are of Albanian origin. Mr Agim Behrami complained on his own behalf, and on behalf of his deceased son, Gadaf Behrami born in 1988. These applicants live in the municipality of Mitrovica in Kosovo, Republic of Serbia. They were represented by Mr Gazmend Nushi, a lawyer with the Council for the Defence of Human Rights and Freedoms, an organisation based in Pristina, Kosovo. Mr Saramati was born in 1950. He is also of Albanian origin living in Kosovo. He was represented by Mr Hazer Susuri of the Criminal Defence Resource Centre, Kosovo. At the oral hearing in the cases, the applicants were further represented by Mr Keir Starmer, QC and Mr Paul Troop as Counsel, assisted by Ms Nuala Mole, Mr David Norris and Mr Ahmet Hasolli, as Advisers.

The French Government were represented by their Agents, Mr R. Abraham, Mr J.-L. Florent and, subsequently, Ms Edwige Belliard, assisted

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1 The abbreviations used are explained in the text but also listed in alphabetical order in the Appendix to this decision.
I. RELEVANT BACKGROUND TO THE CASES


3. UNSC Resolution 1244 of 10 June 1999 provided for the deployment of an international military force following an appropriate UN Security Council Resolution. This resolution was adopted on 25 March 2000, permitting the deployment of an international security force following an appropriate UN Security Council Resolution.

4. UNMIK personnel were represented by their Agents, Mr. Rolf Felle, and Ms. Therese Steen, assisted by Mr. Torfinn Rørsland, Adviser. The German Government were represented by Dr. Hans-Jörg Behrens, Deputy Agent and Professor Dr. Christian Tomuschat, Counsel. The French Government were represented by Dr. Christian Tomuschat, Counsel. The German Government were represented by Dr. Hans-Jörg Behrens, Deputy Agent and Professor Dr. Christian Tomuschat, Counsel. The Norwegian Government were represented by their Agents, Mr. Rolf Felle, and Ms. Therese Steen, assisted by Mr. Torfinn Rørsland, Adviser.

II. THE CIRCUMSTANCES OF THE BEHRAMI CASE

5. On 11 March 2000, eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999. Bekim Behrami was hit by a CBu which was still in the air. Gadaf and Bekim Behrami were both taken to hospital in Pristina where they later had two further operations on 4 April 2000.

6. UNMIK police investigated. They took witness statements, inter alia, from the boys involved in the incident and completed an initial report, indicating that the incident involved a murder attempt. Further investigation reports dated 11, 12, and 13 March 2000 indicated that UNMIK police could not access the site without KFOR agreement.

7. By letter dated 22 May 2000, the UNMIK Police reported that they had not investigated the incident further. The UNMIK Police also reported that the incident was an accident, and that the evidence was that the accident was a result of the CBU explosion. The UNMIK Police also reported that the incident was an accident, and that the evidence was that the accident was a result of the CBU explosion. The UNMIK Police also reported that the incident was an accident, and that the evidence was that the accident was a result of the CBU explosion.

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III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered Mr Saramati's pre-trial detention and an investigation into the case was ordered. On 25 May 2001 the District Court ordered Mr Saramati's appeal to be extended. On 4 June 2001 the Supreme Court of Kosovo allowed Mr Saramati's appeal and he was released.

9. In early July 2001 the police station in Prizren in the sector assigned to KFOR was located in Prizren from which it was arrested by UNMIK police officers on 8 July 2001. Mr Saramati's case was transferred to the District Court for trial but his case was dropped. Mr Saramati's case was transferred to the District Court for trial but his case was continued.

10. On 26 July 2001 the Russian representative in the UNSC referred to “the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international security in Kosovo”.

11. On 26 July 2001 the Russian representative in the UNSC referred to “the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international security in Kosovo”.

12. On 26 July 2002 the Russian representative in the UNSC referred to “the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international security in Kosovo”.

13. On 26 July 2003 Mr Saramati’s detention was again extended by the District Court for trial and he was transferred to the UNMIK detention facilities in Prishtina.

14. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati’s representatives sought his release and the trial court found that the prosecution had been based on the evidence that the arrested was involved in the activities described in the indictment.

IV. RELEVANT LAW AND PRACTICE

A. The prohibition on the unilateral use of force and its collective security counterpart

18. The prohibition on the unilateral use of force by States, together with its counterpart principle of collective security, marked the dividing line between the classic concept of international law, characterised by the right to have recourse to war (ius ad bellum) as an indivisible part of State sovereignty, and modern international law which recognises the prohibition on the use of force as a fundamental legal norm (ius contra bellum). More particularly, the “ius contra bellum” era of public international law is accepted to have begun (at the latest, having regard, inter alia, to the Kellogg-Briand Pact signed in 1928) with the end of the First World War and the suppression of the causes of dispute and the building of sustainable peace.
The second type of action, "negative peace", was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to the prohibition of the unilateral use of force (Article 2 § 4) in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. Two matters were essential to this peace and security mechanism: its "collective" nature (States had to act together against an aggressor identified by the UNSC) as well as its "universality" (competing alliances were considered to undermine the mechanism so that coercive action by regional organisations was subjected to the universal system by Article 53 of the Charter).

B. The Charter of the UN, 1945

21. The Preamble as well as Articles 1 and 2, in so far as relevant, provide as follows:

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

- to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and

- to unite our strength to maintain international peace and security, and

- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

- to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, ..., have agreed to the present Charter of the United Nations and do hereby establish an international organisation to be known as the United Nations.

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

... Article 2 ...

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

...

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

22. Chapter V deals with the UNSC and Article 24 outlines its "Functions and Powers" as follows:

"1. In order to ensure prompt and effective action by the [UN], its Members confer on the [UNSC] primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the [UNSC] acts on their behalf.

2. In discharging these duties the [UNSC] shall act in accordance with the Purposes and Principles of the [UN]. The specific powers granted to the [UNSC] for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

Article 25 provides:

"The Members of the United Nations agree to accept and carry out the decisions of the [UNSC] in accordance with the present Charter."

23. Chapter VII is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression". Article 39 provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The notion of a "threat to the peace" within the meaning of Article 39 has evolved to include internal conflicts which threaten to "spill over" or
concern serious violations of fundamental international (often humanitarian) norms. Large scale cross border displacement of refugees can also render a threat international (Article 2(7) of the UN Charter; and, for example, R. Kolb, “Ius Contra Bellum – Le Droit international relatif au maintien de la paix”, Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68; and “Yugoslav Territory; United Nations Trusteeship or Sovereign State? Reflections on the current and Future Legal Status of Kosovo”, Zimmermann and Stahn, NJIL 70, 2001, p. 437).

Articles 41 and 42 read as follows:

41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

24. Articles 43-45 provide for the conclusion of agreements between member states and the UNSC for the former to contribute to the latter land and air forces necessary for the purpose of maintaining international peace and security. No such agreements have been concluded. There is, consequently, no basis in the Charter for the UN to oblige Member States to contribute resources to Chapter VII missions. Articles 46-47 provide for the UNSC to be advised by a Military Staff Committee (comprising military representatives of the permanent members of the UNSC) on, inter alia, military requirements for the maintenance of international peace and security and on the employment and command of forces placed at the UNSC’s disposal. The MSC has had very limited activity due to the absence of Article 43 agreements.

25. Chapter VII continues:

“Article 48

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations as and by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”

C. Article 103 of the Charter

26. This Article reads as follows:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

27. The ICJ considers Article 103 to mean that the Charter obligations of UN member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the UN Charter or was only a regional arrangement (Nicaragua v. United States of America, ICJ Reports, 1984, p. 392, at § 107. See also Kadi v. Council and Commission, § 183, judgment of the Court of First Instance of the European Communities (“CFI”) of 21 September 2005 (under appeal) and two more recent judgments of the CFI in the same vein: Yusuf and Al Barakaat v. Council and Commission, 21 September 2005, §§ 231, 234, 242-243 and 254 as well as Ayadi v. Council, 12 July 2006, § 116). The ICJ has also found Article 25 to mean that UN member states obligations under a UNSC Resolution prevail over obligations arising under any other international agreement (Orders of 14 April 1992 (provisional measures), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom), ICJ Reports, 1992, p. 16,§ 42 and p. 113, § 39, respectively).

D. The International Law Commission (“ILC”)

28. Article 13 of the UN Charter provided that the UN General Assembly should initiate studies and make recommendations for the purpose of, inter alia, encouraging the progressive development of international law and its codification. On 21 November 1947, the General Assembly adopted Resolution 174(II) establishing the ILC and approving its Statute.

1. Draft Articles on the Responsibility of International Organisations

29. Article 3 of these draft Articles adopted in 2003 during the 55th session of the ILC is entitled “General principles” and it reads as follows (see the Report of the ILC, General Assembly Official Records, 55th session, Supplement No. 10 A/58/10 (2003):

“1. Every internationally wrongful act of an international organization entails the international responsibility of the international organization.

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
(a) Is attributable to the international organization under international law; and

(b) Constitutes a breach of an international obligation of that international organization.

30. Article 5 of the draft Articles adopted in 2004 during the 56th session of the ILC is entitled “Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation” and reads as follows (see the Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 A/59/10 (2004) and Report of the Special Rapporteur on the Responsibility of International Organisations, UN, Official Documents, A/CN.4/541, 2 April 2004):

“The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct.”

31. The ILC Commentary on Article 5, in so far as relevant, provides:

“When an organ of a State is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization. ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a State placed at the disposal of the [UN] for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending State or organization. ...”

Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...

Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.

As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question.”

32. The report noted that it would be difficult to attribute to the UN action resulting from contingents operating under national rather than UN command and that in joint operations, international responsibility would be determined, absent an agreement, according to the degree of effective control exercised by either party in the conduct of the operation. It continued:

“...“What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.”

33. As regards UN peacekeeping forces (namely, those directly commanded by the UN and considered subsidiary organs of the UN), the Report quoted the UN's legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, if committed in violation of an international obligation, entailed the international responsibility of the organisation and its liability in compensation. This, according to the Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in the Report.

2. Draft Articles on State Responsibility

34. Article 6 if these draft Articles is entitled “Conduct of organs placed at the disposal of a State by another State” and it reads as follows (Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 A/56/10):

“The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.”

Article 6 addresses the situation in which an organ of a State is put at the disposal of another, so that the organ may act temporarily for the latter's benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

E. The Vienna Convention on the Law of Treaties

35. Article 30 is entitled “Application of successive treaties relating to the same subject matter” and its first paragraph reads as follows:

“I. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.”

F. The MTA of 9 June 1999

36. Following the agreement by the FRY that its troops would withdraw from Kosovo and the consequent suspension of air operations against the FRY, the MTA was signed between “KFOR” and the Governments of the FRY and the Republic of Serbia on 9 June 1999 which provided for the
phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled “General Obligations”) noted that it was an agreement for the deployment in Kosovo:

“under United Nations auspices of effective international civil and security presences. The Parties note that the [UNSC] is prepared to adopt a resolution, which has been introduced, regarding these measures.”

37. Paragraph 2 of Article I provided for the cessation of hostilities and the withdrawal of FRY forces and, further, that:

“The State governmental authorities of the [FRY] and the Republic of Serbia understand and agree that the international security force (“KFOR”) will deploy following the adoption of the UNSC [Resolution] ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission. They further agree to comply with all of the obligations of this Agreement and to facilitate the deployment and operation of this force.”

38. Article V provided that COMKFOR would provide the authoritative interpretation of the MTA and the security aspects of the peace settlement it supported.

39. Appendix B set out in some detail the breadth and elements of the envisaged security role of KFOR in Kosovo. Paragraph 3 provided that neither the international security force nor its personnel would be “liable for any damages to public or private property that they may cause in the course of duties related to the implementation of this agreement”.

40. The letter of 10 June 1999 from NATO submitting the MTA to the SG of the UN and the latter's letter onwards to the UNSC, described the MTA as having been signed by the “NATO military authorities”.

G. The UNSC Resolution 1244 of 10 June 1999

41. The Resolution reads, in so far as relevant, as follows:

“Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Recalling its [previous relevant] resolutions ...

Regretting that there has not been full compliance with the requirements of these resolutions,

Determined to resolve the grave humanitarian situation in Kosovo ... and to provide for the safe and free return of all refugees and displaced persons to their homes,

... Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the [FRY] of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the [FRY's] agreement to that paper,

... Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

... 5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences;

6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;

7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfill its responsibilities under paragraph 9 below;

... 9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:

... (e) Supervising de-mining until the international civil presence can, as appropriate, take over responsibility for this task;

(f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

... 10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the [FRY], and which will provide transitional administration while establishing and overseeing the development of provisional
democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include: ...

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transfering, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;

19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;

20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;

21. Decides to remain actively seized of the matter.”

42. Annex 1 listed the general principles on a political solution to the Kosovo crisis adopted by the G-8 Foreign Ministers on 6 May 1999. Annex 2 comprised nine principles (guiding the resolution of the crisis presented in Belgrade on 2 June 1999 to which the FRY had agreed) including:

“...

3. Deployment in Kosovo under [UN] auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

4. The international security presence with substantial [NATO] participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

5. Establishment of an interim administration for Kosovo as a part of the international civil presence ..., to be decided by the Security Council of the [UN]. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo. ...”

43. While this Resolution used the term “authorise”, that term and the term “delegation” are used interchangeably. Use of the term “delegation” in the present decision refers to the empowering by the UNSC of another entity to exercise its function as opposed to “authorising” an entity to carry out functions which it could not itself perform.

H. Agreed Points on Russian Participation in KFOR (18 June 1999)

44. Following Russia’s involvement in Kosovo after the deployment of KFOR troops, an Agreement was concluded as to the basis on which Russian troops would participate in KFOR. Russian troops would operate in certain sectors according to a command and control model annexed to the agreement: all command arrangements would preserve the principle of unity of command and, while the Russian contingent was to be under the political and military control of the Russian Government, COMKFOR had authority to order NATO forces to execute missions refused by Russian forces.

45. Its command and control annex described the link between the UNSC and the NAC as one of “Consultation/Interaction” and between the NAC and COMKFOR as one of “operational control”.

I. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo

46. This Regulation was adopted on 18 August 2000 by the SRSO to implement the Joint Declaration of 17 August 2000 on the status of KFOR and UNMIK and their personnel, and the privileges and immunities to which they are entitled. It was deemed to enter into force on 10 June 1999.

KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo and such personnel were to be “subject to the exclusive jurisdiction of their respective sending States” (section 2 of the Regulation). UNMIK personnel were also to be immune from legal process in respect of words spoken and all acts performed by them in their official capacity (section 3). The SG could waive the immunity of UNMIK personnel and requests to waive jurisdiction over KFOR personnel were to be referred to the relevant national commander (section 6).
47. Referring to UNSC Resolution 1244 and UNMIK Regulation No. 2000/47, the SOP was intended as a guide. The KCO would adjudicate claims relating to the overall administration of military operations in Kosovo by KFOR in accordance with Annex A to the SOP. It would also determine whether the matter was against a TCN, in which case the claim would be forwarded to that TCN.

48. TCNs were responsible for adjudicating claims that arose from their own activities in accordance with their own rules and procedures. While there was at that time no approved policy for processing and paying claims that arose out of KFOR operations in Kosovo, TCNs were encouraged to process claims (through TCN Claims Offices – “TCNCOs”) in accordance with Annex B which provided guidelines on the claims procedure. While the adjudication of claims against a TCN was purely a “national matter for the TCN concerned”, the payment of claims in a fair manner was considered to further the rule of law, enhance the reputation of KFOR and to serve the interests of force protection for KFOR.

49. Annex C provided guidelines for the structure and procedures before the Kosovo Appeals Commission (from the KCO or from a TCNCO).


50. The relevant parts of paragraph 14 of the Opinion read:

“KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall “under the unified command and control” (UNSC Resolution 1244, Annex 2, para. 4) of COMKFOR from NATO. “Unified command and control” is a military term of art which only encompasses a limited form of transfer of power over troops. TCNs have therefore not transferred “full command” over their troops. When TCNs contribute troops to a NATO-led operation they usually transfer only the limited powers of “operational control” and/or “operational command”. These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g. those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers. In addition, TCNs always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of TCNs to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables states to do the utmost for the safety of their soldiers, to preserve their discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers.”

L. Detention and De-mining in Kosovo

1. Detention

51. A letter from COMKFOR to the OSCE of 6 September 2001 described how COMKFOR authorised detention: each case was reviewed by KFOR staff, the MNB commander and by a review panel at KFOR HQ, before being authorised by COMKFOR based on KFOR/OPS/FRAGO997 (superseded by COMKFOR Detention Directive 42 in October 2001).

2. De-mining

52. Landmines and unexploded ordinance (from the NATO bombardment of early 1999) posed a significant problem in post-conflict Kosovo, a problem exacerbated by the relative absence of local knowledge given the large scale displacement of the population during the conflict. The UN Mine Action Service (UNMAS) was the primary UN body charged with monitoring de-mining developments in general.

53. On 12 June 1999 the SG delivered his operational plan for the civil mission in Kosovo to the UNSC (Doc. No. S/1999/672). In outlining the structure of UNMIK, he noted that mine action was dealt with under humanitarian affairs (the former Pillar I of UNMIK) and that UNMIK had been tasked to establish, as soon as possible, a mine action centre. The UN Mine Action Coordination Centre (“UNMACC”: used interchangeably with “UNMIK MACC”) opened its office in Kosovo on 17 June 1999 and it was placed under the direction of the Deputy SRSG of Pillar I. Pending the transfer of responsibility for mine action to UNMACC, in accordance with the UNSC Resolution 1244, KFOR acted as the de facto coordination centre. The SG’s detailed report on UNMIK of 12 July 1999 (Doc No. S/1999/779) confirmed that UNMACC would plan mine action activities and act as the point of coordination between the mine action partners including KFOR, UN agencies, NGOs and commercial companies”.

54. On 24 August 1999 the Concept Plan for UNMIK Mine Action Programme (“MAP”) was published in a document entitled “UNMIK MACC, Office of the Deputy SRSG (Humanitarian Affairs)”. It confirmed that the UN, through UNMAS, the SRSG and the Deputy SRSG of Pillar I of UNMIK retained “overall responsibility” for the MAP in terms of providing policy guidance, identifying needs and priorities, coordinating with UN and non-UN partners as well as member states, and defining the overall operational plan and structure. The MAP was an “integral component of UNMIK”. As to the role of UNMIK MACC, it was
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underlined that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators, including UN agencies, KFOR contingents, NGOs and commercial companies. Those operators had to be coordinated and prioritized. Accordingly, a key element in the execution of the mine action programme was the establishment of UNMIK MACC which was designed to take full control of the mine action programme, although formally still under KFOR’s responsibility. This was followed, on 24 August, by the approval of the Concept Plan, which was then followed up with a letter dated 5 October from the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should be forwarded to the UN as a request that KFOR should take over from the military to the civilian sector of the mine action programme for Kosovo.

55.  Accordingly, on 24 August 1999, a memorandum was sent by the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should also be forwarded to the UN as a request that KFOR should assume responsibility for mine action in Kosovo. The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

56.  KFOR Directive on CBU Marking (KFOR/OPS/FRAGO 300) was adopted on 29 August 1999 and provided:

57.  On 5 October 1999, the Deputy SRSG wrote to COMKFOR noting paragraph 9(e) of UNSC Resolution 1244, attaching the Concept Plan, confirming that “we are now in a position to formally assume responsibility for mine action in Kosovo” and underlining the critical need for UNMIK and KFOR to cooperate and to work closely together.

58.  The report of KFOR for July 1999 (submitted to the UNSC by the SG’s letter of 10 August 1999) explained that KFOR worked closely with UNMAS and had “jointly established” UNMACC. The report continued:

59.  By letter dated 6 April 2000 to COMKFOR, the Deputy SRSG drew the latter’s attention to recent CBU explosions involving deaths and asked for the latter’s personal support to ensure KFOR continued to support the clearance project by marking CBU sites as a matter of urgency and providing any further information they had.


61. Agim Behrami complained under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter’s death and Bekir Behrami complained about his serious injury. They submitted that KFOR, by failing to mark the un-owned CBUs which those troops knew to be present on that site, had been in breach of its positive obligation to ensure the safety of those residing in Kosovo.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his detention by KFOR between 13 July 2001 and 26 January 2002. He claimed that the incident had amounted to a breach of the respondent States’ positive obligation to guarantee the Convention rights of those residing in Kosovo.

63. The Court agreed that the parties’ submissions to the Grand Chamber could be limited to the admissibility of the cases.

THE LAW

64. Messrs Behrami invoked Article 2 of the Convention as regards the impugned inaction of KFOR troops. Mr Saramati relied on Articles 5 and 13 as regards his detention by the KFOR and on the orders of KFOR. The President of the Court agreed that the parties’ submissions to the Grand Chamber could be limited to the admissibility of the cases.

83
I. WITHDRAWAL OF THE SARAMATI CASE AGAINST GERMANY

64. In arguing that he fell within the jurisdiction of, inter alia, Germany, Mr Saramati initially maintained that a German KFOR officer had been involved in his arrest in July 2001 and he also referred to the fact that Germany was the lead nation in MNB Southeast. In their written submissions to the Grand Chamber, the German Government indicated that, despite detailed investigations, they had not been able to establish any involvement of a German KFOR officer in Mr Saramati’s arrest.

Mr Saramati responded that, while German KFOR involvement was his recollection and while he had made that submission in good faith, he was unable to produce any objective evidence in support. He therefore accepted the contrary submission of Germany and, further, that German KFOR control of the relevant sector was of itself an insufficient factual nexus to bring him within the jurisdiction of Germany. By letter of 2 November 2006 he requested the Court to allow him to withdraw his case against Germany, which State did not therefore make oral submissions at the subsequent Grand Chamber hearing.

65. The Court considers reasonable the grounds for Mr Saramati’s request. There being two remaining respondent States in this case also disputing, inter alia, that Mr Saramati fell within their jurisdiction as well as the compatibility of his complaints, the Court does not find that respect for human rights requires a continued examination of Mr Saramati’s case against Germany (Article 37 § 1 in fine of the Convention) and it should therefore be struck out as against that State.

In such circumstances, the President of the Court has accepted the submissions of the German Government as third party observations under Rule 44 § 2 of the Rules of Court. References hereunder to the respondent States do not therefore include Germany and it is referred to below as a third party.

II. THE CASES AGAINST FRANCE AND NORWAY

A. The issue to be examined by the Court

66. The applicants maintained that there was a sufficient jurisdictional link, within the meaning of Article 1 of the Convention, between them and the respondent States and that their complaints were compatible ratione loci, personae and materiae with its provisions.

67. The respondent and third party States disagreed.

The respondent Governments essentially contended that the applications were incompatible ratione loci and personae with the provisions of the Convention because the applicants did not fall within their jurisdiction within the meaning of Article 1 of the Convention. They further maintained that, in accordance with the “Monetary Gold principle” (Monetary Gold Removed from Rome in 1943, ICJ Reports 1954), this Court could not decide the merits of the case as it would be determining the rights and obligations of non-Contracting Parties to the Convention.

The French Government also submitted that the cases were inadmissible under Article 35 § 1 mainly because the applicants had not exhausted remedies available to them, although they accepted that issues of jurisdiction and compatibility had to be first examined. While the Norwegian Government responded to questions during the oral hearing as to the remedies available to Mr Saramati, they did not argue that his case was inadmissible under Article 35 § 1 of the Convention.

The third party States submitted in essence that the respondent States had no jurisdiction loci or personae. The UN, intervening as a third party in the Behrami case at the request of the Court, submitted that, while de-mining fell within the mandate of UNMACK created by UNMIK, the absence of the necessary CBU location information from KFOR meant that the impugned inaction could not be attributed to UNMIK.

68. Accordingly, much of these submissions concerned the question of whether the applicants fell within the extra-territorial “jurisdiction” of the respondent States within the meaning of Article 1 of the Convention, the compatibility ratione loci of the complaints and, consequently, the decision in Banković and Others v. Belgium and 16 Other Contracting States ((dec.) [GC], no. 52207/99, ECHR 2001 XII) as well as related jurisprudence of this Court (Drozd and Janousek v. France and Spain, judgment of 26 June 1992, Series A no. 240; Loizidou v. Turkey, judgment of 18 December 1996, Reports 1996 VI, § 56; Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV; Issa and Others v. Turkey, no. 31821/96, 16 November 2004; Ilıçasu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII; Öcalan v. Turkey [GC], no. 46221/99, ECHR 2005-IV; and No. 23276/04, Hussein v. Albania and Others, (dec.) 14 March 2006).

In this respect, it was significant for the applicants in the Behrami case that, inter alia, France was the lead nation in MNB Northeast and Mr Saramati underlined that French and Norwegian COMKFOR issued the relevant detention orders. The respondent (as well as third party) States disputed their jurisdiction ratione loci arguing, inter alia, that the applicants were not on their national territory, that it was the UN which had overall effective control of Kosovo, that KFOR controlled Mr Saramati and not the individual COMKFORs and that the applicants were not resident in the “legal space” of the Convention.

69. The Court recalls that Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling with their “jurisdiction”. This jurisdictional competence is primarily territorial and, while the notion of compatibility ratione personae of complaints is distinct, the two concepts can be inter-dependent (Banković and Others, cited above, at § 75 and
In the present case, the Court considers, and indeed it was not disputed, that the FRY did not “control” Kosovo (within the meaning of the word in the above-cited jurisprudence of the Court concerning northern Cyprus) since prior to the relevant events it had agreed in the MTA, as it was entitled to do as the sovereign power (Banković and Others, cited above, at §§ 60 and 71 and further references therein; Shaw, *International Law*, 1997, 4th Edition, p. 462, Nguyen Quoc Dinh, *Droit International Public*, 1999, 6th Edition, pp. 475-478; and Dixon, *International Law*, 2000, 4th Edition, pp. 133-135), to withdraw its own forces in favour of the deployment of international civil (UNMIK) and security (KFOR) presences to be further elaborated in a UNSC Resolution, which Resolution had already been introduced under Chapter VII of the UN Charter (see Article 1 of the MTA, paragraph 36 above).

70. The following day, 10 June 1999, UNSC Resolution 1244 was adopted. KFOR was mandated to exercise complete military control in Kosovo. UNMIK was to provide an interim international administration and its first Resolution confirmed that the authority vested in it by the UNSC comprised all legislative and executive power as well as the authority to administer the judiciary (UNMIK Regulation 1999/1 and see also UNMIK Regulation 2001/9). While the UNSC foresaw a progressive transfer to the local authorities of UNMIK’s responsibilities, there is no evidence that either the security or civil situation had relevantly changed by the dates of the present events. Kosovo was, therefore, on those dates under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY (Banković and Others, cited above, at § 71).

71. The Court therefore considers that the question raised by the present cases is, less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States’ contribution to the civil and security presences which did exercise the relevant control of Kosovo.

72. Accordingly, the first issue to be examined by this Court is the compatibility *ratione personae* of the applicants’ complaints with the provisions of the Convention. The Court has summarised and examined below the parties’ submissions relevant to this question.

B. The applicants’ submissions

73. The applicants maintained that KFOR (as opposed to the UN or UNMIK) was the relevant responsible organisation in both cases.

The MTA and UNSC Resolution 1244 provided that KFOR, on which UNMIK relied to exist, controlled and administered Kosovo in a manner equivalent to that of a State. In addition, KFOR was responsible for de-mining and the applicants referred in support to KFOR’s duties outlined in the MTA, in UNSC Resolution 1244, in FRAGO300, in the UNSG reports to the UNSC (which indicated that UNMACC had been “set up jointly” by KFOR and the UN to co-ordinate de-mining (see the SG reports cited at paragraph 58 above) and in a report of the International Committee of the Red Cross (“Explosive Remnants of War, Cluster Bombs and Landmines in Kosovo”, Geneva, August 2000, revised June 2001). Since KFOR had been aware of the unexploded ordinance and controlled the site, it should have excluded the public. Moreover, NATO had initially dropped the cluster bombs. Their oral submissions endorsed the UN submissions to the effect that, if UNMACC had responsibility for co-ordinating de-mining, KFOR retained direct responsibility for supporting de-mining which was “critical” to the success of the clearance operation. Mr Saramati’s detention was clearly a security matter for KFOR (citing the KFOR documents referred to at paragraph 51 above).

74. The impugned acts involved the responsibility *ratione personae* of France, in the *Behrami* case, as well as Norway in the *Saramati* case.

75. In the first place, France had voted in the NAC in favour of deploying an international force to Kosovo.

76. Secondly, the French contingent’s control of MNB Northeast was a relevant jurisdictional link in the *Behrami* case. While Germany was the lead nation in MNB Southeast, the applicants considered that that was, of itself, an insufficient jurisdictional link in the *Saramati* case.

77. Thirdly, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO. KFOR was a NATO-led multinational force made up of NATO and non-NATO troops (from 10-14 States) allegedly under “unified” command and control. KFOR was not established as a UN force or organ, in contrast to other peacekeeping forces and to UNMIK and UNMACC under direct UN command. If KFOR had been such a UN force (with the prefix “UN”), it would have had a UN Commander in Chief, troops would not have accepted instructions from TCNs and all personnel would have had UN immunities. On the contrary, NATO and other States were authorised to establish the security mission in Kosovo under “unified command and control”. However, this was a “term of art” (the Venice Commission, cited at paragraph 50 above): since there was no operational command link between the UNSC and NATO and since the TCNs retained such significant power, there was no unified chain of command from the UNSC so that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN (relying, in addition, on detailed academic publications).
As to the link between KFOR and the UNSC, the applicants referred to the Attachment to the Agreement on Russian Participation (paragraph 45 above) which described the link as one of "consultation/interaction". As to the input of TCNs, the applicants noted that KFOR troops (including COMKFOR) were directly answerable to their national commanders and fell exclusively within the jurisdiction of their national military courts. The applicants further claimed that KFOR was an international force under unified command, and that national commanders, even those in Kosovo, were not subject to the jurisdiction of the international military court, as required by the UNMIK Regulation 2000/47 and KFOR Main SOP. Paragraphs 48-49 below cite the cases of Bici & Anor v Ministry of Defence [2004] EWHC 786; and Hess v. the United Kingdom (28 May 1975, Decisions and Reports no. 2, p. 72).

81. Fourthly, as regards Mr Saramati’s case, final decisions on detention lay with COMKFOR, who was responsible to the UN and the FRY. The Court also noted that the French contingent was not subject to the jurisdiction of the international military court, as required by the UNMIK Regulation 2000/47 and KFOR Main SOP. Paragraph 48-49 below cite the cases of Bici & Anor v Ministry of Defence [2004] EWHC 786; and Hess v. the United Kingdom (28 May 1975, Decisions and Reports no. 2, p. 72).

82. Finally, and as to the respondent States’ arguments, their submissions on the Monetary Gold principle were fundamentally misconceived. In addition, the Court was not convinced that the Convention was not applicable in the present case.
Prevention of Torture, Inhuman and Degrading Treatment (“the CPT”) concluded agreements with KFOR and UNMIK in May 2006 as it considered that Kosovo did not fall under the several jurisdiction of Contracting States. Fourthly, the Venice Commission, in its above-cited Opinion, did not consider that the jurisdiction of Convention States, or therefore of this Court, extended to Kosovo. Fifthly, any recognition of this Court’s jurisdiction would involve judging the actions of non-Contracting States contrary to the Monetary Gold principle (judgment cited above).

Sixthly, the ILC draft Articles on State Responsibility (paragraph 34 above) meant that the French contingent’s acts and omissions (carried out under the authority of NATO and on behalf of KFOR) were not imputable to France.

2. The Norwegian Government

85. The case was incompatible ratione personae as Mr Saramati was not within the jurisdiction of the respondent States.

86. The legal framework for KFOR detention was the MTA, UNSC Resolution 1244, OPLAN 10413, KFOR Rules of Engagement, FRAGO997 replaced (in October 2001) by COMKFOR Detention Directive 42.

87. The command structure was hierarchical under unified command and control: each TCN transferred authority over their contingents to the NATO chain of command to ensure the attainment of the common KFOR objective. That chain of command ran from COMKFOR (appointed every 6 months with NATO approval), through a NATO chain of command to the NAC of NATO and onward to the UNSC which had overall authority and control. In all operational matters, no national military chain of command existed between Norway and COMKFOR so that the former could not instruct COMKFOR nor could COMKFOR deviate from NATO orders. All MNBs and their lead countries were fully within the KFOR chain of command. The present case was distinguishable from the above-cited Bosphorus case since no TCN had any sovereign rights over or in Kosovo.

88. KFOR was therefore a cohesive military force under the authority of the UNSC which monitored the discharge of the mandate through the SG reports. This constituted, with the civilian presence (UNMIK), a comprehensive UN administration of which national contributions were building blocks and not autonomous units.

89. The monitoring systems in place confirmed this: as noted above, the UNSC received feedback via the SG from KFOR and UNMIK, it was UNMIK which submitted a report to the UN Human Rights Committee on the human rights situation in Kosovo (Concluding Observations of the Human Rights Committee: Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO) and this Government also referred to the PACE, CPT and the Venice Commission positions relied on by the French Government (paragraph 84 above).

90. Finally, this Government underlined the serious repercussions of extending Article 1 to cover peacekeeping missions and, notably, the possibility of deterring States from participating in such missions and of making already complex peacekeeping missions unworkable due to overlapping and perhaps conflicting national or regional standards.

3. Joint (oral) submissions of France and Norway

91. In these submissions, the States also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to growing demand. That the UN was the controlling umbrella was consistent with UNMIK and KFOR having independent command and control structures and applied regardless of whether KFOR was a traditionally established UN security presence under direct UN operational command or whether, as in the present cases, the UNSC had authorised an organisation or States to implement its security functions. The structure adopted in the present cases maintained the necessary integrity, effectiveness and centrality of the mandate (Report of the Panel on United Nations Peace Operations (the “Brahimi report”, A/55/305-S/2000/809). The security presence acted under UN auspices and action was taken by, and on behalf of, the international structures established by the UNSC and not by, or on behalf of, any TCN. Neither the status of “lead nation” of a MNB and its consequent control of a sector of Kosovo nor the nationality of the French and Norwegian COMKFOR could detach those States from their international mandate.

92. As to the de-mining and detention mandates, UNSC Resolution 1244 authorised KFOR to use all necessary means to secure, inter alia, the environment, public safety and, until UNMIK could take over responsibility, de-mining. That Resolution also authorized KFOR to carry out security assessments related to arms smuggling (to the Former Yugoslav Republic of Macedonia) and to detain persons according to detention directives and orders adopted under unified command.

93. Referring to the above-cited Bosphorus judgment, they noted that neither of the respondent States exercised sovereignty in Kosovo and none had handed over sovereign powers over Kosovo to an international organisation.

94. There were important sub-issues in the case including liability for involvement in a UN peacekeeping mission and the link between a regional instrument and international peacekeeping mission authorised by an organisation of universal vocation. In this context, they underlined the serious repercussions which the recognition of TCN jurisdiction would have including deterring TCN participation in, and undermining the coherence and therefore effectiveness of, such peacekeeping missions.

95. Finally, the applicants’ suggestion, that the impugned action and inaction constituted a sufficient jurisdictional link between the States and the applicants, was misconceived. The applicants had also confused the
legal personality of international structures (such as NATO and the UN) and that of their member states. Even if KFOR did not have separate legal personality, it was under the control of the UN, which did. Neither the retention of disciplinary control by TCN’s nor the Venice Commission Opinion relied upon by the applicants was inconsistent with the international operational control of such an operation by NATO through KFOR.

D. The submissions of the third parties

1. The Government of Denmark

96. The applicants did not fall within the jurisdiction of the respondent States and the applications were therefore inadmissible as incompatible ratione personae.

97. The cases raised fundamental issues as to the scope of the Convention as a regional instrument and its application to acts of the international peace-keeping forces authorised under Chapter VII of the UN Charter. 192 States had vested the UNSC (including all Convention Contracting States) with primary responsibility for the maintenance of international peace and security (Article 24 of the UN Charter) and, in fulfilling that function, it had the authority to make binding decisions (Article 25) which prevailed over other international obligations (Article 103). The UNSC could lay down the necessary framework for civil and military assistance and, in the case of Kosovo, this was UNSC Resolution 1244. The central question was, therefore, whether personnel contributed by TCNs were also exercising jurisdiction on behalf of the TCN.

98. In the first place, even if the most relevant recognised instance of extra-territorial jurisdiction was the notion (developed in the above-cited jurisprudence concerning Northern Cyprus and the subsequent Issa case) of “effective overall control”, the TCNs could not have exercised such control since the relevant TCN personnel acted in fulfilment of UNMIK and KFOR functions. UNMIK exercised virtually all governmental powers in Kosovo and was answerable, via the SRSG and SG, to the UNSC. Its staff were employed by the UN. The “unified command and control” structure of KFOR, a coherent multinational force established under UNSC Resolution 1244 and falling under a single line of command under the authority of COMKFOR, rendered untenable the proposition of individual TCN liability for the acts or inaction of their troops carried out in the exercise of international authority.

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes and principles of the UN Charter. A finding of “no jurisdiction” would not leave the applicants in a human rights’ vacuum, as they suggested, given the steps being taken by those international presences to promote human rights’ protection.

100. Thirdly, the Convention had to be interpreted and applied in the light of international law, in particular, on the responsibility of international organisations for organs placed at their disposal. Referring to the ongoing work of the ILC in this respect (paragraphs 30-33 above), they noted that that work so far had demonstrated no basis for holding a State responsible for peacekeeping forces placed at the disposal of the UNSC acting under Chapter VII, under unified command and control, within the mandate outlined and in execution of orders from that command structure.

101. Finally, if there were specific inadequacies in human rights’ protection in Kosovo, these should be dealt with within the UN context. Seeking to address those deficiencies through this Court risked deterring States from participating in UN peacekeeping missions and undermining the coherence and effectiveness of such missions.

2. The Government of Estonia

102. The impugned action and inaction were regulated by UNSC Resolution 1244 adopted under Chapter VII of the UN Charter and the States were thereby fulfilling an obligation which fell within the scope of, and complied with, that Resolution in a manner which complied with international human rights standards as prescribed in the UN Charter. Even if there was a conflict between a State’s UN and other treaty obligations, the former took precedent (Articles 25 and 103 of the UN Charter).

3. The German Government’s written submissions

103. There was no jurisdictional link between Mr Saramati and the respondents because, inter alia, the agents of the respondents acted on behalf of UNMIK and KFOR.

104. Ultimate responsibility for Kosovo lay with the UN since effective control of Kosovo was exercised by UNMIK and KFOR pursuant to UNSC Resolution 1244. The UNSC retained overall responsibility and delegated the implementation of the Resolution’s objectives to certain international actors all the while monitoring the discharge of mandates. KFOR retained, and operated under the principle of, “unified command and control”; neither the national contingents nor COMKFOR had roles other than their international mandate under UNSC Resolution 1244 and none exercised sovereign powers, a fact not changed by the retention by TCNs of criminal and disciplinary competence over soldiers. The UNSC, via the SG and the SRSG, continued to be the guiding and legal authority for UNMIK. In short, both presences were international, coherent and comprehensive structures admitting of no national instruction.

105. These submissions as to the unity of the UN operation were confirmed by secondary legislation in Kosovo: if UNMIK took care to
ensure in its regulations human rights' protection and monitoring, that implied that the Convention control mechanisms did not apply. In addition, the Human Rights Committee of the UN regarded the inhabitants of Kosovo as falling under the jurisdiction of UNMIK (see paragraph 89 above).

106. This Court could not review acts of the UN, not least since Article 103 of the UN Charter established the primacy of the UN legal order. The above-cited Bosphorus case could be distinguished since the impugned actions of the Irish authorities took place on Irish territory over which they were deemed to have had full and effective control (relying on the above-cited judgment of Ilașcu and Others, §§ 312-33 and Assanidze v. Georgia [GC], no. 71503/01, §§ 19-142, ECHR 2004-II) whereas none of the present respondent States enjoyed any sovereign rights or authority over the territory of Kosovo (the above cited Opinion of the Venice Commission and Resolution of PACE). Any determination by this Court of a complaint against UNMIK/KFOR would also breach the Monetary Gold principle (cited at paragraph 67 above).

107. Even if the respondent States were found to have "jurisdiction", the impugned act could not be imputed to those States and, in this respect, the actual command structure was clearly determinative. Having regard to Article 6 of the ILC draft Articles on Responsibility of States for international wrongful acts, Article 5 of the ILC draft Articles on the Responsibility of International Organisations and the report of the Special Rapporteur to the ILC as regards the latter (see paragraphs 30-33 above), any damage caused by UN peacekeeping forces acting within their mandate would be attributable to the UN.

108. Finally, the difficulties to which post-conflict situations gave rise had to be recalled, notably the fact that full human rights' protection was not possible in such a reconstructive context. If TCNs feared their several liability if standards fell below those of the Convention, they might restrain from participating in such missions which would run counter to the spirit of the Convention and its jurisprudence which supported international cooperation and the proper functioning of international organisations (the above-cited cases of Banković and Others, at § 62, Ilașcu and Others, at § 332 and Bosphorus, at § 150).

4. The Greek Government

109. The legal basis for the civil and military presence in Kosovo was UNSC Resolution 1244. KFOR formed part, and acted in Kosovo under the direction, of a multinational framework formed by the UN and NATO. Even assuming that KFOR (along with UNMIK) exercised effective control in Kosovo, that presence was under the control of the UN and/or NATO and once the TCNs stayed within the relevant mandate they did not exercise any individual control or jurisdiction in Kosovo. Referring to the Opinion of the Venice Commission (cited at paragraph 50 above), the Government concluded that any action/inaction of KFOR was attributable to the UN and/or NATO and not to the respondent States.

5. The Polish Government

110. A State could not be held responsible for the activities of KFOR or UNMIK, those entities acted under the authority of the UN pursuant to UNSC Resolution 1244 and the UN could not be held accountable under the Convention. In providing resources and personnel to the UN (with a legal personality distinct from its member states), TCNs were not exercising governmental authority in Kosovo. The complaints were therefore incompatible ratione personae.

111. A finding that States were severally liable for participating in peacekeeping and democracy-building missions would have a devastating effect on such missions notably as regards the States' willingness to participate in such missions which result would run counter to the values of the UN Charter, the Statute of the Council of Europe and the Convention.

6. The Government of the United Kingdom

112. The applicants did not fall within the jurisdiction of the respondent States so the question of the attribution of actions to those States did not arise (Banković and Others decision, at § 75).

113. UNSC Resolution 1244 was adopted under Chapter VII of the UN Charter and, according to Article 103 of that Charter, the obligations of members states of the UN under that Resolution took priority over other international treaty obligations.

The administration of Kosovo was in the hands of the UN, via UNMIK and the SRSG, and that administration was not subject to the Convention. UNMIK was an international civil presence created by the UN in Kosovo answerable, via the SRSG, to the UNSC on its tasks set out in UNSC Resolution 1244. UNMIK was responsible for the civil administration of Kosovo and was therefore responsible for human rights matters. As to de-mining in particular, responsibility was that of UNMACC: regard was had to the terms of UNSC Resolution 1244, to the establishment of UNMACC and its taking de facto and then formal control of de-mining in August and October 1999, respectively. UNMACC being an agency of the UN, any allegation about de-mining could not engage the responsibility of France.

KFOR was a multinational and international security presence so that at no time did any respondent State exercise effective overall control over a part of Kosovo. The MNBs comprised contingents from many TCNs (including substantial contingents from States not parties to the Convention and from outside Europe) and were answerable to an overall commander ("unified command and control"). Even if a State was a "lead nation" of a MNB which controlled a particular sector, that gave that State no degree of control or authority over the inhabitants or territory of Kosovo. Neither
8. The UN. The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate adopted by the UNSC was an expression of the will of the member states, and the rather broad responsibilities of the UN were thus dependent on the cooperation and a genuine commitment to the principles of international law. KFOR was tasked with military operations, including the protection of human rights and the enforcement of security, while UNMIK’s role was focused on civil administration and the promotion of human rights. Both entities were expected to work closely together and to coordinate their activities.

114. Accordingly, the effect of UNSC Resolution 1244 was that, at the relevant time, the UNSC exercised the powers of government in Kosovo through an international administration supported by an international security presence to which the respondent States and other non-Contracting States had provided troops. None of the respondent States were therefore in a position to secure the rights and freedoms defined in Article 1 of the Convention to any of the inhabitants of Kosovo. None were asserting any power that could be considered as a matter of principle and run counter to the national interests of the States or engage the Convention responsibility of those States.

115. The application raised fundamental questions about the relationship between the Convention (a regional treaty and “constitutional instrument of European public order”) and the universal organisation. The construction of the relationship between the two was a matter of legitimate concern, particularly given the risk of serious difficulties to Contracting States in participating in UN and other multinational peacekeeping operations outside the territories of the Convention States.

116. To avoid this result, Article 1 should be interpreted to mean that, where officials from States act together within the scope of an international operation authorised by the UN, they are not bringing those affected within the jurisdiction of the States or engaging the Convention responsibility of those States. The Government of Portugal adopted the observations of the UK Government.

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CBU site marking. Accordingly, UNMIK's responsibility for de-mining was dependent on accurate information being available on locations and, since UNMACC was unaware of the location of the unmarked CBUs relevant to the present case, it took no action to de-mine.

120. In sum, while the de-mining operation would have fallen within UNMACC's mandate, in the absence of the necessary location information from KFOR, the impugned inaction could not be attributed to UNMIK.

E. The Court's assessment

121. The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity had a mandate to detain and de-mining was dependent on accurate information being available on locations and, since UNMACC was unaware of the location of the unmarked CBUs relevant to the present case, it took no action to de-mine. Secondly, it has examined whether the impugned action of KFOR (detention in the Saramati case) and inaction of UNMIK (failure to de-mine in the Behrami case) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then examined whether it is competent in law for the UN to take such action or omission found to be attributable to the UN.

122. The Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments: it must nevertheless examine whether there was a plausible basis for interpreting the Convention in the light of those provisions and, thereby, whether the impugned action and omission could be attributed to the UN. In this respect, the Court must take into account relevant rules of international law, including general principles of law (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969, Series A no. 258-B, § 72).

The entity with the mandate to detain and to de-mine

123. The respondent and third party States argued that it made no difference whether it was KFOR or UNMIK which had the mandate to detain (the Saramati case) and to de-mine (the Behrami case). The applicants maintained that KFOR had the mandate to detain, while UNMIK had the mandate to de-mine.

124. Having regard to the MTA (notably paragraph 2 of Annex 2 to paragraph 51 of the Resolution) and UN Resolution 1244, the Court notes that Article 9(e) of the UN Charter provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by the reference to UNMACC of UNMIK's security mandate under Article 11(6) of the Resolution. The Court considers that the impugned inaction could not be attributed to UNMIK since, in the absence of information, it took no action to de-mine.

125. As regards de-mining, the Court considers that Article 9(e) of UN Resolution 1244 provided UNMIK with the mandate to de-mine. The failure of UNMIK to take action in the absence of information was not attributable to UNMIK since it was acting in accordance with the provisions of the UN Charter and, thereby, of the UN and its agencies in their capacity as international organizations.
127. Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

2. Can the impugned action and inaction be attributed to the UN?

(a) The Chapter VII foundation for KFOR and UNMIK

128. As the first step in the application of Chapter VII, the UNSC Resolution 1244 referred expressly to Chapter VII and made the necessary identification of a “threat to international peace and security” within the meaning of Article 39 of the Charter (paragraph 23 above). The UNSC Resolution 1244, inter alia, recalled the UNSC’s “primary responsibility” for the “maintenance of international peace and security”. Being “determined to resolve the grave humanitarian situation in Kosovo” and to “provide for the safe and free return of all refugees and displaced persons to their homes”, it determined that the “situation in the region continues to constitute a threat to international peace and security” and, having expressly noted that it was acting under Chapter VII, it went on to set out the solutions found to the identified threat to peace and security.

129. The solution adopted by UNSC Resolution 1244 to this identified threat was, as noted above, the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

In particular, that Resolution authorised “Member States and relevant international organisations” to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution with all necessary means to fulfil its responsibilities listed in Article 9. Point 4 of Annex 2 added that the security presence would have “substantial [NATO] participation” and had to be deployed under “unified command and control”. The UNSC was thereby delegating to willing organisations and member states (see paragraph 43 as regards the meaning of the term “delegation” and paragraph 24 as regards the voluntary nature of this State contribution) the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command. In addition, the SG was authorised (Article 10) to establish UNMIK with the assistance of “relevant international organisations” and to appoint, in consultation with the UNSC, a SRSG to control its implementation (Articles 6 and 10 of the UNSC Resolution). The UNSC was thereby delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG. Its broad mandate (an interim administration while establishing and overseeing the development of provisional self-government) was outlined in Article 11 of the Resolution.

130. While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK (see generally and inter alia, White and Ulgen, “The Security Council and the Decentralised Military Option: Constitutionality and Function”, Netherlands Law Review 44, 1997, 386; Sarooshi, “The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers”, Oxford University (1999); Chesterman, “Just War or Just Peace: Humanitarian Intervention and International Law”, (2002) Oxford University Press, pp. 167-169 and 172); Zimmermann and Stahn, cited above; De Wet, “The Chapter VII Powers of the United Nations Security Council”, 2004, pp. 260-265; Wolfrum “International Administration in Post-Conflict Situations by the United Nations and other International Actors”, Max Planck UNYB Vol. 9 (2005), pp. 667-672; Friedrich, “UNMIK in Kosovo: struggling with Uncertainty”, Max Planck UNYB 9 (2005) and the references cited therein; and Prosecutor v. Duško Tadić, Decision of 2.10.95, Appeals Chamber of ICTY, §§ 35-36).

131. Whether or not the FRY was a UN member state at the relevant time (following the dissolution of the former Socialist Federal Republic of Yugoslavia), the FRY had agreed in the MTA to these presences. It is true that the MTA was signed by “KFOR” the day before the UNSC Resolution creating that force was adopted. However, the MTA was completed on the express basis of a security presence “under UN auspices” and with UN approval and the Resolution had already been introduced before the UNSC. The Resolution was adopted the following day, annexing the MTA and no international forces were deployed until the Resolution was adopted.

(b) Can the impugned action be attributed to KFOR?

132. While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN (as well as Chesterman, de Wet, Friedrich, Kolb and Sarooshi all cited above, see Gowlland-Debbas “The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance” EIL (2000) Vol 11, No. 2 369-370; Niels Blokker, “Is the authorisation Authorised? Powers and Practice of the UN Security Council

Those limits strike a balance between the central security role of the UNSC and two realities of its implementation. In the first place, the absence of Article 43 agreements which means that the UNSC relies on States (notably its permanent members) and groups of States to provide the necessary military means to fulfil its collective security role. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command.

133. The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the Article 43 agreements never concluded.

134. That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

In the first place, and as noted above, Chapter VII allowed the UNSC to delegate to “Member States and relevant international organisations”. Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions (see the UN submissions, paragraph 118 above) could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

While the text of Article 19 of UNSC Resolution 1244 meant that a veto by one permanent member of the UNSC could prevent termination of the relevant delegation, the Court does not consider this factor alone sufficient to conclude that the UNSC did not retain ultimate authority and control.

135. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR. NATO fulfilled its command mission via a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

136. This delegation model demonstrates that, contrary to the applicants’ argument at paragraph 77 above, direct operational command from the UNSC is not a requirement of Chapter VII collective security missions.

137. However, the applicants made detailed submissions to the effect that the level of TCN control in the present cases was such that it detached troops from the international mandate and undermined the unity of operational command. They relied on various aspects of TCN involvement including that highlighted by the Venice Commission (paragraph 50 above) and noted KFOR’s legal personality separate to that of the TCNs.

138. The Court considers it essential to recall at this point that the necessary (see paragraph 24 above) donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons, inter alia, of safety, discipline and accountability) and certain obligations in their regard (material provision including uniforms and equipment). NATO’s command of operational matters was not therefore intended to be exclusive, but the essential question was whether, despite such TCN involvement, it was “effective” (ILC Report cited at paragraph 32 above).

139. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO’s operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter. Equally there is no reason to consider that the TCN structural involvement highlighted by the applicants undermined the effectiveness of NATO’s operational control. Since TCN troop contributions are in law voluntary, the continued level of national deployment is equally so. That TCNs provided materially for their troops would have no relevant impact on NATO’s operational control. It was not argued that any NATO rules of engagement imposed would not be respected. National command (over own troops or a sector in Kosovo) was under the direct operational authority of COMKFOR. While individual claims might potentially be treated differently depending on which TCN was the source of the alleged problem (national commanders decided on whether immunity was to be waived, TCNs had exclusive jurisdiction in (at least) disciplinary and criminal matters, certain TCNs had put in place their own TCNCOs and at least one TCN accepted civil jurisdiction (the above-cited Bici case)), it has not been explained how this, of itself, could undermine the effectiveness or unity of NATO command in operational matters. The Court does not see how the failure to conclude a SOFA
between the UN and the host FRY could affect, as the applicants suggested, NATO's operational command. That COMKFOR was charged (the applicants at paragraph 78 above) exclusively with issuing legal orders under Article 51 of the UN Charter, whereas the CONAIKFOR operated under Article 55 of the Statute of the UNRRA, the applicants argued, meant that the decisions of COMKFOR and CONAIKFOR were made with a different objective in mind. The Court of Human Rights in Strasbourg (see the judgment of 25 April 2002 in the cases of Geschiere v. Belgium, App. Nos. 57727/00 and 58085/00, and Van der Heijden v. the Netherlands, App. No. 64657/00). The Court therefore concluded that while the State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue specific purposes, it was required to make sure that the organisation was subject to the control and supervision of the host country, and that any such organisation was established under the Convention and the laws and regulations of the host country.

140. Accordingly, even if the UN itself would accept that there is room for progress in cooperation and command structures between the UNSC, UN, and contributing international organisations, it must be noted that the Court cannot be asked to review the policies of the UN. The Court can, however, examine whether the actions of the UN are in line with the Convention. In such circumstances, the Court observes that KFOR was exercising lawfully delegated powers of Chapter VII so that the impugned action was, in principle, “attributable” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

141. In such circumstances, the Court observes that KFOR was exercising lawfully delegated powers of Chapter VII so that the impugned action was, in principle, “attributable” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above. The question arises in the present case whether the Court is competent to review the actions of the respondent States carried out on behalf of the UN and, more generally, to the relationship between the UN and the NATO forces in the area of command.

142. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. UNMIK was established under Chapter VII of the UN Charter, and its mandate was to implement the provisions of the Dayton Accords. The Court has already observed that, in such circumstances, the Court would be justified in examining the actions of UNMIK. In such circumstances, the Court observes that the impugned action was, in principle, “attributable” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above. The question arises in the present case whether the Court is competent to review the actions of the respondent States carried out on behalf of the UN and, more generally, to the relationship between the UN and the NATO forces in the area of command.

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represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfill this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

150. The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not “equivalent” to that under the Convention within the meaning of the Court's Bosphorus judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

151. The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the Bosphorus case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably ratione personae, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the Bosphorus case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence ratione personae.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was then concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

152. In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible ratione personae with the provisions of the Convention.

4. Remaining admissibility issues

153. In light of the above conclusion, the Court considers that it is not necessary to examine the remaining submissions of the parties on the admissibility of the application including on the competence ratione loci of the Court to examine complaints against the respondent States about extra-territorial acts or omissions, on whether the applicants had exhausted any effective remedies available to them within the meaning of Article 35 § 1 of the Convention and on whether the Court was competent to consider the case given the principles established by the above-cited Monetary Gold judgment (the above-cited cited Banković and Others decision, at § 83).

For these reasons, the Court

Decides, unanimously, to strike the Saramati application against Germany out of its list of cases.

Declares, by a majority, inadmissible the application of Behrami and Behrami and the remainder of the Saramati application against France and Norway.

Christos Rozakis
President

Michael O'Boyle
Deputy Registrar
APPENDIX

List of Abbreviations

- CBU: Cluster Bomb Unit
- CFI: Court of First Instance of the European Communities
- CIC SOUTH: Commander in Chief of Allied Forces Southern Europe
- COMKFOR: Commander of KFOR
- CPT: Committee for the Prevention of Torture and Inhuman and Degrading Treatment, Council of Europe
- DSRSG – Deputy Special Representative to the Secretary General, UN
- EU: European Union
- FRAGO: Fragmentary Order
- FRY: Federal Republic of Yugoslavia
- ICJ: International Court of Justice
- ICTY: International Criminal Tribunal for the former Yugoslavia
- ILC: International Law Commission
- KCO: Kosovo Claims Office
- KFOR: Kosovo Force
- MAP: Mine Action Programme
- MNB: Multinational Brigade
- MTA: Military Technical Agreement
- NAC: North Atlantic Council, NATO
- NATO: North Atlantic Treaty Organisation
- OPLAN: Operational Plan
- OSCE: Organisation for Security and Co-operation in Europe
- PACE: Parliamentary Assembly, Council of Europe
- SACEUR: Supreme Allied Commander Europe, NATO
- SG: Secretary General, UN
- SHAPE – Supreme Headquarters Allied Powers Europe, NATO
- SOFA: Status of Forces Agreement
- SOP: Standing Operating Procedures
- SRSR: Special Representative to the Secretary General, UN
- TCN: Troop Contributing Nation
- TCNCO: Troop Contributing Nation Claims' Office
- UN: United Nations
- UNHCR: United Nations High Commissioner for Refugees
- UNMACC: United Nations Mine Action Co-ordination Centre
- UNMAS: United Nations Mine Action Service
- UNMIK: United Nations Interim Administration Mission in Kosovo
- UNICEF: United Nations Children's Fund
- UNPROFOR: United Nations Protection Force
- UNTAC: United Nations Transitional Administration for Cambodia
- UNTAES: United Nations Transitional Administration for Eastern Slavonia
- UNTAET: United Nations Transitional Administration for East Timor
- Venice Commission – European Commission for Democracy through Law, Council of Europe
The Hague, The Netherlands
1 – 2 August 2013

DIPLOMATIC AND CONSULAR RELATIONS
PROFESSOR PIERRE BODEAU-LIVINEC

Codification Division of the United Nations Office of Legal Affairs

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Legal Instruments and documents

1. Vienna Convention on Diplomatic Relations and Optional Protocols, 1961
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 43
2. Vienna Convention on Consular Relations and Optional Protocols, 1963
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 63
3. Convention on Special Missions and Optional Protocol, 1969
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   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 146
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 284

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6. United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),
   Request for the Indication of Provisional Measures, Order, I.C.J. Reports 1979, p. 7
7. United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran),
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8. LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, pp. 472-480,
   paras. 11-34, pp. 489-498, paras. 65-91
9. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment,
   I.C.J. Reports 2002, pp. 9-14, paras. 13-28, pp. 16-34, paras. 37-78
10. Avena and Other Mexican Nationals (Mexico v. United States of America), Request for the
    Indication of Provisional Measures, Order, I.C.J. Reports 2003, p. 77
11. Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J.
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12. Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena
    and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of
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International Court of Justice

United States Diplomatic and Consular Staff in Tehran
(United States of America v. Iran)
Request for the Indication of Provisional Measures Order

I.C.J. Reports 1979
CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN
(UNITED STATES OF AMERICA v. IRAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 15 DECEMBER 1979

1979

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PERSONNEL DIPLOMATIQUE ET CONSULAIRE DES ÉTATS-UNIS A TÉHÉRAN
(ÉTATS-UNIS D'AMÉRIQUE c. IRAN)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ORDONNANCE DU 15 DÉCEMBRE 1979

INTERNATIONAL COURT OF JUSTICE

15 December
General List
No. 64

1979

INTERNATIONAL COURT OF JUSTICE

YEAR 1979

15 December 1979

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN
(UNITED STATES OF AMERICA v. IRAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President Sir Humphrey WALDOCK; Vice-President ELIAS; Judges FORSTER, GROS, LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, TARAzi, ODA, AGO, EL-ERIAN, SETTE-CAMARA, BAXTER; Registrar AQUARONE.

The International Court of Justice,

Composed as above,

After deliberation,

1. Having regard to Articles 41 and 48 of the Statute of the Court,
2. Having regard to Articles 73 and 74 of the Rules of Court,
3. Having regard to the Application by the United States of America filed in the Registry of the Court on 29 November 1979, instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the situation in the United States Embassy in Tehran and the seizure and holding as hostages of members of the United States diplomatic and consular staff in Iran;

Makes the following Order:

1. Whereas in the above-mentioned Application the United States Government invokes jurisdictional provisions in certain treaties as bases
for the Court's jurisdiction in the present case; whereas it further recounts a sequence of events, beginning on 4 November 1979 in and around the United States Embassy in Tehran and involving the invasion of the Embassy premises, the seizure of United States diplomatic and consular staff and their continued detention; and whereas, on the basis of the facts there alleged, it requests the Court to adjudge and declare:

"(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts [in the Application], violated its international legal obligations to the United States as provided by

- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and

- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates";

2. Having regard to the request dated 29 November 1979 and filed in the Registry the same day, whereby the Government of the United States of America, relying on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, asks the Court urgently to indicate, pending the final decision in the case brought before it by the above-mentioned Application of the same date, the following provisional measures:

"(a) That the Government of Iran immediately release all hostages of United States nationality and facilitate the prompt and safe departure from Iran of these persons and all other United States officials in dignified and humane circumstances.

(b) That the Government of Iran immediately clear the premises of the United States Embassy, Chancery and Consulate of all persons whose presence is not authorized by the United States Chargé d'Affaires in Iran, and restore the premises to United States control.

(c) That the Government of Iran ensure that all persons attached to the United States Embassy and Consulate should be accorded, and protected in, full freedom within the Embassy and Chancery premises, and the freedom of movement within Iran necessary to carry out their diplomatic and consular functions.

(d) That the Government of Iran not place on trial any person attached to the Embassy and Consulate of the United States and refrain from any action to implement any such trial.

(e) That the Government of Iran ensure that no action is taken which might prejudice the rights of the United States in respect of the carrying out of any decision which the Court may render on the merits, and in particular neither take nor permit action that would threaten the lives, safety, or well-being of the hostages";

3. Whereas, on the day on which the Application and request for indication of provisional measures were received in the Registry, the Government of Iran was notified by telegram of the filing of the Application and request, and of the particular measures requested, and copies of both documents were transmitted by express airmail to the Minister for Foreign Affairs of Iran;

4. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the Application were transmitted to Members of the United Nations and to other States entitled to appear before the Court;

5. Whereas on 6 December 1979 the Registrar addressed the notification provided for in Article 63 of the Statute of the Court to the States, other than the parties to the case, which were listed in the relevant documents of the United Nations Secretariat as parties to the following conventions, invoked in the Application:
(i) the Vienna Convention on Diplomatic Relations of 1961, and the accompanying Optional Protocol concerning the Compulsory Settlement of Disputes;

(ii) the Vienna Convention on Consular Relations of 1963, and the accompanying Optional Protocol concerning the Compulsory Settlement of Disputes;


6. Whereas on 30 November 1979, pending the meeting of the Court, the President, in exercise of the power conferred on him by Article 74, paragraph 4, of the Rules of Court, addressed a telegram to each of the two Governments concerned calling attention to the fact that the matter was now sub judice before the Court and to the need to act in such a way as would enable any Order the Court might make in the present proceedings to have its appropriate effects; and whereas by those telegrams the two governments were, in addition, informed that the Court would hold public hearings at an early date at which they might present their observations on the request for provisional measures, and that the projected date for such hearings was 10 December 1979, this date being later confirmed by further telegrams of 3 December 1979.

7. Whereas, in preparation for the hearings, the President put certain preliminary questions to the Agent of the United States Government by a telegram of 4 December 1979, a copy of which was communicated on the same date to the Government of Iran; whereas, in response to those questions the United States Agent on 7 December 1979 submitted to the Court a declaration by Mr. David D. Newsom, Under-Secretary of State for Political Affairs, together with certain documents appended thereto; and whereas copies of that letter and the declaration and documents accompanying it were immediately transmitted to the Government of Iran.

8. Whereas on 9 December 1979 a letter, dated the same day and transmitted by telegram, was received from the Minister for Foreign Affairs of Iran, which reads as follows:

[Translation from French]

I have the honour to acknowledge receipt of the telegrams concerning the meeting of the International Court of Justice on 10 December 1979, at the request of the Government of the United States of America, and to submit to you below the position of the Government of the Islamic Republic of Iran in this respect.

1. First of all, the Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished members, for what they have achieved in the quest for just and equitable solutions to legal conflicts between States.

However, the Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in a most significant fashion, a case confined to what is called the question of the “hostages of the American Embassy in Tehran”.

2. For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

3. The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, inter alia, all the crimes perpetrated in Iran by the American Government, in particular the coup d'état of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadeghi, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural, and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.

4. With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interests of the parties, they cannot be unilateral, as they are in the request submitted by the American Government.

In conclusion, the Government of the Islamic Republic of Iran respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic revolution of Iran, a revolution of a wholly oppressed nation against its oppressors and their masters; any examination of the numerous repercussions thereof is a matter essentially and directly within the national sovereignty of Iran.

9. Whereas both the Government of the United States of America and
the Government of Iran have been afforded an opportunity of presenting
their observations on the request for the indication of provisional mea-
sures.

10. Whereas at the public hearing held on 10 December 1979 there were
present in Court the Agent, counsel and adviser of the United States of
America;

11. Having heard the oral observations on the request for provisional
measures on behalf of the United States of America presented by the
Honorable Roberts B. Owen, Agent, and the Honorable Benjamin R.
Civiletti, Attorney-General of the United States, as counsel, and taking
note of the replies given on behalf of that Government to further questions
put at the conclusion of the hearing by the President of the Court and by
two Members of the Court;

12. Having taken note that the final submissions of the United States of
America filed in the Registry on 12 December 1979, following the hearing
of 10 December 1979, were to the effect that the Government of the United
States requests that the Court, pending final judgment in this case, indicate
forthwith the following measures:

"First, that the Government of Iran immediately release all hos-
tages of United States nationality and facilitate the prompt and safe
departure from Iran of these persons and all other United States
officials in dignified and humane circumstances.

Second, that the Government of Iran immediately clear the
premises of the United States Embassy, Chancery and Consulate in
Tehran of all persons whose presence is not authorized by the United
States Chargé d’Affaires in Iran, and restore the premises to United
States control.

Third, that the Government of Iran ensure that, to the extent that
the United States should choose, and Iran should agree, to the con-
tinued presence of United States diplomatic and consular personnel in
Iran, all persons attached to the United States Embassy and Consu-
lates should be accorded, and protected in, full freedom of movement,
as well as the privileges and immunities to which they are entitled,
necessary to carry out their diplomatic and consular functions.

Fourth, that the Government of Iran not place on trial any person
attached to the Embassy and Consulates of the United States and
refrain from any action to implement any such trial; and that the
Government of Iran not detain or permit the detention of any such
person in connection with any proceedings, whether of an ‘interna-
tional commission’ or otherwise, and that any such person not be
required to participate in any such proceeding.

Fifth, that the Government of Iran ensure that no action is taken
which might prejudice the rights of the United States in respect of
carrying out of any decision which the Court may render on the
merits, and, in particular neither take, nor permit, action that would
threaten the lives, safety, or well-being of the hostages";

13. Noting that the Government of Iran was not represented at the
hearing; and whereas the non-appearance of one of the States concerned
cannot by itself constitute an obstacle to the indication of provisional
measures;

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14. Whereas the treaty provisions on which, in its Application and oral
observations, the United States Government claims to found the jurisdic-
tion of the Court to entertain the present case are the following:

(i) the Vienna Convention on Diplomatic Relations of 1961, and Arti-
cle I of its accompanying Optional Protocol concerning the Com-
 pulsory Settlement of Disputes;

(ii) the Vienna Convention on Consular Relations of 1963, and Article
I of its accompanying Optional Protocol concerning the Compulsory
Settlement of Disputes;

(iii) Article XXI, paragraph 2, of the Treaty of Amity, Economic Rela-
tions, and Consular Rights of 1955 between the United States of
America and Iran; and

(iv) Article 13, paragraph 1, of the Convention of 1973 on the Prevention
and Punishment of Crimes against Internationally Protected Per-
sons, including Diplomatic Agents;

15. Whereas on the request for provisional measures in the present case
the Court ought to indicate such measures only if the provisions invoked by
the Applicant appear, prima facie, to afford a basis on which the jurisdic-
tion of the Court might be founded;

16. Whereas, so far as concerns the rights claimed by the United States
of America with regard to the personnel and premises of its Embassy and
Consulates in Iran, Article I of each of the two Protocols which accompany
the Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and
Consular Relations provides expressly that:

"Disputes arising out of the interpretation or application of the
Convention shall lie within the compulsory jurisdiction of the Inter-
national Court of Justice and may accordingly be brought before the
Court by an application made by any party to the dispute being a
Party to the present Protocol";

whereas the United Nations publication Multilateral Treaties in respect of
which the Secretary-General Performs Depository Functions lists both Iran
and the United States as parties to each of the two Conventions, as also to each of their Protocols concerning the compulsory settlement of disputes, and in all cases without any reservation to the instrument in question;

17. Whereas, while it is true that Articles II and III of the above-mentioned Protocols provide for the possibility for the parties to agree, under certain conditions, to resort not to the International Court of Justice but to an arbitral tribunal or to a conciliation procedure, no such agreement was reached by the parties; and whereas the terms of Article I of the Optional Protocols provide in the clearest manner for the compulsory jurisdiction of the International Court of Justice in respect of any dispute arising out of the interpretation or application of the above-mentioned Vienna Conventions;

18. Whereas, accordingly, it is manifest from the information before the Court and from the terms of Article I of each of the two Protocols that the provisions of these articles furnish a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States under the Vienna Conventions of 1961 and 1963;

19. Whereas, so far as concerns the rights claimed by the United States with regard to two of its nationals who, according to the declaration by Mr. David D. Newsom referred to in paragraph 7 above, are not personnel either of its diplomatic or of its consular mission, it appears from the statements of the United States Government that these two private individuals were seized and are detained as hostages within the premises of the United States Embassy or Consulate in Tehran; whereas it follows that the seizure and detention of these individuals also fall within the scope of the applicable provisions of the Vienna Conventions of 1961 and 1963 relating to the inviolability of the premises of Embassies and Consulates; whereas, furthermore, the seizure and detention of these individuals in the circumstances alleged by the United States clearly fall also within the scope of the provisions of Article 5 of the Vienna Convention of 1963 expressly providing that consular functions include the functions of protecting, assisting and safeguarding the interests of nationals; and whereas the purpose of these functions is precisely to enable the sending State, through its consulates, to ensure that its nationals are accorded the treatment due to them under the general rules of international law as aliens within the territory of the foreign State;

20. Whereas, accordingly, it is likewise manifest that Article I of the Protocols concerning the compulsory settlement of disputes which accompany the Vienna Conventions of 1961 and 1963 furnishes a basis on which the jurisdiction of the Court might be founded with regard to the claims of the United States in respect of the two private individuals in question;

21. Whereas, therefore, the Court does not find it necessary for present purposes to enter into the question whether a basis for the exercise of its powers under Article 41 of the Statute might also be found under Article XXI, paragraph 2, of the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and Article 13, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

22. Whereas, on the other hand, in the above-mentioned letter of 9 December 1979 the Government of Iran maintains that the Court cannot and should not take cognizance of the present case, for the reason that the question of the hostages forms only “a marginal and secondary aspect of an overall problem” involving the activities of the United States in Iran over a period of more than 25 years; and whereas it further maintains that any examination of the numerous repercussions of the Islamic revolution of Iran is essentially and directly a matter within the national sovereignty of Iran;

23. Whereas, however important, and however connected with the present case, the iniquities attributed to the United States Government by the Government of Iran in that letter may appear to be to the latter Government, the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot, in the view of the Court, be regarded as something “secondary” or “marginal”, having regard to the importance of the legal principles involved; whereas the Court notes in this regard that the Secretary-General of the United Nations has indeed referred to these occurrences as “a grave situation” posing “a serious threat to international peace and security” and that the Security Council in resolution 457 (1979) expressed itself as deeply concerned at the dangerous level of tension between the two States, which could have grave consequences for international peace and security;

24. Whereas, moreover, if the Iranian Government considers the alleged activities of the United States in Iran legally to have a close connection with the subject matter of the United States Application, it remains open to that Government under the Court’s Statute and Rules to present its own arguments to the Court regarding those activities either by way of defence in a Counter-Memorial or by way of a counter-claim filed under Article 80 of the Rules of Court; whereas, therefore, by not appearing in the present proceedings, the Government of Iran, by its own choice, deprives itself of the opportunity of developing its own arguments before the Court and of itself filing a request for the indication of provisional measures; and whereas no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important;

25. Whereas it is no doubt true that the Islamic revolution of Iran is a
matter "essentially and directly within the national sovereignty of Iran"; whereas however a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction;

26. Whereas accordingly the two considerations advanced by the Government of Iran in its letter of 9 December 1979 cannot, in the view of the Court, be accepted as constituting any obstacle to the Court's taking cognizance of the case brought before it by the United States Application of 29 November 1979;

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27. Whereas in that same letter of 9 December 1979 the Government of Iran also puts forward two considerations on the basis of which it contends that the Court ought not, in any event, to accede to the United States request for provisional measures in the present case;

28. Whereas, in the first place, it maintains that the request for provisional measures, as formulated by the United States, "in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it"; whereas it is true that in the Factory at Chorzów case the Permanent Court of International Justice declined to indicate interim measures of protection on the ground that the request in that case was "designed to obtain an interim judgment in favour of a part of the claim" (Order of 21 November 1927, P.C.I.J., Series A, No. 12, at p. 10); whereas, however, the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money; whereas, moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and whereas in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims pendente lite;

29. Whereas, in the second place, the Government of Iran takes the position that "since provisional measures are by definition intended to protect the interests of the parties they cannot be unilateral"; whereas, however, the hypothesis on which this proposition is based does not accord with the terms of Article 41 of the Statute which refer explicitly to "any provisional measures which ought to be taken to preserve the respective rights of either party"; whereas the whole concept of an indication of provisional measures, as Article 73 of the Rules recognizes, implies a request from one of the parties for measures to preserve its own rights against action by the other party calculated to prejudice those rights pendente lite; whereas it follows that a request for provisional measures is by its nature unilateral; and whereas the Government of Iran has not appeared before the Court in order to request the indication of provisional measures; whereas, however, the Court, as it has recognized in Article 75 of its Rules, must at all times be alert to protect the rights of both the parties in proceedings before it and, in indicating provisional measures, has not infrequently done so with reference to both the parties; and whereas this does not, and cannot, mean that the Court is precluded from entertaining a request from a party merely by reason of the fact that measures which it requests are unilateral;

30. Whereas, accordingly, neither of the considerations put forward in the Iranian Government's letter of 9 December 1979 can be regarded as constituting grounds which should lead the Court to decline to entertain the United States request in the present case;

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31. Whereas it follows that the Court has not found in the Iranian Government's letter of 9 December 1979 legal grounds which should lead it to conclude that it ought not to entertain the United States request;

* 

32. Whereas the Court will accordingly now proceed to examine the request of the United States Government for the indication of provisional measures in the present case;

33. Whereas by the terms of Article 41 of the Statute the Court may indicate such measures only when it considers that circumstances so require in order to preserve the rights of either party;

34. Whereas the circumstances alleged by the United States Government which, in the submission of that Government, require the indication of provisional measures in the present case may be summarized as follows:

(i) On 4 November 1979, in the course of a demonstration outside the United States Embassy compound in Tehran, demonstrators attacked the Embassy premises; no Iranian security forces intervened or were sent to relieve the situation, despite repeated calls for help from the Embassy to the Iranian authorities. Ultimately the whole of the Embassy premises was invaded. The Embassy personnel, including consular and non-American staff, and visitors who were present in the Embassy at the time were seized. Shortly afterwards, according to the United States Government, its consulates in Tabriz and Shiraz, which
had been attacked earlier in 1979, were also seized, without any action being taken to prevent it.

(ii) Since that time, the premises of the United States Embassy in Tehran, and of the consulates in Tabriz and Shiraz, have remained in the hands of the persons who seized them. These persons have ransacked the archives and documents both of the diplomatic mission and of its consular section. The Embassy personnel and other persons seized at the time of the attack have been held hostage with the exception of 13 persons released on 18 and 20 November 1979. Those holding the hostages have refused to release them, save on condition of the fulfilment by the United States of various demands regarded by it as unacceptable. The hostages are stated to have frequently been bound, blindfolded, and subjected to severe discomfort, complete isolation and threats that they would be put on trial or even put to death. The United States Government affirms that it has reason to believe that some of them may have been transferred to other places of confinement.

(iii) The Government of the United States considers that not merely has the Iranian Government failed to prevent the events described above, but also that there is clear evidence of its complicity in, and approval of, those events.

(iv) The persons held hostage in the premises of the United States Embassy in Tehran include, according to the information furnished to the Court by the Agent of the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "member of the administrative and technical staff" within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Embassy.

(v) In addition to the persons held hostage in the premises of the Tehran Embassy, the United States Chargé d'Affaires in Iran and two other United States diplomatic agents are detained in the premises of the Iranian Ministry of Foreign Affairs, in circumstances which the Government of the United States has not been able to make entirely clear, but which apparently involve restriction of their freedom of movement, and a threat to their inviolability as diplomats.

35. Whereas on the basis of the above circumstances alleged by the United States Government it claims in the Application that the Government of Iran has violated and is violating a number of the legal obligations imposed upon it by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of 1955, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, the Charter of the United Nations, and customary international law;

36. Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings;

37. Whereas the rights which the United States of America submits as entitled to protection by the indication of provisional measures were specified in the request of 29 November 1979 as:

"the rights of its nationals to life, liberty, protection and security; the rights of inviolability, immunity and protection for its diplomatic and consular officials; and the rights of inviolability and protection for its diplomatic and consular premises";

and at the hearing of 10 December 1979 as:

"the right of the United States of America to maintain a working and effective embassy in Tehran, the right to have its diplomatic and consular personnel protected in their lives and persons, as well as in the respect for their freedom of movement, and the right to have its nationals protected and secure";

and whereas the measures requested by the United States for the protection of these rights are as set out in paragraphs 2 and 12 above;

38. Whereas there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function;

39. Whereas the institution of diplomacy, with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means;

40. Whereas the unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less
important in the context of present-day international law, in promoting
the development of friendly relations among nations, and ensuring pro-
tection and assistance for aliens resident in the territories of other States;
and whereas therefore the privileges and immunities of consular officers
and consular employees, and the inviolability of consular premises and
archives, are similarly principles deep-rooted in international law;

41. Whereas, while no State is under any obligation to maintain dip-
loomatic or consular relations with another, yet it cannot fail to recognize
the imperative obligations inherent therein, now codified in the Vienna
Conventions of 1961 and 1963, to which both Iran and the United States
are parties;

42. Whereas continuance of the situation the subject of the present
request exposes the human beings concerned to privation, hardship,
anguish and even danger to life and health and thus to a serious possibility
of irreparable harm;

43. Whereas in connection with the present request the Court cannot
fail to take note of the provisions of the Convention on the Prevention
and Punishment of Crimes against Internationally Protected Persons,
including Diplomatic Agents, of 1973, to which both Iran and the United States
are parties;

44. Whereas in the light of the several considerations set out above, the
Court finds that the circumstances require it to indicate provisional mea-
sures, as provided by Article 41 of the Statute of the Court, in order to
preserve the rights claimed;

* *

45. Whereas the decision given in the present proceedings in no way
prejudges the question of the jurisdiction of the Court to deal with
the merits of the case or any questions relating to the merits themselves, and
leaves unaffected the right of the Government of Iran to submit arguments
against such jurisdiction or in respect of such merits;

* *

46. Whereas the Court will therefore now proceed to indicate the mea-
sures which it considers are required in the present case;

47. Accordingly,
The COURT,
unanimously,

1. Indicates, pending its final decision in the proceedings instituted on
29 November 1979 by the United States of America against the Islamic
Republic of Iran, the following provisional measures:

A. (i) The Government of the Islamic Republic of Iran should immedi-
ately ensure that the premises of the United States Embassy, Chancery
and Consulates be restored to the possession of the United States
authorities under their exclusive control, and should ensure their
inviolability and effective protection as provided for by the treaties in
force between the two States, and by general international law;

(ii) The Government of the Islamic Republic of Iran should ensure the
immediate release, without any exception, of all persons of United
States nationality who are or have been held in the Embassy of the
United States of America or in the Ministry of Foreign Affairs in
Tehran, or have been held as hostages elsewhere, and afford full pro-
tection to all such persons, in accordance with the treaties in force
between the two States, and with general international law;

(iii) The Government of the Islamic Republic of Iran should, as from
that moment, afford to all the diplomatic and consular personnel of the
United States the full protection, privileges and immunities to which
they are entitled under the treaties in force between the two States, and
under general international law, including immunity from any form of
criminal jurisdiction and freedom and facilities to leave the territory of
Iran;

B. The Government of the United States of America and the Government
of the Islamic Republic of Iran should not take any action and should
ensure that no action is taken which may aggravate the tension between
the two countries or render the existing dispute more difficult of solution;

2. Decides that, until the Court delivers its final judgment in the present
case, it will keep the matters covered by this Order continuously under
review.

Done in English and in French, the English text being authoritative, at
the Peace Palace, The Hague, this fifteenth day of December, one thousand
nine hundred and seventy-nine, in four copies, of which one will be placed
in the archives at the Court, and the others transmitted respectively to the
Government of the Islamic Republic of Iran, to the Government of the
United States of America, and to the Secretary-General of the United
Nations for transmission to the Security Council.

(Signed) Humphrey WALDOCK,
President.

(Signed) S. AQUARONE,
Registrar.
International Court of Justice

United States Diplomatic and Consular Staff in Tehran
(United States of America v. Iran)
Judgment

I.C.J. Reports 1980
1980

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA v. IRAN)

JUDGMENT OF 24 MAY 1980

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INTERNATIONAL COURT OF JUSTICE

YEAR 1980

24 May 1980

CASE CONCERNING UNITED STATES
DIPLOMATIC AND CONSULAR STAFF
IN TEHRAN

(UNITED STATES OF AMERICA v. IRAN)

Article 53 of the Statute — Proof of Facts — Admissibility of Proceedings — Existence of wider political dispute no bar to legal proceedings — Security Council proceedings no restriction on functioning of the Court — Fact-finding commission established by Secretary-General.


State responsibility for violations of Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations — Action by persons not acting on behalf of State — Non-imputability thereof to State — Breach by State of obligation of protection — Subsequent decision to maintain situation so created on behalf of State — Use of situation as means of coercion.

Question of special circumstances as possible justification of conduct of State — Remedies provided for by diplomatic law for abuses.

Cumulative effect of successive breaches of international obligations — Fundamental character of international diplomatic and consular law.

JUDGMENT

Present: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Morozov, Nangedra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-erian, Sette-Camara, Baxter; Registrar Aquarone.

In the case concerning United States Diplomatic and Consular Staff in Tehran, between

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State, as Agent,

H.E. Mrs. Geri Joseph, Ambassador of the United States of America to the Netherlands, as Deputy Agent,

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State, as Deputy Agent and Counsel,

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States of America, as Deputy Agent,

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State,

Mr. Ted L. Stein, Attorney-Adviser, Department of State,

Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America, as Advisers,

and

the Islamic Republic of Iran,

THE COURT, composed as above, delivers the following Judgment:

1. On 29 November 1979, the Legal Adviser of the Department of State of the United States of America handed to the Registrar an Application instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the
Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41 and 42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 5 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depository were parties to one or more of the following Conventions and Protocols:

(a) the Vienna Convention on Diplomatic Relations of 1961;
(b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(c) the Vienna Convention on Consular Relations of 1963;
(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America:

in the Application:

"The United States requests the Court to adjudge and declare as follows:

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations;
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations;
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates";

in the Memorial:

"The Government of the United States respectfully requests that the Court adjudge and declare as follows:

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations;
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- Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran; and
- Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(b) that, pursuant to the foregoing international legal obligations:

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a ‘trial’, ‘grand jury’, ‘international commission’ or otherwise;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings.”

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of the Government of Iran was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court’s Order of 15 December 1979, I.C.J. Reports 1979, pp. 10-11); the second was a letter transmitted by telex dated 16 March 1980 and received on 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows:

[Translation from French]

“I have the honour to acknowledge receipt of the telegram concerning the meeting of the International Court of Justice to be held on 17 March 1980 at the request of the Government of the United States of America, and to set forth for you below, once again, the position of the Government of the Islamic Republic of Iran in that respect:

The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the ‘hostages of the American Embassy in Tehran’.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon
which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.

With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government."

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

* * *

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required inter alia to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the Corfu Channel case that this requirement is to be understood as applying within certain limits:

"While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded." (I.C.J. Reports 1949, p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.

They have been presented to the Court by the United States in its Memorial, in statements of its Agent and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a "Statement of Verification" made by a high official of the United States Department of State having "overall responsibility within the Department for matters relating to the crisis in Iran". While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court's information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

13. The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities. So far as newspaper, radio and television reports emanating from Iran are concerned, the Court has necessarily in some cases relied on translations into English supplied by the Applicant. The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case. This information, as well as the United States Memorial and the records of the oral proceedings, has all been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States. Accordingly, the Court is satisfied that, within the meaning of Article 53 of the Statute, the allegations of fact on which the United States bases its claims in the present case are well founded.

* * *

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed; serious damage was caused to the Embassy and there were some acts of
pillaging of the Ambassador's residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan, expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and inter alia result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d'affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d'affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfill its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personnel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uniformed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d'affaires, who informed Washington that the Chief was "taking his job of protecting the Embassy very seriously". It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d'affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises. The invading group (who subsequently described themselves as "Muslim Student Followers of the Imam's Policy", and who will hereafter be referred to as "the militants") gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d'affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister's Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d'affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian secu-
rity forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government “to prevent clashes”, they considered that their task was merely to “protect the safety of both the hostages and the students”, according to statements subsequently made by the Iranian Government’s spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran of the USSR by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.

21. The premises of the United States Embassy in Tehran have remained in the hands of militants; and the same appears to be the case with the Consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18-20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to “hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran”.

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of “member of the diplomatic staff” within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of “member of the administrative and technical staff” within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows: at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d’affaires in Tehran and the other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that “as the protection of foreign nationals is the duty of the Iranian Government”, the Chargé d’affaires was “staying in” the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that “it has been announced that, if the U.S. Embassy’s chargé d’affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them”.

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that “as soon as they leave the ministry precincts they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried”. The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that “Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini]; in case there is no clear decision by the
imam of the nation, the Revolution Council will make a decision on this matter.”

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that “the U.S. Embassy in Iran is our enemies’ centre of espionage against our sacred Islamic movement”, and the message continued:

“Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation.”

Subsequently, despite the efforts of the United States Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court’s examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70-74 below).

* * *

28. On 9 November 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the “sanctity of diplomatic personnel and establishments”. The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council “in an effort to seek a peaceful solution to the problem”. The Security Council met on 27 November and 4 December 1979; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures to that end. It further stated that the Council would “remain actively seized of the matter” and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council’s resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission to undertake a “fact-finding mission” to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

* * *

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United
States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d’affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took other action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 10 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting); as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran — one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view to “designing a program against Iran for the hostages, the hostage families and other U.S. claimants” involving the preparation of legislation “to facilitate processing and paying of these claims” and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the nights of 24–25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that preparations for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter’s announcement and of certain other

official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, “pursuant to Article 51 of the Charter of the United Nations”. In that report, the United States maintained that the mission had been carried out by it “in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy”. The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

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33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, proprio motu, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the “deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters”. The examination of the “numerous repercussions” of the revolution, it added, is “a matter essentially and directly within the national sovereignty of Iran”. However, as the Court pointed out in its Order of 15 December 1979, “a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction” (I.C.J. Reports 1979, p. 16, para. 25).

In its letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.
35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is "confined to what is called the question of the 'hostages of the American Embassy in Tehran'." It then went on to explain why it considered this to preclude the Court from taking cognizance of the case:

"For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, inter alia, all the crimes perpetrated in Iran by the American Government, in particular the coup d'etat of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem". Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979. It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States' Application cannot be examined by the Court separately from what it describes as the "overall problem" involving "more than 25 years of continual interference by the United States in the internal affairs of Iran". Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the "overall problem" of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's function or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

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39. The Court, however, has also thought it right to examine, ex officio, whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United
Nations on 20 February 1980. As already indicated, the occupation of the Embassy and detention of its diplomatic and consular staff as hostages was referred to the United Nations Security Council by the United States on 9 November 1979 and by the Secretary-General on 25 November. Four days later, while the matter was still before the Security Council, the United States submitted the present Application to the Court together with a request for the indication of provisional measures. On 4 December, the Security Council adopted resolution 457 (1979) (the terms of which have already been indicated in paragraph 28 above), whereby the Council would “remain actively seized of the matter” and the Secretary-General was requested to report to it urgently on developments regarding the efforts he was to make pursuant to the resolution. In announcing the setting up of the Commission on 20 February 1980, the Secretary-General stated its terms of reference to be “to undertake a fact-finding mission to Iran to hear Iran’s grievances and to allow for an early solution of the crisis between Iran and the United States”; and he further stated that it was to complete its work as soon as possible and submit its report to him. Subsequently, in a message cabled to the President of the Court on 15 March 1980, the Secretary-General confirmed the mandate of the Commission to be as stated in his announcement of 20 February, adding that the Governments of Iran and the United States had “agreed to the establishment of the Commission on that basis”. In this message, the Secretary-General also informed the Court of the decision of the Commission to suspend its activities in Tehran and to return to New York on 11 March 1980 “to confer with the Secretary-General with a view to pursuing its tasks which it regards as indivisible”. The message stated that while, in the circumstances, the Commission was not in a position to submit its report, it was prepared to return to Tehran, in accordance with its mandate and the instructions of the Secretary-General, when the situation required. The message further stated that the Secretary-General would continue his efforts, as requested by the Security Council, to search for a peaceful solution of the crisis, and would remain in contact with the parties and the Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council was “actively seized of the matter” and that the Secretary-General was under an express mandate from the Council to use his good offices in the matter when, on 15 December, the Court decided unanimously that it was competent to entertain the United States’ request for an indication of provisional measures, and proceeded to indicate such measures. As already mentioned the Council met again on 31 December 1979 and adopted resolution 461 (1979). In the preamble to this second resolution the Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.

Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute: and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3 of which specifically provides that:

“In making recommendations under this Article the Security Council should also take into consideration that legal disputes should be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

41. In the present instance the proceedings before the Court continued in accordance with the Statute and Rules of Court and, on 15 January 1980, the United States filed its Memorial. The time-limit fixed for delivery of Iran’s Counter-Memorial then expired on 18 February 1980 without Iran’s having filed a Counter-Memorial or having made a request for the extension of the time-limit. Consequently, on the following day the case became ready for hearing, and pursuant to Article 31 of the Rules, the views of the Applicant State were requested regarding the date for the opening of the oral proceedings. On 19 February 1980 the Court was informed by the United States Agent that, owing to the delicate stage of negotiations bearing upon the release of the hostages in the United States Embassy, he would be grateful if the Court for the time being would defer setting a date for the opening of the oral proceedings. On the very next day, 20 February, the Secretary-General announced the establishment of the above-mentioned Commission, which commenced its work in Tehran on 23 February. Asked on 27 February to clarify the position of the United States in regard to the future procedure, the Agent stated that the Commission would not address itself to the claims submitted by the United States to the Court. The United States, he said, continued to be anxious to secure an early judgment on the merits, and he suggested 17 March as a convenient date for the opening of the oral proceedings. At the same time, however, he added that consideration of the well-being of the hostages might lead the United States to suggest a later date. The Iranian Government was then asked, in a telex message of 28 February, for any views it might wish to express as to the date for the opening of the hearings, mention being made of 17 March as one possible date. No reply had been received from the Iranian Government when, on 10 March, the Commission, unable to complete its mission, decided to suspend its activities in Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Com-
mission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iranian Government's reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a "fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States" (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the Aegean Sea Continental Shelf case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued pari passu. In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (I.C.J. Reports 1978, p. 12, para. 29).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

* * *

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexes. Moreover, the Iranian Government has not maintained its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the per-
sonnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé d'Affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debate on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after any party has notified its opinion to the other that a dispute exists, the parties may agree either: (a) "to resort not to the International Court of Justice but to an arbitral tribunal"; or (b) "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties may agree upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, in limine, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

* * *

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States were addressed to the Iran under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held
hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, inter alia, the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties agree to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded in limine any question of an agreement to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

* * *

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

* * *

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have
to be looked at by the Court from two points of view. First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable. The events which are the subject of the United States' claims fall into two phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences. The attack and the subsequent overrunning, bit by bit, of the whole Embassy premises, was an operation which continued over a period of some three hours without any body of police, any military unit or any Iranian official intervening to try to stop or impede it from being carried through to its completion. The result of this attack was considerable damage to the Embassy premises and property, the forcible opening and seizure of its archives, the confiscation of the archives and other documents found in the Embassy and, most grave of all, the seizure by force of its diplomatic and consular personnel as hostages, together with two United States nationals.

58. No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognized "agents" or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayatollah Khomeini, had made several public declarations inveighing against the United States as responsible for all his country's problems. In so doing, it would appear, the Ayatollah Khomeini was giving utterance to the general resentment felt by supporters of the revolution at the admission of the former Shah to the United States. The information before the Court also indicates that a spokesman for the militants, in explaining their action afterwards, did expressly refer to a message issued by the Ayatollah Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini had declared that it was "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up dissenion between the main streams of Islamic thought). In the view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an authorization from the State to undertake the specific operation of invading and seizing the United States Embassy. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy. Again, congratulations after the event, such as those reportedly telephoned to the militants by the Ayatollah Khomeini on the actual evening of the attack, and other subsequent statements of official approval, though highly significant in another context shortly to be considered, do not alter the initially independent and unofficial character of the militants' attack on the Embassy.

60. The first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants not having an official character, and successful because of lack of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks: for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of a diplomatic mission, Article 22 of the 1961 Convention continues in paragraph 2:

"The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be inviolable, and that he shall not be liable to any form of arrest or detention, Article 29 provides:

"The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the
archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be “inviolable at any time and wherever they may be”. Under Article 25 it is required to “accord full facilities for the performance of the functions of the mission”, under Article 26 to “ensure to all members of the mission freedom of movement and travel in its territory”, and under Article 27 to “permit and protect free communication on the part of the mission for all official purposes”. Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz, but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kerman-shah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article 11, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure “the most constant protection and security” to each other’s nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities:

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the
security of such other persons as might be present on the said premises;

(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;

(c) had the means at their disposal to perform their obligations;

(d) completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

* * *

69. The second phase of the events which are the subject of the United States' claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States' mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that "according to international regulations the Iranian Government is dutybound to safeguard the life and property of foreign nationals". But he made no mention of Iran's obligation to safeguard the inviolability of foreign embassies and diplomats; and he ended by announcing that the action of the students "enjoys the endorsement and support of the government, because America herself is responsible for this incident". As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted "because they saw that the Shah was allowed in America". Saying that he had been informed that the "centre occupied by our young men . . . has been a lair of espionage and plotting", he asked how the young people could be expected "simply to remain idle and witness all these things". Furthermore he expressly stigmatized as "rotten roots" those in Iran who were "hoping we would mediate and tell the young people to leave this place". The Ayatollah's refusal to order the "young people" to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed "the young people" who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step further. On 6 November they proclaimed that the Embassy, which they too referred to as "the U.S. centre of plots and espionage", would remain under their occupation, and that they were watching "most closely" the members of the diplomatic staff taken hostage whom they called "U.S. mercenaries and spies".

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was a centre of espionage and conspiracy and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect". He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to "hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran". As to the rest of the hostages, he made the Iranian Government's intentions all too clear:

"The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."
74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been "done by our nation". Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court's Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

* *

76. The Iranian authorities' decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conven-

tions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d'affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d'affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States' mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the con-
continuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Islamic Republic of Iran and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: “A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.” Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General’s Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that: “A diplomatic agent is not obliged to give evidence as a witness.”

* * *

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Islamic Republic vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran’s Minister for Foreign Affairs referred to the present case as only “a marginal and secondary aspect of an overall problem”. This problem, he maintained, “involves, inter alia, more than 25 years of continuous interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms”. In the first of the two letters he indeed singled out amongst the “crimes” which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d’état of 1953 and in the restoration of the Shah to the throne of Iran.

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister’s letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States’ claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States’ claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister’s letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case where members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic
Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide:

"Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

Paragraph 3 of Article 41 of the 1961 Convention further states: "The premises of the mission must not be used in any manner incompatible with the functions of the missions..."; an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates:

"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3(1)(d) of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" may be considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is "persona non grata" or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its de-

86. The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean — and this the Applicant Government expressly acknowledges — that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran persona non grata. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a
means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in according to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

* * *

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran’s breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran’s breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. “There is no more fundamental prerequisite for the conduct of relations between States”, the Court there said, “than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.” The institution of diplomacy, the Court continued, has proved to be “an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means” (I.C.J. Reports 1979, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply
in the present case, the Court considers it to be its duty to draw the
attention of the entire international community, of which Iran itself has
been a member since time immemorial, to the irreparable harm that may be
carried by events of the kind now before the Court. Such events cannot fail
to undermine the edifice of law carefully constructed by mankind over a
period of centuries, the maintenance of which is vital for the security and
well-being of the complex international community of the present day, to
which it is more essential than ever that the rules developed to ensure the
ordered progress of relations between its members should be constantly
and scrupulously respected.

93. Before drawing the appropriate conclusions from its findings on the
merits in this case, the Court considers that it cannot let pass without
comment the incursion into the territory of Iran made by United States
military units on 24-25 April 1980, an account of which has been given
earlier in this Judgment (paragraph 32). No doubt the United States
Government may have had understandable preoccupations with respect to
the well-being of its nationals held hostage in its Embassy for over five
months. No doubt also the United States Government may have had
understandable feelings of frustration at Iran's long-continued detention
of the hostages, notwithstanding two resolutions of the Security Council as
well as the Court's own Order of 15 December 1979 calling expressly for
their immediate release. Nevertheless, in the circumstances of the present
proceedings, the Court cannot fail to express its concern in regard to the
United States' incursion into Iran. When, as previously recalled, this case
had become ready for hearing on 19 February 1980, the United States
Agent requested the Court, owing to the delicate stage of certain negotia-
tions, to defer setting a date for the hearings. Subsequently, on 11 March,
the Agent informed the Court that the United States Government's anxiety
to obtain an early judgment on the merits of the case. The hearings were
accordingly held on 18, 19 and 20 March, and the Court was in course of
preparing the present judgment adjudicating upon the claims of the United
States against Iran when the operation of 24 April 1980 took place. The
Court therefore feels bound to observe that an operation undertaken in
those circumstances, from whatever motive, is of a kind calculated to
undermine respect for the judicial process in international relations; and
to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the
Court had indicated that no action was to be taken by either party which
might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the
question of the legality of the operation of 24 April 1980, under the Charter
of the United Nations and under general international law, nor any possi-
ble question of responsibility flowing from it, is before the Court. It must
also point out that this question can have no bearing on the evaluation of
the conduct of the Iranian Government over six months earlier, on 4 No-

September 1979, which is the subject-matter of the United States’ Applica-
tion. It follows that the findings reached by the Court in this Judgment are
not affected by that operation.

95. For these reasons,

THE COURT,

1. By thirteen votes to two,

Decides that the Islamic Republic of Iran, by the conduct which the
Court has set out in this Judgment, has violated in several respects, and is
still violating, obligations owed by it to the United States of America under
international conventions in force between the two countries, as well as
under long-established rules of general international law;

IN FAVOUR: President Sir Humphrey Wallock; Vice-President Elias; Judges
Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian,
Sette-Camara and Baxter.

AGAINST: Judges Morozov and Tarazi.

2. By thirteen votes to two,

Decides that the violations of these obligations engage the responsibil-
ty of the Islamic Republic of Iran towards the United States of America
under international law;

IN FAVOUR: President Sir Humphrey Wallock; Vice-President Elias; Judges
Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian,
Sette-Camara and Baxter.

AGAINST: Judges Morozov and Tarazi.

3. Unanimously,

Decides that the Government of the Islamic Republic of Iran must
immediately take all steps to redress the situation resulting from the events
of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United
States Chargé d'affaires and other diplomatic and consular staff and
other United States nationals now held hostage in Iran, and must
immediately release each and every one and entrust them to the pro-
tecting Power (Article 45 of the 1961 Vienna Convention on Diplo-
matic Relations);
(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

4. Unanimously,

Decides that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness;

5. By twelve votes to three,

Decides that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judges Lachs, Morozov and Tarazi.

6. By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judge Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) S. AQUARONE,
Registrar.

Judge Lachs appends a separate opinion to the Judgment of the Court.

Judges Morozov and Tarazi append dissenting opinions to the Judgment of the Court.

(Initialled) H.W.
(Initialled) S.A.
International Court of Justice

LaGrand (Germany v. United States of America)

Judgment

I.C.J. Reports 2001
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

LAGRAND CASE
(GERMANY v. UNITED STATES OF AMERICA)

JUDGMENT OF 27 JUNE 2001

2001

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE LAGRAND
(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

ARRÊT DU 27 JUIN 2001

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LAGRAND CASE
(GERMANY v. UNITED STATES OF AMERICA)

Facts of the case.

* * *


Jurisdiction of Court in respect of Germany’s first submission — Recognition by United States of existence of dispute arising out of breach of subparagraph (b) of Article 36, paragraph 1, of Vienna Convention on Consular Relations — Recognition by United States of Court’s jurisdiction to hear this dispute in so far as concerns Germany’s own rights — Objection by United States to Court’s jurisdiction over Germany’s claim founded on diplomatic protection — Objection by United States to Court’s jurisdiction over alleged breach of subparagraphs (a) and (c) of Article 36, paragraph 1, of Convention.

Jurisdiction of Court in respect of Germany’s third submission concerning implementation of Order of 3 March 1999 indicating provisional measures.

Jurisdiction of Court in respect of Germany’s fourth submission — Objection by United States — United States argument that submission seeking guarantees of non-repetition falls outside terms of Optional Protocol.

* * *

Admissibility of Germany’s submissions.

United States objection to admissibility of Germany’s second, third and fourth submissions — United States argument that Court cannot be turned into ultimate court of appeal in criminal proceedings before its own domestic courts.

United States objection to admissibility of Germany’s third submission —

United States challenging manner of Germany’s institution of present proceedings before the Court.

United States objection to admissibility of Germany’s first submission — Allegation of failure to exhaust local remedies.

United States objection to Germany’s submissions — Allegation that Germany seeking to apply standard to United States different from own practice.

* * *

Germany’s first submission — Question of disregard by United States of its legal obligations to Germany under Articles 5 and 36, paragraph 1, of Convention.

Submission advanced by Germany in own right — Recognition by United States of breach of Article 36, paragraph 1 (b), of Convention — Article 36, paragraph 1, establishing interrelated regime designed to facilitate implementation of system of consular protection.

Submission by Germany based on diplomatic protection — Article 36, paragraph 1 (b), of Convention and obligations of receiving State to detained person and to sending State.

* * *

Germany’s second submission — Question of disregard by United States of its legal obligation under Article 36, paragraph 2, of Convention.

Argument of United States that Article 36, paragraph 2, applicable only to rights of sending State.

“Procedural default” rule — Distinction to be drawn between rule as such and application in present case.

* * *

Germany’s third submission — Question of disregard by United States of its legal obligation to comply with Order indicating provisional measures of 3 March 1999.

Court called upon to rule expressly on question of legal effects of orders under Article 41 of Statute — Interpretation of that provision — Comparison of French and English texts — French and English versions of Statute “equally authentic” by virtue of Article 111 of United Nations Charter — Article 33, paragraph 4, of Vienna Convention on Law of Treaties — Object and purpose of Statute — Context — Principle that party to legal proceedings must abstain from any measure which might aggravate or extend the dispute — Preparatory work of Article 41 — Article 94 of United Nations Charter.

Question of binding nature of Order of 3 March 1999 — Measures taken by United States to give effect to Order — No request for reparation in Germany’s third submission — Time pressure due to circumstances in which proceedings were instituted.

* * *

Germany’s fourth submission — Question of obligation to provide certain assurances of non-repetition.
General request for assurance of non-repetition — Measures taken by United States to prevent recurrence of violation of Article 36, paragraph 1 (b) — Commitment undertaken by United States to ensure implementation of specific measures adopted in performance of obligations under that provision.

Consideration of other assurances requested by Germany — Germany's characterization of individual right provided for in Article 36, paragraph 1, as human right — Court's power to determine existence of violation of international obligation and, if necessary, to hold that domestic law has caused violation — United States having apologized to Germany for breach of Article 36, paragraph 1, of Convention — Germany not having requested material reparation for injury to itself and to LaGrand brothers — Question of review and reconsideration of certain sentences.

JUDGMENT

Present: President Guillaume; Vice-President Shih; Judges Oda, Bedioui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchegin, Higgins, Parra-Aranguren, Kooiman, Rezek, Al-Khasawneh, Buergerenthal; Registrar Couvreur.

In the LaGrand case,

between

the Federal Republic of Germany,

represented by

Mr. Gerhard Westdickenberg, Director General for Legal Affairs and Legal Adviser, Federal Foreign Office of the Federal Republic of Germany,

H.E. Mr. Eberhard U. B. von Puttkamer, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

as Agents;

Mr. Bruno Simma, Professor of Public International Law at the University of Munich,

as Co-Agent and Counsel;

Mr. Pierre-Marie Dupuy, Professor of Public International Law at the University of Paris (Panthéon-Assas) and at the European University Institute in Florence,

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Hans-Peter Kaul, Head of the Public International Law Division, Federal Foreign Office of the Federal Republic of Germany,

Mr. Daniel Khan, University of Munich,

Mr. Andreas Paulus, University of Munich,

as Counsel;

the United States of America,

represented by

Mr. James H. Thessin, Acting Legal Adviser, United States Department of State,

as Agent;

Ms Catherine W. Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State,

Mr. D. Stephen Mathias, Assistant Legal Adviser for United Nations Affairs, United States Department of State,

as Deputy Agents;

The Honourable Janet Napolitano, Attorney General, State of Arizona,

Mr. Michael J. Matheson, Professor of International Law, School of Advanced International Studies, Johns Hopkins University; former Acting Legal Adviser, United States Department of State,

Mr. Theodor Meron, Counsellor on International Law, United States Department of State; Charles L. Denison Professor of International Law, New York University; Associate Member of the Institute of International Law,

Mr. Stefan Trechsel, Professor of Criminal Law and Procedure, University of Zurich Faculty of Law,

as Counsel and Advocates;

Mr. Shabtai Rosenne, Member of the Israel Bar; Honorary Member of the American Society of International Law; Member of the Institute of International Law,

Ms Norma B. Martens, Assistant Attorney General, State of Arizona,

Mr. Paul J. McMurdie, Assistant Attorney General, State of Arizona,

Mr. Robert J. Erickson, Principal Deputy Chief, Appellate Section, Criminal Division, United States Department of Justice,

Mr. Allen S. Weiner, Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

Ms Jessica R. Holmes, Attaché, Office of the Counsellor for Legal Affairs, Embassy of the United States of America in the Netherlands,

as Counsel,
The Court,

composed as above,
after deliberation,
delivers the following Judgment:

1. On 2 March 1999 the Federal Republic of Germany (hereinafter referred to as “Germany”) filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the “United States”) for “violations of the Vienna Convention on Consular Relations [of 24 April 1963]” (hereinafter referred to as the “Vienna Convention”). In its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention (hereinafter referred to as the “Optional Protocol”).

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

3. On 2 March 1999, the day on which the Application was filed, the German Government also filed in the Registry of the Court a request for the indication of provisional measures based on Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court.

By a letter dated 2 March 1999, the Vice-President of the Court, acting President in the case, addressed the Government of the United States in the following terms:

“Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of [the Government of the United States] to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects.”

By an Order of 3 March 1999, the Court indicated certain provisional measures (see paragraph 32 below).

4. In accordance with Article 43 of the Rules of Court, the Registrar sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Vienna Convention or to that Convention and the Optional Protocol.

5. By an Order of 5 March 1999, the Court, taking account of the views of the Parties, fixed 16 September 1999 and 27 March 2000, respectively, as the time-limits for the filing of a Memorial by Germany and of a Counter-Memorial by the United States.

The Memorial and Counter-Memorial were duly filed within the time-limits so prescribed.

6. By letter of 26 October 2000, the Agent of Germany expressed his Government’s desire to produce five new documents in accordance with Article 56 of the Rules.

By letter of 6 November 2000, the Agent of the United States informed the Court that his Government consented to the production of the first and second documents, but not to that of the third, fourth and fifth documents.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 13 to 17 November 2000, at which the Court heard the oral arguments and replies of:

For Germany:
- Mr. Gerhard Westdickenberg,
- Mr. Bruno Simma,
- Mr. Daniel Khan,
- Mr. Hans-Peter Kaul,
- Mr. Andreas Paulus,
- Mr. Donald Francis Donovan,
- Mr. Pierre-Marie Dupuy.

For the United States:
- Mr. James H. Thessin,
- The Honourable Janet Napolitano,
- Mr. Theodor Meron,
- Ms. Catherine W. Brown,
- Mr. D. Stephen Mathias,
- Mr. Stefan Trechsel,
- Mr. Michael J. Matheson.

9. At the hearings, Members of the Court put questions to Germany, to which replies were given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

In addition, the United States, acting within the time-limit accorded it for this purpose, commented on the new documents filed by Germany on 26 October 2000 (see paragraph 6 above) and produced documents in support of those comments.

10. In its Application, Germany formulated the decision requested in the following terms:

“Accordingly the Federal Republic of Germany asks the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to
apply the doctrine of 'procedural default' or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;
(3) the United States should restore the status quo ante in the case of Walter LaGrand, that is to say the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and
(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,
in the Memorial:

"Having regard to the facts and points of law set forth in the present Memorial, and without prejudice to such elements of fact and law and to such evidence as may be submitted at a later time, and likewise without prejudice to the right to supplement and amend the present Submissions, the Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 (h) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations."

On behalf of the Government of the United States,
in the Counter-Memorial:

"Accordingly, on the basis of the facts and arguments set forth in this Counter-Memorial, and without prejudice to the right further to amend and supplement these submissions in the future, the United States asks the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36 (1) (b) of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) That all other claims and submissions of the Federal Republic of Germany are dismissed."

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

On behalf of the Government of Germany,

"The Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1 (h), of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering con-
sular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand. It violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36, paragraph 1, of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36, paragraph 2, of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.

On behalf of the Government of the United States.

"The United States of America respectfully requests the Court to adjudge and declare that:

(1) There was a breach of the United States obligation to Germany under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, in that the competent authorities of the United States did not promptly give to Karl and Walter LaGrand the notification required by that Article, and that the United States has apologized to Germany for this breach, and is taking substantial measures aimed at preventing any recurrence; and

(2) All other claims and submissions of the Federal Republic of Germany are dismissed."

* * *

13. Walter LaGrand and Karl LaGrand were born in Germany in 1962 and 1963 respectively, and were German nationals. In 1967, when they were still young children, they moved with their mother to take up permanent residence in the United States. They returned to Germany only once, for a period of about six months in 1974. Although they lived in the United States for most of their lives, and became the adoptive children of a United States national, they remained at all times German nationals, and never acquired the nationality of the United States. However, the United States has emphasized that both had the demeanour and speech of Americans rather than Germans, that neither was known to have spoken German, and that they appeared in all respects to be native citizens of the United States.

14. On 7 January 1982, Karl LaGrand and Walter LaGrand were arrested in the United States by law enforcement officers on suspicion of having been involved earlier the same day in an attempted armed bank robbery in Marana, Arizona, in the course of which the bank manager was murdered and another bank employee seriously injured. They were subsequently tried before the Superior Court of Pima County, Arizona, which, on 17 February 1984, convicted them both of murder in the first degree, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. On 14 December 1984, each was sentenced to death for first degree murder and to concurrent sentences of imprisonment for the other charges.

15. At all material times, Germany as well as the United States were parties to both the Vienna Convention on Consular Relations and the Optional Protocol to that Convention. Article 36, paragraph 1 (b), of the Vienna Convention provides that:

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

It is not disputed that at the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required by this provision of the Vienna Convention, and had not informed the relevant German consular post of the LaGrands' arrest. The United States concedes that the competent authorities failed to do so, even after becoming aware that the LaGrands were German nationals and not United States nationals, and admits that
the United States has therefore violated its obligations under this provision of the Vienna Convention.

16. However, there is some dispute between the Parties as to the time at which the competent authorities in the United States became aware of the fact that the LaGrands were German nationals. Germany argues that the authorities of Arizona were aware of this from the very beginning, and in particular that probation officers knew by April 1982. The United States argues that at the time of their arrest, neither of the LaGrands identified himself to the arresting authorities as a German national, and that Walter LaGrand affirmatively stated that he was a United States citizen. The United States position is that its “competent authorities” for the purposes of Article 36, paragraph 1 (b), of the Vienna Convention were the arresting and detaining authorities, and that these became aware of the German nationality of the LaGrands by late 1984, and possibly by mid-1983 or earlier, but in any event not at the time of their arrest in 1982. Although other authorities, such as immigration authorities or probation officers, may have known this even earlier, the United States argues that these were not “competent authorities” for the purposes of the provision of the Vienna Convention. The United States has also suggested that at the time of their arrest, the LaGrands may themselves have been unaware that they were not nationals of the United States.

17. At their trial, the LaGrands were represented by counsel assigned by the court, as they were unable to afford legal counsel of their own choice. Their counsel at trial did not raise the issue of non-compliance with the Vienna Convention, and did not themselves contact the German consular authorities.

18. The convictions and sentences pronounced by the Superior Court of Pima County, Arizona, were subsequently challenged by the LaGrands in three principal sets of legal proceedings.

19. The first set of proceedings consisted of appeals against the convictions and sentences to the Supreme Court of Arizona, which were rejected by that court on 30 January 1987. The United States Supreme Court, in the exercise of its discretion, denied applications by the LaGrands for further review of these judgments on 5 October 1987.

20. The second set of proceedings involved petitions by the LaGrands for post-conviction relief, which were denied by an Arizona state court in 1989. Review of this decision was denied by the Supreme Court of Arizona in 1990, and by the United States Supreme Court in 1991.

21. At the time of these two sets of proceedings, the LaGrands had not been informed by the competent United States authorities of their rights under Article 36, paragraph 1 (b), of the Vienna Convention, and the German consular post had still not been informed of their arrest. The issue of the lack of consular notification, which had not been raised at trial, was also not raised in these two sets of proceedings.

22. The relevant German consular post was only made aware of the case in June 1992 by the LaGrands themselves, who had learnt of their rights from other sources, and not from the Arizona authorities. In December 1992, and on a number of subsequent occasions between then and February 1999, an official of the Consulate-General of Germany in Los Angeles visited the LaGrands in prison. Germany claims that it subsequently helped the LaGrands’ attorneys to investigate the LaGrands’ childhood in Germany, and to raise the issue of the omission of consular advice in further proceedings before the federal courts.

23. The LaGrands commenced a third set of legal proceedings by filing applications for writs of habeas corpus in the United States District Court for the District of Arizona, seeking to have their convictions—or at least their death sentences—set aside. In these proceedings they raised a number of different claims, which were rejected by that court in orders dated 24 January 1995 and 16 February 1995. One of these claims was that the United States authorities had failed to notify the German consulate of their arrest, as required by the Vienna Convention. This claim was rejected on the basis of the “procedural default” rule. According to the United States, this rule:

“is a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal habeas corpus proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.”

The United States District Court held that the LaGrands had not shown an objective external factor that prevented them from raising the issue of the lack of consular notification earlier. On 16 January 1998, this judgment was affirmed on appeal by the United States Court of Appeals,
Ninth Circuit, which also held that the LaGrands' claim relating to the Vienna Convention was "procedurally defaulted", as it had not been raised in any of the earlier proceedings in state courts. On 2 November 1998, the United States Supreme Court denied further review of this judgment.

24. On 21 December 1998, the LaGrands were formally notified by the United States authorities of their right to consular access.

25. On 15 January 1999, the Supreme Court of Arizona decided that Karl LaGrand was to be executed on 24 February 1999, and that Walter LaGrand was to be executed on 3 March 1999. Germany claims that the German Consulate learned of these dates on 19 January 1999.

26. In January and early February 1999, various interventions were made by Germany seeking to prevent the execution of the LaGrands. In particular, the German Foreign Minister and German Minister of Justice wrote to their respective United States counterparts on 27 January 1999; the German Foreign Minister wrote to the Governor of Arizona on the same day; the German Chancellor wrote to the President of the United States and to the Governor of Arizona on 2 February 1999; and the President of the Federal Republic of Germany wrote to the President of the United States on 5 February 1999. These letters referred to German opposition to capital punishment generally, but did not raise the issue of the absence of consular notification in the case of the LaGrands. The latter issue was, however, raised in a further letter, dated 22 February 1999, two days before the scheduled date of execution of Karl LaGrand, from the German Foreign Minister to the United States Secretary of State.

27. On 23 February 1999, the Arizona Board of Executive Clemency rejected an appeal for clemency by Karl LaGrand. Under the law of Arizona, this meant that the Governor of Arizona was prevented from granting clemency.

28. On the same day, the Arizona Superior Court in Pima County rejected a further petition by Walter LaGrand, based inter alia on the absence of consular notification, on the ground that these claims were "procedurally precluded".

29. On 24 February 1999, certain last-minute federal court proceedings brought by Karl LaGrand ultimately proved to be unsuccessful. In the course of these proceedings the United States Court of Appeals, Ninth Circuit, again held the issue of failure of consular notification to be procedurally defaulted. Karl LaGrand was executed later that same day.

30. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, at 7.30 p.m. (The Hague time), Germany filed in the Registry of this Court the Application instituting the present proceedings against the United States (see paragraph 1 above), accompanied by a request for the following provisional measures:

"The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order."

By a letter of the same date, the German Foreign Minister requested the Secretary of State of the United States "to urge [the] Governor [of Arizona] for a suspension of Walter LaGrand's execution pending a ruling by the International Court of Justice".

31. On the same day, the Arizona Board of Executive Clemency met to consider the case of Walter LaGrand. It recommended against a commutation of his death sentence, but recommended that the Governor of Arizona grant a 60-day reprieve having regard to the Application filed by Germany in the International Court of Justice. Nevertheless, the Governor of Arizona decided, "in the interest of justice and with the victims in mind", to allow the execution of Walter LaGrand to go forward as scheduled.

32. In an Order of 3 March 1999, this Court found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules (I.C.J. Reports 1999 (1), p. 15, para. 26); it indicated provisional measures in the following terms:

"(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

(b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."

33. On the same day, proceedings were brought by Germany in the United States Supreme Court against the United States and the Governor of Arizona, seeking inter alia to enforce compliance with this Court's Order indicating provisional measures. In the course of these proceedings, the United States Solicitor General as counsel of record took the position, inter alia, that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief". On the same date, the United States Supreme Court dismissed the motion by Germany, on the ground of the tardiness of Germany's application and of jurisdictional barriers under United States domestic law.

34. On that same day, proceedings were also instituted in the United
States Supreme Court by Walter LaGrand. These proceedings were
decided against him. Later that day, Walter LaGrand was executed.

* * *

35. The Court must as a preliminary matter deal with certain issues,
which were raised by the Parties in these proceedings, concerning the
jurisdiction of the Court in relation to Germany’s Application, and the
admissibility of its submissions.

* * *

36. In relation to the jurisdiction of the Court, the United States, with-
owout having raised preliminary objections under Article 79 of the Rules of
Court, nevertheless presented certain objections thereto.

Germany bases the jurisdiction of the Court on Article I of the Optional
Protocol, which reads as follows:

“Disputes arising out of the interpretation or application of the
Convention shall lie within the compulsory jurisdiction of the Inter-
national Court of Justice and may accordingly be brought before the
Court by an application made by any party to the dispute being a
Party to the present Protocol.”

Germany contends that the
“proceedings instituted by [it] in the present case raise questions of
the interpretation and application of the Vienna Convention on
Consular Relations and of the legal consequences arising from the
non-ob servance on the part of the United States of certain of its pro-
visions vis-à-vis Germany and two of its nationals”.

Accordingly, Germany states that all four of its submissions

“are covered by one and the same jurisdictional basis, namely Art. I
of the Optional Protocol to the Vienna Convention on Consular
Relations concerning the Compulsory Settlement of Disputes of
24 April 1963”.

* *

37. The Court will first examine the question of its jurisdiction with
respect to the first submission of Germany. Germany relies on para-
graph 1 of Article 36 of the Vienna Convention, which provides:

“With a view to facilitating the exercise of consular functions
relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of
the sending State and to have access to them. Nationals of the
sending State shall have the same freedom with respect to com-
munication with and access to consular officers of the sending
State;

(b) if he so requests, the competent authorities of the receiving
State shall, without delay, inform the consular post of the send-
ing 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 authorities shall inform the person con-
cerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the
sending State who is in prison, custody or detention, to con-
verse and correspond with him and to arrange for his legal rep-
resentation. They shall also have the right to visit any national
of the sending State who is in prison, custody or detention in
their district in pursuance of a judgement. Nevertheless, consu-
lar officers shall refrain from taking action on behalf of a
national who is in prison, custody or detention if he expressly
opposes such action.”

38. Germany alleges that the failure of the United States to inform the
LaGrand brothers of their right to contact the German authorities “pre-
vented Germany from exercising its rights under Art. 36 (1) (a) and (c)
of the Convention” and violated “the various rights conferred upon the
sending State vis-à-vis its nationals in prison, custody or detention as
provided for in Art. 36 (1) (b) of the Convention”. Germany further
alleges that by breaching its obligations to inform, the United States also
violated individual rights conferred on the detainees by Article 36, para-
graph 1 (a), second sentence, and by Article 36, paragraph 1 (b). Ger-
many accordingly claims that it “was injured in the person of its two
nationals”, a claim which Germany raises “as a matter of diplomatic pro-
tection on behalf of Walter and Karl LaGrand”.

39. The United States acknowledges that “there was a breach of the
U.S. obligation . . . to inform the LaGrand brothers that they could ask
that a German consular post be notified of their arrest and detention”. It
does not deny that this violation of Article 36, paragraph 1 (b), has given
rise to a dispute between the two States and recognizes that the Court has
jurisdiction under the Optional Protocol to hear this dispute in so far as it concerns Germany’s own rights.

40. Concerning Germany’s claims of violation of Article 36, paragraph 1 (a) and (c), the United States however calls these claims “particularly misplaced” on the grounds that the “underlying conduct complained of is the same” as the claim of the violation of Article 36, paragraph 1 (b). It contends, moreover, that “to the extent that this claim by Germany is based on the general law of diplomatic protection, it is not within the Court’s jurisdiction” under the Optional Protocol because it “does not concern the interpretation or application of the Vienna Convention”. The United States points to the distinction between jurisdiction over treaties and jurisdiction over customary law and observes that “[e]ven if a treaty norm and a customary norm were to have exactly the same content”, each would have its “separate applicability”. It contests the German assertion that diplomatic protection “enters through the intermediary of the Vienna Convention” and submits:

“the Vienna Convention deals with consular assistance...it does not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its national through diplomatic protection. The former is within the jurisdiction of the Court under the Optional Protocol; the latter is not...Germany based its right of diplomatic protection on customary law...[T]his case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious...that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?”

41. Germany responds that the breach of paragraph 1 (a) and (c) of Article 36 must be distinguished from that of paragraph 1 (b), and that as a result, the Court should not only rule on the latter breach, but also on the violation of paragraph 1 (a) and (c). Germany further asserts “that application of the Convention” in the sense of the Optional Protocol very well encompasses the consequences of a violation of individual rights under the Convention, including the esposal of respective claims by the State of nationality”.

42. The Court cannot accept the United States objections. The dispute between the Parties as to whether Article 36, paragraph 1 (a) and (c), of the Vienna Convention have been violated in this case in consequence of the breach of paragraph 1 (b) does relate to the interpretation and applic-

43. The United States does not challenge the Court’s jurisdiction in regard to Germany’s second submission. Nor does it as such address the issue of the jurisdiction of the Court over the third submission concerning the binding nature of the Order of the Court of 3 March 1999 indicating provisional measures. It argues, however, that this submission is inadmissible (see paragraphs 50 and 53-55 below), and that the Court can fully and adequately dispose of the merits of this case without having to rule on the submission.

44. Germany asserts that the Court’s Order of 3 March 1999 was intended to “enforce” the rights enjoyed by Germany under the Vienna Convention and “preserve those rights pending its decision on the merits”. Germany claims that a dispute as to “whether the United States were obliged to comply and did comply with the Order” necessarily arises out of the interpretation or application of the Convention and thus falls within the jurisdiction of the Court. Germany argues further that questions “relating to the non-compliance with a decision of the Court under Article 41, para. 1, of the Statute, e.g. Provisional Measures, are an integral component of the entire original dispute between the parties”. Moreover, Germany contends that its third submission also implicates “in an auxiliary and subsidiary manner...the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case”.

45. The third submission of Germany concerns issues that arise directly out of the dispute between the Parties before the Court over which the Court has already held that it has jurisdiction (see paragraph 42 above), and which are thus covered by Article I of the Optional Protocol. The Court reaffirms, in this connection, what it said in its Judgment in the
Fisheries Jurisdiction case, where it declared that in order to consider the dispute in all its aspects it may also deal with a submission that “is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court’s jurisdiction . . .” (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72). Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.

46. The United States objects to the jurisdiction of the Court over the fourth submission in so far as it concerns a request for assurances and guarantees of non-repetition. The United States submits that its “jurisdictional argument [does] not apply to jurisdiction to order cessation of a breach or to order reparation, but is limited to the question of assurances and guarantees . . . [which] are conceptually distinct from reparation”. It contends that Germany’s fourth submission

“goes beyond any remedy that the Court can or should grant, and should be rejected. The Court’s power to decide cases . . . does not extend to the power to order a State to provide any ‘guarantee’ intended to confer additional legal rights on the Applicant State . . . The United States does not believe that it can be the role of the Court . . . to impose any obligations that are additional to or that differ in character from those to which the United States consented when it ratified the Vienna Convention.”

47. Germany counters this argument by asserting that

“a dispute whether or not the violation of a provision of the Vienna Convention gives rise to a certain remedy is a dispute concerning ‘the application and interpretation’ of the aforesaid Convention, and thus falls within the scope of Art. 1 of the Optional Protocol”.

Germany notes in regard that the Court, in its Order of 9 April 1998 in the case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), held that

“there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and . . . is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963” (I.C.J. Reports 1998, p. 256, para. 31).

48. The Court considers that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court’s jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (Factory at Chorzów, P.C.I.J., Series A, No. 9, p. 22). Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.

49. The United States has argued that the submissions of Germany are inadmissible on various grounds. The Court will consider these objections in the order presented by the United States.

50. The United States objects first to Germany’s second, third and fourth submissions. According to the United States, these submissions are inadmissible because Germany seeks to have this Court “play the role of ultimate court of appeal in national criminal proceedings”, a role which it is not empowered to perform. The United States maintains that many of Germany’s arguments, in particular those regarding the rule of “procedural default”, ask the Court “to address and correct . . . asserted violations of US law and errors of judgment by US judges” in criminal proceedings in national courts.

51. Germany denies that it requests the Court to act as an appellate criminal court, or that Germany’s requests are in any way aimed at interfering with the administration of justice within the United States judicial system. It maintains that it is merely asking the Court to adjudge and declare that the conduct of the United States was inconsistent with its international legal obligations towards Germany under the Vienna Convention, and to draw from this failure certain legal consequences provided for in the international law of State responsibility.

52. The Court does not agree with these arguments of the United
States concerning the admissibility of the second, third and fourth German submissions. In the second submission, Germany asks the Court to interpret the scope of Article 36, paragraph 2, of the Vienna Convention; the third submission seeks a finding that the United States violated an Order issued by this Court pursuant to Article 49 of its Statute; and in Germany’s fourth submission, the Court is asked to determine the applicable remedies for the alleged violations of the Convention. Although Germany deals extensively with the practice of American courts as it bears on the application of the Convention, all three submissions seek to require the Court to do no more than apply the relevant rules of international law to the issues in dispute between the Parties to this case. The exercise of this function, expressly mandated by Article 38 of its Statute, does not convert this Court into a court of appeal of national criminal proceedings.

53. The United States also argues that Germany’s third submission is inadmissible because of the manner in which these proceedings were brought before the Court by Germany. It notes that German consular officials became aware of the LaGrands’ cases in 1992, but that the German Government did not express concern or protest to the United States authorities for some six and a half years. It maintains that the issue of the absence of consular notification was not raised by Germany until 22 February 1999, two days before the date scheduled for Karl LaGrand’s execution, in a letter from the German Foreign Minister to the Secretary of State of the United States (see paragraph 26 above). Germany then filed the Application instituting these proceedings, together with a request for provisional measures, after normal business hours in the Registry in the evening of 2 March 1999, some 27 hours before the execution of Walter LaGrand (see paragraph 30 above).

54. The United States rejects the contention that Germany found out only seven days before the filing of its Application that the authorities of Arizona knew as early as 1982 that the LaGrands were German nationals; according to the United States, their German nationality was referred to in pre-sentence reports prepared in 1984, which should have been familiar to German consular officers much earlier than 1999, given Germany’s claims regarding the vigour and effectiveness of its consular assistance.

55. According to the United States, Germany’s late filing compelled the Court to respond to its request for provisional measures by acting ex parte, without full information. The United States claims that the procedure followed was inconsistent with the principles of “equality of the Parties” and of giving each Party a sufficient opportunity to be heard, and that this would justify the Court in not addressing Germany’s third submission which is predicated wholly upon the Order of 3 March 1999.

56. Germany acknowledges that delay on the part of a claimant State may render an application inadmissible, but maintains that international law does not lay down any specific time-limit in that regard. It contends that it was only seven days before it filed its Application that it became aware of all the relevant facts underlying its claim, in particular, the fact that the authorities of Arizona knew of the German nationality of the LaGrands since 1982. According to Germany, it cannot be accused of negligence in failing to obtain the 1984 pre-sentence reports earlier. It also maintains that in the period between 1992, when it learned of the LaGrands’ cases, and the filing of its Application, it engaged in a variety of activities at the diplomatic and consular level. It adds that it had been confident for much of this period that the United States would ultimately rectify the violations of international law involved.

57. The Court recognizes that Germany may be criticized for the manner in which these proceedings were filed and for their timing. The Court recalls, however, that notwithstanding its awareness of the consequences of Germany’s filing at such a late date it nevertheless considered it appropriate to enter the Order of 3 March 1999, given that an irreparable prejudice appeared to be imminent. In view of these considerations, the Court considers that Germany is now entitled to challenge the alleged failure of the United States to comply with the Order. Accordingly, the Court finds that Germany’s third submission is admissible.

58. The United States argues further that Germany’s first submission, as far as it concerns its right to exercise diplomatic protection with respect to its nationals, is inadmissible on the ground that the LaGrands did not exhaust local remedies. The United States maintains that the alleged breach concerned the duty to inform the LaGrands of their right to consular access, and that such a breach could have been remedied at the trial stage, provided it was raised in a timely fashion. The United States contends that when a person fails, for example, to sue in a national court before a statute of limitations has expired, the claim is both procedurally barred in national courts and inadmissible in international tribunals for failure to exhaust local remedies. It adds that the failure of counsel for the LaGrands to raise the breach of the Vienna Convention at the appropriate stage and time of the proceedings does not excuse the non-exhaustion of local remedies. According to the United States, this
failure of counsel is imputable to their clients because the law treats
defendants and their lawyers as a single entity in terms of their legal posi-
tions. Moreover, the State is not accountable for the errors or mistaken
strategy by lawyers.

59. Germany responds that international law requires the exhaustion
of only those remedies which are legally and practically available. Ger-
many claims that in this case there was no remedy which the LaGrands
failed to invoke that would have been available in the specific context of
their case. This is so because, prior to 1992, the LaGrands could not
resort to the available remedies, since they were unaware of their rights
due to failure of the United States authorities to comply with the require-
ments of the Vienna Convention; thereafter, the "procedural default" rule
prevented them from seeking any remedy.

60. The Court notes that it is not disputed that the LaGrands sought
to plead the Vienna Convention in United States courts after they learned
in 1992 of their rights under the Convention; it is also not disputed that
by that date the procedural default rule barred the LaGrands from
obtaining any remedy in respect of the violation of those rights. Counsel
assigned to the LaGrands failed to raise this point earlier in a timely fash-
ion. However, the United States may not now rely before this Court on
this fact in order to preclude the admissibility of Germany’s first submis-
sion, as it was the United States itself which had failed to carry out its
obligation under the Convention to inform the LaGrand brothers.

61. The United States also contends that Germany’s submissions are
inadmissible on the ground that Germany seeks to have a standard
applied to the United States that is different from its own practice.
According to the United States, Germany has not shown that its system
of criminal justice requires the annulment of criminal convictions where
there has been a breach of the duty of consular notification; and that
the practice of Germany in similar cases has been to do no more than offer
an apology. The United States maintains that it would be contrary to
basic principles of administration of justice and equality of the Parties to
apply against the United States alleged rules that Germany appears not
to accept for itself.

62. Germany denies that it is asking the United States to adhere to
standards which Germany itself does not abide by; it maintains that its
law and practice is fully in compliance with the standards which it
invokes. In this regard, it explains that the German Code of Criminal

Procedure provides a ground of appeal where a legal norm, including a
norm of international law, is not applied or incorrectly applied and where
there is a possibility that the decision was impaired by this fact.

63. The Court need not decide whether this argument of the United
States, if true, would result in the inadmissibility of Germany’s submis-
sions. Here the evidence adduced by the United States does not justify
the conclusion that Germany’s own practice fails to conform to the
standards it demands from the United States in this litigation. The
United States relies on certain German cases to demonstrate that Ger-
many has itself proffered only an apology for violating Article 36 of the
Vienna Convention, and that State practice shows that this is the appro-
priate remedy for such a violation. But the cases concerned entailed rela-
tively light criminal penalties and are not evidence as to German practice
where an arrested person, who has not been informed without delay of
his or her rights, is facing a severe penalty as in the present case. It is no
doubt the case, as the United States points out, that Article 36 of the
Vienna Convention imposes identical obligations on States, irrespective
of the gravity of the offence a person may be charged with and of the
penalties that may be imposed. However, it does not follow therefrom
that the remedies for a violation of this Article must be identical in all
situations. While an apology may be an appropriate remedy in some
cases, it may in others be insufficient. The Court accordingly finds that
this claim of inadmissibility must be rejected.

* * *

64. Having determined that the Court has jurisdiction, and that the
submissions of Germany are admissible, the Court now turns to the
merits of each of these four submissions.

* *

65. Germany’s first submission requests the Court to adjudge and
declare:

"that the United States, by not informing Karl and Walter LaGrand
without delay following their arrest of their rights under Article 36
subparagraph 1 (b) of the Vienna Convention on Consular Rela-
tions, and by depriving Germany of the possibility of rendering con-
sular assistance, which ultimately resulted in the execution of Karl
and Walter LaGrand, violated its international legal obligations to
Germany, in its own right and in its right of diplomatic protection of
its nationals, under Articles 5 and 36 paragraph 1 of the said
Convention".
66. Germany claims that the United States violated its obligation under Article 36, paragraph 1(b), to “inform a national of the sending State without delay of his or her right to inform the consular post of his home State of his arrest or detention”. Specifically, Germany maintains that the United States violated its international legal obligation to Germany under Article 36, paragraph 1(b), by failing to inform the German nationals Karl and Walter LaGrand “without delay” of their rights under that subparagraph.

67. The United States acknowledges, and does not contest Germany’s basic claim, that there was a breach of its obligation under Article 36, paragraph 1(b), of the Convention “promptly to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention”.

68. Germany also claims that the violation by the United States of Article 36, paragraph 1(b), led to consequential violations of Article 36, paragraph 1(a) and (c). It points out that, when the obligation to inform the arrested person without delay of his or her right to contact the consulate is disregarded, “the other rights contained in Article 36, paragraph 1, become in practice irrelevant, indeed meaningless”. Germany maintains that, “by informing the LaGrand brothers of their right to inform the consulate more than 16 years after their arrest, the United States . . . clearly failed to meet the standard of Article 36 [(1) (c)]”. It concludes that, by not preventing the execution of Karl and Walter LaGrand, and by “making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law”.

69. The United States argues that the underlying conduct complained of by Germany is one and the same, namely, the failure to inform the LaGrand brothers as required by Article 36, paragraph 1(b). Therefore, it disputes any other basis for Germany’s claims that other provisions, such as subparagraphs (a) and (c) of Article 36, paragraph 1, of the Convention, were also violated. The United States asserts that Germany’s claims regarding Article 36, paragraph 1(a) and (c), are “particularly misplaced” in that the LaGrands were able to and did communicate freely with consular officials after 1992. There was, in the view of the United States, “no deprivation of Germany’s right to provide consular assistance, under Article 5 or Article 36, to Karl or Walter LaGrand” and “Germany’s attempt to transform a breach of one obligation into an additional breach of a wholly separate and distinct obligation should be rejected by the Court.”

70. In response, Germany asserts that it is “commonplace that one and the same conduct may result in several violations of distinct obligations”. Hence, when a detainee’s right to notification without delay is violated, he or she cannot establish contact with the consulate, receive visits from consular officers, nor be supported by adequate counsel. “Therefore, violation of this right is bound to imply violation of the other rights . . . [and] later observance of the rights of Article 36, paragraph 1(a) and (c), could not remedy the previous violation of those provisions.”

71. Germany further contends that there is a causal relationship between the breach of Article 36 and the ultimate execution of the LaGrand brothers. Germany’s inability to render prompt assistance was, in its view, a “direct result of the United States’ breach of its Vienna Convention obligations”. It is claimed that, had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene in time and present a “persuasive mitigation case” which “likely would have saved” the lives of the brothers. Germany believes that, “[h]ad proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence”. Moreover, Germany argues that, due to the doctrine of procedural default and the high post-conviction threshold for proving ineffective counsel under United States law, Germany’s intervention at a stage later than the trial phase could not “remedy the extreme prejudice created by the counsel appointed to represent the LaGrands”.

72. The United States terms these arguments as “suppositions about what might have occurred had the LaGrand brothers been properly informed of the possibility of consular notification”. It calls into question Germany’s assumption that German consular officials from Los Angeles would rapidly have given extensive assistance to the LaGrands’ defense counsel before the 1984 sentencing, and contests that such consular assistance would have affected the outcome of the sentencing proceedings. According to the United States, these arguments “rest on speculation” and do not withstand analysis. Finally, the United States finds it extremely doubtful that the early childhood “mitigating evidence” mentioned by Germany, if introduced at the trial, would have persuaded the sentencing judge to be lenient, as the brothers’ subsequent 17 years of experiences in the United States would have been given at least equal weight. The United States points out, moreover, that such evidence was in fact presented at trial.

73. The Court will first examine the submission Germany advances in its own right. The Court observes, in this connection, that the United States does not deny that it violated paragraph 1(b) in relation to Ger-
many. The Court also notes that as a result of this breach, Germany did not learn until 1992 of the detention, trial and sentencing of the LaGrand brothers. The Court concludes therefore that on the facts of this case, the breach of the United States had the consequence of depriving Germany of the exercise of the rights accorded it under Article 36, paragraph 1 (a) and paragraph 1 (c), and thus violated those provisions of the Convention. Although the violation of paragraph 1 (b) of Article 36 will not necessarily always result in the breach of the other provisions of this Article, the Court finds that the circumstances of this case compel the opposite conclusion, for the reasons indicated below. In view of this finding, it is not necessary for the Court to deal with Germany's further claim under Article 5 of the Convention.

74. Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1. It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.

75. Germany further contends that “the breach of Article 36 by the United States did not only infringe upon the rights of Germany as a State party to the [Vienna] Convention but also entailed a violation of the individual rights of the LaGrand brothers”. Invoking its right of diplomatic protection, Germany also seeks relief against the United States on this ground.

Germany maintains that the right to be informed of the rights under Article 36, paragraph 1 (b), of the Vienna Convention, is an individual right of every national of a State party to the Convention who enters the territory of another State party. It submits that this view is supported by the ordinary meaning of the terms of Article 36, paragraph 1 (b), of the Vienna Convention, since the last sentence of that provision speaks of the “rights” under this subparagraph of “the person concerned”, i.e., of the foreign national arrested or detained. Germany adds that the provision in Article 36, paragraph 1 (b), according to which it is for the arrested person to decide whether consular notification is to be provided, has the effect of conferring an individual right upon the foreign national concerned. In its view, the context of Article 36 supports this conclusion since it relates to both the concerns of the sending and receiving States and to those of individuals. According to Germany, the travaux préparatoires of the Vienna Convention lend further support to this interpretation. In addition, Germany submits that the “United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live”, adopted by General Assembly resolution 40/144 on 13 December 1985, confirms the view that the right of access to the consulate of the home State, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens.

76. The United States questions what this additional claim of diplomatic protection contributes to the case and argues that there are no parallels between the present case and cases of diplomatic protection involving the espousal by a State of economic claims of its nationals. The United States maintains that the right of a State to provide consular assistance to nationals detained in another country, and the right of a State to espouse the claims of its nationals through diplomatic protection, are legally different concepts.

The United States contends, furthermore, that rights of consular notification and access under the Vienna Convention are rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance. It maintains that the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or a human right. The United States argues that the fact that Article 36 by its terms recognizes the rights of individuals does not determine the nature of those rights or the remedies required under the Vienna Convention for breaches of that Article. It points out that Article 36 begins with the words “[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State”, and that this wording gives no support to the notion that the rights and obligations enumerated in paragraph 1 of that Article are intended to ensure that nationals of the sending State have any particular rights or
treatment in the context of a criminal prosecution. The travaux préparatoires of the Vienna Convention according to the United States do not reflect a consensus that Article 36 was addressing immutable individual rights, as opposed to individual rights derivative of the rights of States.

77. The Court notes that Article 36, paragraph 1 (b), spells out the obligations the receiving State has towards the detained person and the sending State. It provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual’s detention “without delay”. It provides further that any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State “without delay”. Significantly, this subparagraph ends with the following language: “The said authorities shall inform the person concerned without delay of his rights under this subparagraph” (emphasis added). Moreover, under Article 36, paragraph 1 (c), the sending State’s right to provide consular assistance to the detained person may not be exercised “if he expressly opposes such action”. The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand (see Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p. 20; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; Territorial Dispute (Libyan Arab Jamahiriya v Chad), Judgment, I.C.J. Reports 1994, p. 25, para. 51). Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person. These rights were invoked in the present case.

78. At the hearings, Germany further contended that the right of the individual to be informed without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but has today assumed the character of a human right. In consequence, Germany added, “the character of the right under Article 36 as a human right renders the effectiveness of this provision even more imperative”. The Court having found that the United States violated the rights accorded by Article 36, paragraph 1, to the LaGrand brothers, it does not appear necessary to it to consider the additional argument developed by Germany in this regard.

79. The Court will now consider Germany’s second submission, in which it asks the Court to adjudge and declare:

“that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended”.

80. Germany argues that, under Article 36, paragraph 2, of the Vienna Convention

“the United States is under an obligation to ensure that its municipal laws and regulations . . . enable full effect to be given to the purposes for which the rights accorded under this article are intended [and that it] is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury”.

81. Germany points out that the “procedural default” rule is among the rules of United States domestic law whose application makes it impossible to invoke a breach of the notification requirement. According to Germany, this rule “is closely connected with the division of labour between federal and state jurisdiction in the United States . . . [where] [e]xistence of remedies at the state level before a habeas corpus motion can be filed with federal Courts”.

Germany emphasizes that it is not the “procedural default” rule as such that is at issue in the present proceedings, but the manner in which it was applied in that it “deprived the brothers of the possibility to raise the violations of their right to consular notification in US criminal proceedings”.

82. Furthermore, having examined the relevant United States jurisprudence, Germany contends that the procedural default rule had “made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992”.

* * *
83. Finally, Germany states that it seeks

"[n]othing . . . more than compliance, or, at least, a system in place which does not automatically reproduce violation after violation of the Vienna Convention, only interrupted by the apologies of the United States Government".

84. The United States objects to Germany’s second submission, since it considers that “Germany’s position goes far beyond the wording of the Convention, the intentions of the parties when it was negotiated, and the practice of States, including Germany’s practice”.

85. In the view of the United States:

“[t]he Vienna Convention does not require States Party to create a national law remedy permitting individuals to assert claims involving the Convention in criminal proceedings. If there is no such requirement, it cannot violate the Convention to require that efforts to assert such claims be presented to the first court capable of adjudicating them”.

According to the United States,

“[i]f there is no obligation under the Convention to create such individual remedies in criminal proceedings, the rule of procedural default — requiring that claims seeking such remedies be asserted at an appropriately early stage — cannot violate the Convention”.

86. The United States believes that Article 36, paragraph 2, "has a very clear meaning" and

“means, as it says, that the rights referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso that said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended”.

In the view of the United States,

“[i]n the context of a foreign national in detention, the relevant laws and regulations contemplated by Article 36 (2) are those that may affect the exercise of specific rights under Article 36 (1), such as those addressing the timing of communications, visiting hours, and security in a detention facility. There is no suggestion in the text of Article 36 (2) that the rules of criminal law and procedure under which a defendant would be tried or have his conviction and sentence reviewed by appellate courts are also within the scope of this provision.”

87. The United States concludes that Germany’s second submission must be rejected “because it is premised on a misinterpretation of Article 36, paragraph 2, which reads the context of the provision — the exercise of a right under paragraph 1 — out of existence”.

88. Article 36, paragraph 2, of the Vienna Convention reads as follows:

“The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended”.

89. The Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to “rights” in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual (see paragraph 77 above).

90. Turning now to the “procedural default” rule, the application of which in the present case Germany alleges violated Article 36, paragraph 2, the Court emphasizes that a distinction must be drawn between that rule as such and its specific application in the present case. In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information “without delay”, thus preventing the person from seeking and obtaining consular assistance from the sending State.

91. In this case, Germany had the right at the request of the LaGrands “to arrange for [their] legal representation” and was eventually able to provide some assistance to that effect. By that time, however, because of the failure of the American authorities to comply with their obligation under Article 36, paragraph 1 (b), the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result, although United States courts could and did examine the professional competence of counsel assigned to the indigent LaGrands by reference to United States constitutional standards, the procedural default rule prevented them from attaching any legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for
them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violated paragraph 2 of Article 36.

* * *

92. The Court will now consider Germany's third submission, in which it asks the Court to adjudge and declare:

"that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on provisional measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending".

93. In its Memorial, Germany contended that "[p]rovisional [m]easures indicated by the International Court of Justice [were] binding by virtue of the law of the United Nations Charter and the Statute of the Court". In support of its position, Germany developed a number of arguments in which it referred to the "principle of effectiveness", to the "procedural prerequisites" for the adoption of provisional measures, to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision", to "Article 94 (1), of the United Nations Charter", to "Article 41 (1), of the Statute of the Court" and to the "practice of the Court".

Referring to the duty of the "parties to a dispute before the Court . . . to preserve its subject-matter", Germany added that:

"[a]part from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending".

At the hearings, Germany further stated the following:

"A judgment by the Court on jurisdiction or merits cannot be treated on exactly the same footing as a provisional measure . . . Article 59 and Article 60 [of the Statute] do not apply to provisional measures or, to be more exact, apply to them only by implication; that is to say, to the extent that such measures, being both incidental and provisional, contribute to the exercise of a judicial function whose end-result is, by definition, the delivery of a judicial decision. There is here an inherent logic in the judicial procedure, and to disregard it would be tantamount, as far as the Parties are concerned, to deviating from the principle of good faith and from what the German pleadings call 'the principle of institutional effectiveness' . . . [P]rovisional measures . . . are indeed legal decisions, but they are decisions of procedure . . . Since their decisional nature is, however, implied by the logic of urgency and by the need to safeguard the effectiveness of the proceedings, they accordingly create genuine legal obligations on the part of those to whom they are addressed."

94. Germany claims that the United States committed a threefold violation of the Court's Order of 3 March 1999:

"(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the US Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court's Order to the same effect. In the course of these proceedings — and in full knowledge of the Order of the International Court — the Office of the Solicitor General, a section of the US Department of Justice — in a letter to the Supreme Court argued once again that: 'an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief'.

This statement of a high-ranking official of the Federal Government . . . had a direct influence on the decision of the Supreme Court.

(2) In the following, the US Supreme Court — an agency of the United States — refused by a majority vote to order that the execution be stayed. In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures . . .

(3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency — for the first time in the history of this institution — had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case . . ."

95. The United States argues that it "did what was called for by the Court's 3 March Order, given the extraordinary and unprecedented cir-
circumstances in which it was forced to act”. It points out in this connection that the United States Government “immediately transmit[ted] the Order to the Governor of Arizona”, that “the United States placed the Order in the hands of the one official who, at that stage, might have had legal authority to stop the execution” and that by a letter from the Legal Counsellor of the United States Embassy in The Hague dated 8 March 1999, it informed the International Court of Justice of all the measures which had been taken in implementation of the Order.

The United States further states that:

“[t]he central factors constrained the United States ability to act. The first was the extraordinarily short time between issuance of the Court’s Order and the time set for the execution of Walter LaGrand...”

“The second constraining factor was the character of the United States of America as a federal republic of divided powers.”

96. The United States also alleges that the “terms of the Court’s 3 March Order did not create legal obligations binding on [it]”. It argues in this respect that “[t]he language used by the Court in the key portions of its Order is not the language used to create binding legal obligations” and that

“the Court does not need here to decide the difficult and controversial legal question of whether its orders indicating provisional measures would be capable of creating international legal obligations if worded in mandatory... terms”.

It nevertheless maintains that those orders cannot have such effects and, in support of that view, develops arguments concerning “the language and history of Article 41 (1) of the Court’s Statute and Article 94 of the Charter of the United Nations”, the “Court’s and State practice under these provisions”, and the “weight of publicists’ commentary”.

Concerning Germany’s argument based on the “principle of effectiveness”, the United States contends that

“[t]he arena where the concerns and sensitivities of States, and not abstract logic, have informed the drafting of the Court’s constitutive documents, it is perfectly understandable that the Court might have the power to issue binding final judgments, but a more circumscribed authority with respect to provisional measures”.

Referring to Germany’s argument that the United States “violated the obligation to refrain from any action which might interfere with the subj

ject matter of a dispute while judicial proceedings are pending”, the United States further asserts that:

“The implications of the rule as presented by Germany are potentially quite dramatic, however, Germany appears to contend that by merely filing a case with the Court, an Applicant can force a Respondent to refrain from continuing any action that the Applicant deems to affect the subject of the dispute. If the law were as Germany contends, the entirety of the Court’s rules and practices relating to provisional measures would be surplusage. This is not the law, and this is not how States or this Court have acted in practice.”

97. Lastly, the United States states that in any case, “[b]ecause of the press of time stemming from Germany’s last-minute filing of the case, basic principles fundamental to the judicial process were not observed in connection with the Court’s 3 March Order” and that

“[t]hus, whatever one might conclude regarding a general rule for provisional measures, it would be anomalous — to say the least — for the Court to construe this Order as a source of binding legal obligations”.

98. Neither the Permanent Court of International Justice, nor the present Court to date, has been called upon to determine the legal effects of orders made under Article 41 of the Statute. As Germany’s third submission refers expressly to an international legal obligation “to comply with the Order on Provisional Measures issued by the Court on 3 March 1999”, and as the United States disputes the existence of such an obligation, the Court is now called upon to rule expressly on this question.

99. The dispute which exists between the Parties with regard to this point essentially concerns the interpretation of Article 41, which is worded in identical terms in the Statute of each Court (apart from the respective references to the Council of the League of Nations and the Security Council). This interpretation has been the subject of extensive controversy in the literature. The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties. According to paragraph 1 of Article 31, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose.

100. The French text of Article 41 reads as follows:

“1. La Cour a le pouvoir d’indiquer, si elle estime que les circonst-

annces rendent nécessaire son intervention, les mesures préliminaires qui doivent être prises, les mesures de nature à empêcher la réalisation de l’acte ou des actes litigieux. Par ces mesures, la Cour entend empêcher, si possible, l’irréversibilité complète de l’acte ou des actes litigieux.”
tances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.”

(Emphasis added.)

In this text, the terms “indiquer” and “l'indication” may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words “doivent être prises” have an imperative character.

For its part, the English version of Article 41 reads as follows:

“1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

(Emphasis added.)

According to the United States, the use in the English version of “indicate” instead of “order”, of “ought” instead of “must” or “shall”, and of “suggested” instead of “ordered”, is to be understood as implying that decisions under Article 41 lack mandatory effect. It might however be argued, having regard to the fact that in 1920 the French text was the original version, that such terms as “indicate” and “ought” have a meaning equivalent to “order” and “must” or “shall”.

101. Finding itself faced with two texts which are not in total harmony, the Court will first of all note that according to Article 92 of the Charter, the Statute “forms an integral part of the present Charter”. Under Article 111 of the Charter, the French and English texts of the latter are “equally authentic”. The same is equally true of the Statute.

In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law. This provision reads “when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

The Court will therefore now consider the object and purpose of the Statute together with the context of Article 41.

102. The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of

“the principle universally accepted by international tribunals and likewise laid down in many conventions...to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute” (Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J. Series A/B, No. 79, p. 199).


104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute
does not preclude the conclusion that orders under Article 41 have binding force.

105. The initial preliminary draft of the Statute of the Permanent Court of International Justice, as prepared by the Committee of Jurists established by the Council of the League of Nations, made no mention of provisional measures. A provision to this effect was inserted only at a later stage in the draft prepared by the Committee, following a proposal from the Brazilian jurist Raul Fernandes.

Basing himself on the Bryan Treaty of 13 October 1914 between the United States and Sweden, Raul Fernandes had submitted the following text:

"Dans le cas où la cause du différend consiste en actes déterminés déjà effectués ou sur le point de l'être, la Cour pourra ordonner, dans le plus bref délai, à titre provisoire, des mesures conservatoires adéquates, en attendant le jugement définitif." (Comité consultatif de juristes, Procès-verbaux des séances du Comité, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 609.)

In its English translation this text read as follows:

"In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court." (Advisory Committee of Jurists, Procès-verbaux de la séance du Comité, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 609.)

The Drafting Committee prepared a new version of this text, to which two main amendments were made: on the one hand, the words "la Cour pourra ordonner" ("the Court may . . . order") were replaced by "la Cour a le pouvoir d'indiquer" ("the Court shall have the power to suggest"), while, on the other, a second paragraph was added providing for notice to be given to the parties and to the Council of the "measures suggested" by the Court. The draft Article 2bis as submitted by the Drafting Committee thus read as follows:

"Dans le cas où la cause du différend consiste en actes effectués ou sur le point de l'être, la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

En attendant son arrêt, cette suggestion de la Cour est immédiatement transmise aux parties et au Conseil." (Comité consultatif de juristes, Procès-verbaux des séances du Comité, 16 juin-24 juillet 1920 (avec annexes), La Haye, 1920, p. 567-568.)

The English version read:

"If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council." (Advisory Committee of Jurists, Procès-verbaux des séances du Comité, 16 juin-24 juillet 1920 (with annexes), The Hague, 1920, pp. 567-568.)

The Committee of Jurists eventually adopted a draft Article 39, which amended the former Article 2bis only in its French version; in the second paragraph, the words "cette suggestion" were replaced in French by the words "l'indication".

106. When the draft Article 39 was examined by the Sub-Committee of the Third Committee of the first Assembly of the League of Nations, a number of amendments were considered. Raul Fernandes suggested again to use the words "ordonner" in the French version. The Sub-Committee decided to stay with the word "indiquer"; the Chairman of the Sub-Committee observing that the Court lacked the means to execute its decisions. The language of the first paragraph of the English version was then made to conform to the French text: thus the word "suggest" was replaced by "indicate", and "should" by "ought to". However, in the second paragraph of the English version, the phrase "measures suggested" remained unchanged.

The provision thus amended in French and in English by the Sub-Committee was adopted as Article 41 of the Statute of the Permanent Court of International Justice. It passed as such into the Statute of the present Court without any discussion in 1945.

107. The preparatory work of Article 41 shows that the preference given in the French text to "indiquer" over "ordonner" was motivated by the consideration that the Court did not have the means to execute the measures suggested by the Court. The draft Article 2bis thus read as follows:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it
deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute both the word "decision" and the word "judgment" are used does little to clarify the matter.

Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.

109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect.

* * *

110. The Court will now consider the Order of 3 March 1999. This Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.

* * *

111. As regards the question whether the United States has complied with the obligation incumbent upon it as a result of the Order of 3 March 1999, the Court observes that the Order indicated two provisional measures, the first of which states that

"[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order".

The second measure required the Government of the United States to

112. The Court observes, nevertheless, that the mere transmission of its Order to the Governor of Arizona without any comment, particularly without even so much as a plea for a temporary stay and an explanation that there is no general agreement on the position of the United States that orders of the International Court of Justice on provisional measures are non-binding, was certainly less than could have been done even in the short time available. The same is true of the United States Solicitor General's categorical statement in his brief letter to the United States Supreme Court that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief" (see paragraph 33 above). This statement went substantially further than the amicus brief referred to in a mere footnote in his letter, which was filed on behalf of the United States in earlier proceedings before the United States Supreme Court in the case of Angel Francisco Breard (see Breard v. Greene, United States Supreme Court, 14 April 1998, International Legal Materials, Vol. 37 (1998), p. 824; Memorial of Germany, Ann. 34). In that amicus brief, the same Solicitor General had declared less than a year earlier that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding . . . The better reasoned position is that such an order is not binding."

113. It is also noteworthy that the Governor of Arizona, to whom the
Court’s Order had been transmitted, decided not to give effect to it, even though the Arizona Clemency Board had recommended a stay of execution for Walter LaGrand.

114. Finally, the United States Supreme Court rejected a separate application by Germany for a stay of execution, "given the tardiness of the pleas and the jurisdictional barriers they implicate." Yet it would have been open to the Supreme Court, as one of its members urged, to grant a preliminary stay, which would have given it "time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved ..." (Federal Republic of Germany et al. v. United States et al., United States Supreme Court, 3 March 1999).

115. The review of the above steps taken by the authorities of the United States with regard to the Order of the International Court of Justice of 3 March 1999 indicates that the various competent United States authorities failed to take all the steps they could have taken to give effect to the Court’s Order. The Order did not require the United States to exercise powers it did not have: but it did impose the obligation to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings ...". The Court finds that the United States did not discharge this obligation.

Under these circumstances the Court concludes that the United States has not complied with the Order of 3 March 1999.

116. The Court observes finally that in the third submission Germany requests the Court to adjudge and declare only that the United States violated its international legal obligation to comply with the Order of 3 March 1999: it contains no other request regarding that violation. Moreover, the Court points out that the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings. The Court notes moreover that at the time when the United States authorities took their decision the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence. The Court would have taken these factors into consideration had Germany’s submission included a claim for indemnification.

* *

117. Finally, the Court will consider Germany’s fourth submission, in which it asks the Court to adjudge and declare that the United States shall provide Germany an assurance that it will not repeat its unlawful acts and that, in any future cases of detention or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations. In particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36.”

118. Germany states that:

"Concerning the requested assurances and guarantees of non-repetition of the United States, they are appropriate because of the existence of a real risk of repetition and the seriousness of the injury suffered by Germany. Further, the choice of means by which full conformity of the future conduct of the United States with Article 36 of the Vienna Convention is to be ensured may be left to the United States."

Germany explains that:

"the effective exercise of the right to consular notification embodied in Article 36, paragraph 2, requires that, where it cannot be excluded that the judgment was impaired by the violation of the right to consular notification, appellate proceedings allow for a reversal of the judgment and for either a retrial or a re-sentencing”.

Finally, Germany points out that its fourth submission has been so worded “as to ... leave the choice of means by which to implement the remedy it seeks to the United States”.

119. In reply, the United States argues as follows:

"Germany’s fourth submission is clearly of a wholly different nature than its first three submissions. Each of the first three submissions seeks a judgment and declaration by the Court that a violation of a stated international legal obligation has occurred. Such judgments are at the core of the Court’s function, as an aspect of reparation.

In contrast, however, to the character of the relief sought in the first three submissions, the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court’s jurisdiction and authority in this case. It is exceptional even as a non-legal undertaking in State practice, and it would be entirely inappropriate for the Court to require such assurances with respect to the duty to inform undertaken in the Consular Convention in the circumstances of this case.”
It points out that “US authorities are working energetically to strengthen the regime of consular notification at the state and local level throughout the United States, in order to reduce the chances of cases such as this recurring” and adds that:

“the German request for an assurance as to the duty to inform foreign nationals without delay of their right to consular notification ... seeks to have the Court require the United States to assure that it will never again fail to inform a German foreign national of his or her right to consular notification”,

and that “the Court is aware that the United States is not in a position to provide such an assurance”. The United States further contends that it “has already provided appropriate assurances to Germany on this point”. Finally, the United States recalls that:

“[w]ith respect to the alleged breach of Article 36, paragraph 2, ... Germany seeks an assurance that, in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36”.

According to the United States,

“[such an assurance] is again absolute in character ... [and] seeks to create obligations on the United States that exceed those that are contained in the Vienna Convention. For example, the requirement of consular notification under Article 36, paragraph 1 (b), of the Convention applies when a foreign national is arrested, committed to prison or to custody pending trial or detained in any other manner. It does not apply, as the submission would have it, to any future criminal proceedings. That is a new obligation, and it does not arise out of the Vienna Convention.”

The United States further observes that:

“[e]ven if this Court were to agree that, as a result of the application of procedural default with respect to the claims of the LaGrands, the United States committed a second internationally wrongful act, it should limit that judgment to the application of that law in the particular case of the LaGrands. It should resist the invitation to require an absolute assurance as to the application of US domestic law in all such future cases. The imposition of such an additional obligation on the United States would ... be unprecedented in international jurisprudence and would exceed the Court’s authority and jurisdiction.”

120. The Court observes that in its fourth submission Germany seeks several assurances. First it seeks a straightforward assurance that the United States will not repeat its unlawful acts. This request does not specify the means by which non-repetition is to be assured.

Additionally, Germany seeks from the United States that

“in any future cases of detention of or criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations”.

This request goes further, for, by referring to the law of the United States, it appears to require specific measures as a means of preventing recurrence.

Germany finally requests that

“[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by a violation of the rights under Article 36”.

This request goes even further, since it is directed entirely towards securing specific measures in cases involving the death penalty.

121. Turning first to the general demand for an assurance of non-repetition, the Court observes that it has been informed by the United States of the “substantial measures [which it is taking] aimed at preventing any recurrence” of the breach of Article 36, paragraph 1 (b). Throughout these proceedings, oral as well as written, the United States has insisted that it “keenly appreciates the importance of the Vienna Convention’s consular notification obligation for foreign citizens in the United States as well as for United States citizens travelling and living abroad”; that “effective compliance with the consular notification requirements of Article 36 of the Vienna Convention requires constant effort and attention”; and that

“the Department of State is working intensively to improve understanding of and compliance with consular notification and access requirements throughout the United States, so as to guard against future violations of these requirements”.

The United States points out that

“[t]his effort has included the January 1998 publication of a booklet entitled Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding
Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them', and development of a small reference card designed to be carried by individual arresting officers”.

According to the United States, it is estimated that until now over 60,000 copies of the brochure as well as over 400,000 copies of the pocket card have been distributed to federal, state and local law enforcement and judicial officials throughout the United States. The United States is also conducting training programmes reaching out to all levels of government. In the Department of State a permanent office to focus on United States and foreign compliance with consular notification and access requirements has been created.

122. Germany has stated that it “does not consider the so-called ‘assurances’ offered by the Respondent as adequate”. It says

“[v]iolations of Article 36 followed by death sentences and executions cannot be remedied by apologies or the distribution of leaflets.
An effective remedy requires certain changes in US law and practice”.

In order to illustrate its point, Germany has presented to the Court a “[l]ist of German nationals detained after January 1, 1998, who claim not to have been informed of their consular rights”. The United States has criticized this list as misleading and inaccurate.

123. The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.

In this respect, the Court has taken note of the fact that the United States repeated in all phases of these proceedings that it is carrying out a vast and detailed programme in order to ensure compliance by its competent authorities at the federal as well as at the state and local levels with its obligation under Article 36 of the Vienna Convention.

124. The United States has provided the Court with information, which it considers important, on its programme. If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligation of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.

125. The Court will now examine the other assurances sought by Germany in its fourth submission. The Court observes in this regard that it can determine the existence of a violation of an international obligation. If necessary, it can also hold that a domestic law has been the cause of this violation. In the present case the Court has made its findings of violations of the obligations under Article 36 of the Vienna Convention when it dealt with the first and the second submission of Germany. But it has not found that a United States law, whether substantive or procedural in character, is inherently inconsistent with the obligations undertaken by the United States in the Vienna Convention. In the present case the violation of Article 36, paragraph 2, was caused by the circumstances in which the procedural default rule was applied, and not by the rule as such.

In the present proceedings the United States has apologized to Germany for the breach of Article 36, paragraph 1, and Germany has not requested material reparation for this injury to itself and to the LaGrand brothers. It does, however, seek assurances:

“that, in any future cases of detention or of criminal proceedings against German nationals, the United States will ensure in law and practice the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations”.

and that

“[i]n particular in cases involving the death penalty, this requires the United States to provide effective review of and remedies for criminal convictions impaired by the violation of the rights under Article 36”.

The Court considers in this respect that if the United States, notwithstanding its commitment referred to in paragraph 124 above, should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and
sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States.

126. Given the foregoing ruling by the Court regarding the obligation of the United States under certain circumstances to review and reconsider convictions and sentences, the Court need not examine Germany’s further argument which seeks to found a like obligation on the contention that the right of a detained person to be informed without delay pursuant to Article 36, paragraph 1, of the Vienna Convention is not only an individual right but has today assumed the character of a human right.

127. In reply to the fourth submission of Germany, the Court will therefore limit itself to taking note of the commitment undertaken by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Vienna Convention, as well as the aforementioned duty of the United States to address violations of that Convention should they still occur in spite of its efforts to achieve compliance.

* * *

128. For these reasons,

THE COURT,

(1) By fourteen votes to one,

Finds that it has jurisdiction, on the basis of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963, to entertain the Application filed by the Federal Republic of Germany on 2 March 1999;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;
AGAINST: Judge Oda;

(2) (a) By thirteen votes to two,

Finds that the first submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;
AGAINST: Judges Oda, Parra-Aranguren;

(b) By fourteen votes to one,

Finds that the second submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;
AGAINST: Judge Oda;

(c) By twelve votes to three,

Finds that the third submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Kooijmans, Rezek, Al-Khasawneh;
AGAINST: Judges Oda, Parra-Aranguren, Buergenthal;

(d) By fourteen votes to one,

Finds that the fourth submission of the Federal Republic of Germany is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;
AGAINST: Judge Oda;

(3) By fourteen votes to one,

Finds that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (b), of the Convention, and by thereby depriving the Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herzegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;
AGAINST: Judge Oda;

(4) By fourteen votes to one,

Finds that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Ger-
many and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda;

(5) By thirteen votes to two,

Finds that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judges Oda, Parra-Aranguren;

(6) Unanimously,

Takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and finds that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

(7) By fourteen votes to one,

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal;

AGAINST: Judge Oda.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, two thousand and one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and the Government of the United States of America, respectively.

(Signed) Gilbert Guillaume,
President.

(Signed) Philippe Couveur,
Registrar.

President Guillaume makes the following declaration:

Subparagraph (7) of the operative part of the Court's Judgment envisages a situation where, despite the commitment by the United States noted by the Court in subparagraph (6), a severe penalty is imposed upon a German national without his or her rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations having been respected. The Court states that, in such a case, "the United States, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention".

This subparagraph represents a response to certain submissions by Germany and hence rules only on the obligations of the United States in cases of severe penalties imposed upon German nationals.

Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an a contrario interpretation to this paragraph.

(Signed) Gilbert Guillaume.

Vice-President Shi appends a separate opinion to the Judgment of the Court; Judge Oda appends a dissenting opinion to the Judgment of the Court; Judges Koroma and Parra-Aranguren append separate opinions to the Judgment of the Court; Judge Buergenthal appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.
International Court of Justice

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)
Judgment

_I.C.J. Reports 2002_
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU MANDAT D'ARRÊT
DU 11 AVRIL 2000
(REPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

ARRÊT DU 14 FÉVRIER 2002

2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGMENT OF 14 FEBRUARY 2002

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GENERAL LIST

No. 121

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of “an international arrest warrant in absentia” against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a “legal dispute” between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita rule — Claim in Application instituting proceedings that Belgium’s claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-

tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

Immunity from criminal jurisdiction in other State; and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an “official” capacity and those claimed to have been performed in a “private capacity”.

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and immunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: President GUILLAUME; Vice-President SHI JUDGES ODA, RANIEVA, HERZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIMANS, REZEK, AL-KHASEAN, BUERGENTHAL; Judges ad hoc BULA-BULA, VAN DEN WYNGAERT; Registrar COUVREUR.

In the case concerning the arrest warrant of 11 April 2000, between

the Democratic Republic of the Congo,
1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as “the Congo”) filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as “Belgium”) in respect of a dispute concerning an ‘international arrest warrant’ issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaie Yerodia Ndombasi”.

In that Application the Congo contended that Belgium had violated the “principle that a State may not exercise its authority on the territory of another State”, the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

In order to found the Court’s jurisdiction the Congo invoked in the aforementioned Application the fact that “Belgium [had] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifies[d] acceptance of that jurisdiction by the Democratic Republic of the Congo”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium 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. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case: the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium’s request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Cour. also held that “it [was] desirable that the issues before the Court should be determined as soon as possible” and that “it [was] therefore appropriate to ensure that a decision on the Congo’s Application be reached with all expedition”.

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request...
by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kosisaka Komba,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d'Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

10. In its Application, the Congo formulated the decision requested in the following terms:

"The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdoulaye Yerodia Ndombei, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law,' that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

in the Memorial:

"In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombei, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court's Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

in the Counter-Memorial:

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

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

On behalf of the Government of the Congo,

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombei, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the war-
The arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law”.

16. At the hearings, Belgium further claimed that it offered “to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution”, and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: “We have scant information concerning the form [of these Belgian proposals].” It added that: “these proposals . . . appear to have been made very belatedly, namely after an arrest warrant against Mr. Yerodia had been issued”.

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000”. The Congo relied in its Application on two separate legal grounds. First, it claimed that “[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question” constituted a

“violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”.

Secondly, it claimed that “[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office” constituted a “violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo’s Application had become moot and asked the Court, as has already been

rant was circulated that Belgium renounces its request for their cooperation in executing the unlawful warrant.”

On behalf of the Government of Belgium,

“For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court’s jurisdiction and the admissibility of the Applicant on, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application.”

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued “an international arrest warrant in absentia” against Mr. Abdalaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 15 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, as amended by the Law of 10 February 1999 “concerning the Punishment of Serious Violations of International Humanitarian Law” (hereinafter referred to as the “Belgian Law”).

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which
recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium’s submissions to that effect and also the Congo’s request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation “in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers” (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* * *

23. The first objection presented by Belgium reads as follows:

“That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a ‘legal dispute’ between the Parties within the meaning of this term in theOptional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.”

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect inter alia to the Northern Cameroon case, in which the Court found that it “may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties” (I.C.J. Reports 1963, pp. 33-34), as well as to the Nuclear Tests cases (Australia v. France)/(New Zealand v. France), in which the Court stated the following: “The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision” (I.C.J. Reports 1974, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo’s Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium’s view, is that the case has become an attempt by the Congo to “[seek] an advisory opinion from the Court”, and no longer a “concrete case” involving an “actual controversy” between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful ab initio, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia’s official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

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26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently
become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see Noteboom, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142; 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, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo’s Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision. Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court’s jurisprudence, namely “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” in which “the claim of one party is positively opposed by the other” (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. 17, para. 22; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium’s first objection must therefore be rejected.

* * *

29. The second objection presented by Belgium is the following:

“That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies in support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (I.C.J. Reports 1974, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

* *

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see Questions of Interpretation and Application of the 1971 Mont-

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court: to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo’s submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium’s second objection must accordingly be rejected.

* * *

33. The third Belgian objection is put as follows:

“That the case as it now stands is materially different to that set out in the [Congo]’s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension of which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but “condense and refine” its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

* * *

36. The Court notes that, in accordance with settled jurisprudence, it “cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character” (Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; A. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo’s final submissions arise “directly out of the question which is the subject-matter of that Application” (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium’s third objection must accordingly be rejected.

* * *

37. The fourth Belgian objection reads as follows:

“That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-
tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo’s Foreign Minister. However, according to Belgium, the case was radically transformed after: the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo’s final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the remit of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seized of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

* * *

40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia’s personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (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, pp. 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium’s fourth objection must accordingly be rejected.

* * *

41. As a subsidiary argument, Belgium further contends that “[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo’s] final submissions”. Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge’s lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the “exercise of an excessive universal jurisdiction” being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can “represent a valid counterweight to the observance of immunities”.

* * *

43. The Court would recall the well-established principle that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Asylum, Judgment, I.C.J. Reports 1950, p. 25).
p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* * *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo’s Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo’s submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* * *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being “absolute or complete”, that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as “official acts”.

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused’s official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a “ground of exemption from his criminal responsibility or a ground for mitigation of sentence”. The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

* * *

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain
holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is “to ensure the efficient performance of the functions of diplomatic missions as representing States”. It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

“The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the privileges, immunities and facilities accorded by international law.”

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the diplomatic missions and, with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence; to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d’affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private” capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

* *
56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the Pinochet and Qaddafi cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the Pinochet decision recognizes an exception to the immunity rule when Lord Millett stated that “[i]nternational law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose”, or when Lord Phillips of Worth Matravers said that “no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime”. As to the French Court of Cassation, Belgium contends that, in holding that, “under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent Heads of State”, the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the Pinochet and Qaddafi cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the Pinochet case, the Congo cites Lord Browne-Wilkinson’s statement that “[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . ”. According to the Congo, the French Court of Cassation adopted the same position in its Qaddafi judgment, in affirming that “international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.

As regards the instruments creating international criminal tribunals and the latter’s jurisprudence, these, in the Congo’s view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium, deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,
although various international conventions on the prevention and punishment of certain serious crimes impose or States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy immunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudicate and declare that:

"[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers: in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[t]hus manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly
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“no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there would be a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]”.

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. Yerodia’s criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia, stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”. The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator of:

— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)
— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).”

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunt (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.”

68. The warrant further states that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The investigating judge does, however, observe in the warrant that “the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement” and explains as follows:

“Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on official visits). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this
undertaking could give rise to the host State’s international responsibility.”

69. The arrest warrant concludes with the following order:

“We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant:

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it.”

70. The Court notes that the issuance, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to “all bailiffs and agents of public authority . . . to execute this arrest warrant” (see paragraph 69 above) and from the assertion in the warrant that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo’s incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium’s violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

“A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it.

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant;”

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that “[i]t is fundamentally flawed” and that it cannot therefore have any legal effect today. It points
out that the purpose of its request is reparation for the injury caused, 
requiring the restoration of the situation which would in all probability 
have existed if the said act had not been committed. It states that, 
inasmuch as the wrongful act consisted in an internal legal instrument, 
only the “withdrawal” and “cancellation” of the latter can provide 
appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court 
by itself to withdraw or cancel the warrant, but to determine the means 
whereby Belgium is to comply with its decision. It explains that the with- 
drawal and cancellation of the warrant, by the means that Belgium deems 
most suitable, “are not means of enforcement of the judgment of the 
Court but the requested measure of legal reparation/restitution itself”. 
The Congo maintains that the Court is consequently only being requested 
to declare that Belgium, by way of reparation for the injury to the rights 
of the Congo, be required to withdraw and cancel this warrant by the 
means of its choice.

74. Belgium for its part maintains that a finding by the Court that the 
immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had 
been violated would in no way entail an obligation to cancel the arrest 
warrant. It points out that the arrest warrant is still operative and that 
“there is no suggestion that it presently infringes the immunity of the 
Congo’s Minister for Foreign Affairs”. Belgium considers that what the 
Congo is in reality asking of the Court in its third and fourth final sub-
missions is that the Court should direct Belgium as to the method by 
which it should give effect to a judgment of the Court finding that the 
warrant had infringed the immunity of the Congo’s Minister for Foreign 
Affairs.

* *

75. The Court has already concluded (see paragraphs 70 and 71) that the 
issue and circulation of the arrest warrant of 11 April 2000 by the 
Belgian authorities failed to respect the immunity of the incumbent Min-
ister for Foreign Affairs of the Congo and, more particularly, infringed 
the immunity from criminal jurisdiction and the inviolability then enjoyed 
by Mr. Yerodia under international law. Those acts engaged Belgium’s 
international responsibility. The Court considers that the findings so 
reached by it constitute a form of satisfaction which will make good the 
moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated 
in its Judgment of 13 September 1928 in the case concerning the Factory 
at Chorzów:

“[t]he essential principle contained in the actual notion of an illegal 
act — a principle which seems to be established by international 
practice and in particular by the decisions of arbitral tribunals — is 
that reparation must, as far as possible, wipe out all the conse- 
quences of the illegal act and reestablish the situation which would, 
in all probability, have existed if that act had not been committed” 

In the present case, “the situation which would, in all probability, have 
existed if [the illegal act] had not been committed” cannot be re-es-

tablished merely by a finding by the Court that the arrest warrant was 
unlawful under international law. The warrant is still extant, and remains 
unlawful, notwithstanding the fact that Mr. Yerodia has ceased to 
be Minister for Foreign Affairs. The Court accordingly considers that 
Belgium must, by means of its own choosing, cancel the warrant in question 
and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the 
Court cannot, in a judgment ruling on a dispute between the Congo and 
Belgium, indicate what that judgment’s implications might be for third 
States, and the Court cannot therefore accept the Congo’s submissions 
on this point.

* *

78. For these reasons,
THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to juris-
diction, mootness and admissibility;

In favour: President Guillaume; Vice-President Shi; Judges Ranjeva, Herc-
zegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, 
Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-
Bula, Van den Wyngaert;

Against: Judge Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the 
Democratic Republic of the Congo on 17 October 2000;

In favour: President Guillaume; Vice-President Shi Judges Ranjeva, Herc-
zegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, 
Kooijmans, Rezek, Al-Khasawneh, Buergenthal Judges ad hoc Bula-
Bula, Van den Wyngaert;

Against: Judge Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is 
not without object and that accordingly the case is not moot;

In favour: President Guillaume; Vice-President Shi; Judges Ranjeva, Herc-
zegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren,
Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Hercezgh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

ocratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge ad hoc BULA-BULA appends a separate opinion to the Judgment of the Court; Judge ad hoc VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.
International Court of Justice

Avena and Other Mexican Nationals
(Mexico v. United States of America),
Request for the Indication of Provisional Measures
Order

I.C.J. Reports 2003
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER OF 5 FEBRUARY 2003

2003

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE AVENA ET AUTRES RESSORTISSANTS MEXICAINS
(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

ordonnance du 5 février 2003

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(MEXICO v. UNITED STATES OF AMERICA)
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AVENA ET AUTRES RESSORTISSANTS MEXICAINS
(MEXIQUE c. ÉTATS-UNIS D'AMÉRIQUE)
DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

5 FÉVRIER 2003
ORDONNANCE

INTERNATIONAL COURT OF JUSTICE
YEAR 2003

5 February 2003

CASE CONCERNING AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)
REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President GUILLAUME; Vice-President SHI; Judges ODA, RANJEA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOLMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY; Registrar COUVREUR.

The International Court of Justice,
Composed as above,
After deliberation,
Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,
Having regard to the Application filed in the Registry of the Court on 9 January 2003, whereby the United Mexican States (hereinafter “Mexico”) instituted proceedings against the United States of America (hereinafter the “United States”) for “violations of the Vienna Convention on Consular Relations (done on 24 April 1963)” (hereinafter the “Vienna Convention”) allegedly committed by the United States.

Makes the following Order:

1. Whereas in its aforementioned Application Mexico bases the juris-
2. Whereas the Application states that 54 Mexican nationals are on death row in the United States; whereas it is alleged that these individuals were arrested, detained, tried, convicted and sentenced to death by competent authorities of the United States following proceedings in which those authorities failed to comply with their obligations under Article 36, paragraph 1 (b), of the Vienna Convention; whereas it is contended that this provision requires that the authorities of the receiving State inform without delay any national of another State detained by those authorities of his right to contact his consulate, that, if the detained national so requests, it further requires those authorities to inform without delay the nearest consular post of the State concerned of the detention, and lastly that it obliges those authorities to forward without delay any communication addressed to the consular post by the detained individual; and whereas it is alleged that, in the cases of 49 of the detained Mexican nationals, the competent authorities of the United States made no attempt at any time to comply with Article 36 of the Vienna Convention, that in the cases of four other detained individuals, the required notification was not made “without delay”, and finally that in one case, while the detained national was informed of his rights, it was in connection with proceedings other than those involving capital charges against him;

3. Whereas in its Application Mexico states that “[t]he rights conferred by Article 36 . . . are not rights without remedies” and that in particular, as the Court determined in the Judgment delivered on 27 June 2001 in the case concerning LaGrand (Germany v. United States of America):

“[t]he rights conferred by Article 36 . . . are not rights without remedies” and that in particular, as the Court determined in the Judgment delivered on 27 June 2001 in the case concerning LaGrand (Germany v. United States of America):

4. Whereas Mexico alleges that various rules of United States municipal law, specifically “[t]hat the rule of procedural default, the need to show prejudice and the interpretation of the Eleventh Amendment of the United States Constitution followed by the United States tribunals”, rendered ineffective all actions brought before state or federal courts in the United States seeking relief for the violations of the Vienna Convention, whether those actions were brought by Mexican nationals or by Mexico itself;

5. Whereas in the Application Mexico explains that it has made numerous démarches to the competent authorities of the United States with a view to vindicating its rights and those of its nationals, but that these authorities have consistently refused to provide relief adequate to put an end to these violations and to ensure Mexico that they will not reoccur in the future;

6. Whereas Mexico further notes that the diplomatic démarches which it has made over the last six years to the executive branch of the federal Government of the United States and to the competent authorities of the constituent States have been ineffective; whereas, despite many diplomatic protests during that period, those authorities carried out the execution of several Mexican nationals whose rights under the Vienna Convention had been violated; and whereas the only response ever received by Mexico from those authorities has consisted of formal apologies made after the executions;

7. Whereas in its Application Mexico maintains that the United States, by breaching its obligations under Article 36, paragraph 1 (b), of the Vienna Convention, prevented Mexico from exercising its rights and performing its consular functions pursuant to Articles 5 and 36 of the Convention, which “could have prevented the convictions and death sentences”; whereas it contends that the steps taken by the United States to improve compliance with the Vienna Convention do not enable full effect to be given to the rights established by the Convention; whereas it claims that apologies by the United States in cases of breaches of the Convention are an insufficient remedy; and whereas Mexico accordingly asserts that it has suffered injury, in its own right and in the form of injury to its nationals, and that it is entitled to *restitutio in integram*, that is to say, to the “reestablishment of the situation which would, in all probability, have existed if [the violators] had not been committed”;

8. Whereas Mexico asks the Court to adjudge and declare:

“(1) that the United States, in arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals on death row described in this Application, violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals, as provided by Articles 5 and 36, respectively of the Vienna Convention;

(2) that Mexico is therefore entitled to *restitutio in integram*;

(3) that the United States is under an international legal obligation not to apply the doctrine of procedural default, or any other doctrine of its municipal law, to preclude the exercise of the rights afforded by Article 36 of the Vienna Convention;
(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character;

(5) that the right to consular notification under the Vienna Convention is a human right;

and that, pursuant to the foregoing international legal obligations,

1. the United States must restore the status quo ante, that is, reestablish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States international legal obligations;

2. the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended;

3. the United States must take the steps necessary and sufficient to establish a meaningful remedy at law for violations of the rights afforded to Mexico and its nationals by Article 36 of the Vienna Convention, including by barring the imposition, as a matter of municipal law, of any procedural penalty for the failure timely to raise a claim or defence based on the Vienna Convention where competent authorities of the United States have breached their obligation to advise the national of his or her rights under the Convention; and

4. the United States, in light of the pattern and practice of violations set forth in this Application, must provide Mexico a full guarantee of the non-repetition of the illegal acts’;

9. Whereas, on 9 January 2003, after filing its Application Mexico also submitted a request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court:

10. Whereas in its request for the indication of provisional measures Mexico refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein; and whereas it reiterates in particular that the United States has systematically violated the rights of Mexico and its nationals under Article 36 of the Vienna Convention;

11. Whereas in the request for the indication of provisional measures Mexico states that three Mexican nationals, namely Messrs. Cesar Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, risk execution within the next six months and that many other Mexican nationals could be executed before the end of 2003; and whereas Mexico further states that Cesar Roberto Fierro Reyna's execution could take place as early as 14 February 2003;

12. Whereas in the request for the indication of provisional measures Mexico notes that the Court indicated provisional measures to prevent executions in two prior cases involving claims brought under the Vienna Convention by States whose nationals were subject to execution in the United States as a result of criminal proceedings conducted in violation of the Convention; whereas it states that “[i]t cannot be said that the life of the defendant does not matter, and one can ask what is the point of placing a value on one person’s life and not another's”, that “[i]nternational law recognizes the sanctity of human life” and that “Article 6 of the International Covenant on Civil and Political Rights, to which the United States is a State party, establishes that every human being has an inherent right to life and mandates that States protect that right by law”; and whereas Mexico states in the following terms the grounds for its request and the possible consequences if it is denied:

"Unless the Court indicates provisional measures directing the United States to halt any executions of Mexican nationals until this Court's decision on the merits of Mexico's claims, the executive officials of constituent states of the United States will execute Messrs. Fierro [Reyna]. Moreno Ramos, Torres [Aguilera], or other Mexican nationals on death row before the Court has had the opportunity to consider those claims. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of its nationals. As the Court recognized in the LaGrand case, such circumstances would constitute irreparable prejudice. . . .";

13. Whereas Mexico concludes that “[t]heir execution is therefore clearly justified in order both to protect Mexico's paramount interest in the life and liberty of its nationals and to ensure the Court's ability to order the relief Mexico seeks”;

14. Whereas Mexico adds in its request that “[t]here can also be no question about the urgency of the need for provisional measures”;

15. Whereas Mexico states that, while it recognizes that the Court may
wish to leave to the United States the choice of means to ensure compliance with the provisional measures ordered, it nevertheless requests that the Court “leave no doubt as to the required result”;

16. Whereas Mexico notes specifically in its request that “[a]s a matter of international law, both the United States and its constituent political subdivisions have an obligation to abide by the international legal obligations of the United States”; and whereas Mexico takes the view that, “[h]aving undertaken international obligations on behalf of its constituent political entities, the United States should not now be heard to suggest that it cannot enforce their compliance with its obligations”;

17. Whereas Mexico further states that,

“[g]iven the clarity of both international law and United States municipal law, there can be no doubt that the United States has the means to ensure compliance with an order of provisional measures issued by this Court pursuant to Article 41 (1) [of its Statute]”;

18. Whereas Mexico asks that, pending final judgment in this case, the Court indicate:

“(a) that the Government of the United States take all measures necessary to ensure that no Mexican national be executed;

(b) that the Government of the United States take all measures necessary to ensure that no execution dates be set for any Mexican national;

(c) that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraphs (a) and (b); and

(d) that the Government of the United States ensure that no action is taken that might prejudice the rights of the United Mexican States or its nationals with respect to any decision this Court may render on the merits of the case”; and whereas Mexico further asks the Court to treat its request as a matter of the greatest urgency “[i]n view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican citizen”;

19. Whereas on 9 January 2003, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith sent it originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of that filing;

20. Whereas on 9 January 2003 the Registrar informed the Parties that the President of the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 20 January 2003 as the date for the opening of the oral proceedings;

21. Whereas, pending notification under Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court by transmission, in two languages, of the printed text of the Application to the States entitled to appear before the Court, on 9 January 2003 the Registrar informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

22. Whereas, following the Registrar’s subsequent consultations with the Parties, the Court decided to hear the Parties on 21 January 2003 concerning Mexico’s request for the indication of provisional measures; and whereas the Parties were so advised by letters of 14 January 2003 from the Registrar;

23. Whereas by a letter of 17 January 2003, received in the Registry on the same day, the United States Government informed the Court of the appointment of an Agent and a Co-Agent for the case;

24. Whereas by a letter of 20 January 2003 Mexico informed the Court that, further to the decision of the Governor of the State of Illinois to commute the death sentences of all convicted individuals awaiting execution in that State, it was withdrawing its request for provisional measures on behalf of three of the 54 Mexican nationals referred to in the Application; Messrs. Juan Caballero Hernández, Mario Flores Urbán and Gabriel Solache Romero; whereas it further stated that its request for provisional measures would stand for the other 51 Mexican nationals imprisoned in the United States and that “[t]he application stands, on its merits, for the fifty-four cases”;

25. Whereas, at the public hearings held on 21 January 2003 in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the following representatives of the Parties:

On behalf of Mexico: H.E. Mr. Juan Manuel Gómez Robledo, H.E. Mr. Santiago Oñate, H.E. Mr. Alberto Székely, Ms Sandra Babcock, Mr. Donald Francis Donovan;

On behalf of the United States: The Honorable William H. Taft, IV, Mr. Stephen Mathias, Ms Catherine W. Brown, Mr. James H. Thessin, Sir Eilhu Lauterbach, Mr. Daniel Paul Collins;
and whereas at the hearings a question was put by a Member of the Court, to which an oral reply was given;

* * *

26. Whereas in the first round of oral argument Mexico restated the position set out in its Application and in its request for the indication of provisional measures, and stressed that the requirements for the indication by the Court of the provisional measures requested were met in the present case;

27. Whereas Mexico has stressed that neither the apologies offered by the Government of the United States following the execution of Mexican nationals whose rights under the Vienna Convention had been violated, nor the review by an executive official "as a matter of grace and not of legal right" could represent a sufficient remedy for violations by competent authorities in the United States of obligations arising from the Vienna Convention; that a "meaningful 'review and reconsideration' of its nationals' claims in accord with the Judgment in LaGrand" requires the provision of "a remedy at law"; and that only the restoration of the status quo ante, that is, the re-establishment of the situation that existed before the violation, would be such a remedy;

28. Whereas Mexico has insisted that, unless provisional measures are indicated by the Court, three of its nationals, namely Messrs. Fierro Reyna, Moreno Ramos and Torres Aguilera, risk execution in the next few months and that many others could also be at risk of execution before the Court rules on the merits; and whereas it accordingly contends that the condition of urgency required for the indication of provisional measures is satisfied;

29. Whereas in the first round of oral argument the United States contended that the request by Mexico was without foundation in fact or in law and that the requirements for the Court to indicate provisional measures were not met;

30. Whereas the United States submitted that the Court had ruled in the LaGrand case that, where there had been a violation of the obligation of notification prescribed by Article 36, paragraph 1 (b), of the Vienna Convention "in death penalty cases", the remedy to be provided by the receiving State was to ensure that there was in every case review and reconsideration of the decision; whereas it stated that, following the LaGrand case, the competent authorities in the United States had instituted measures providing for review and reconsideration in all such cases, that so far these measures had proved effective and that there was no reason to think that they would not be effective in future cases; whereas it added that the receiving State was, on the other hand, under no obligation to quash all convictions and to recommence the trial process in such cases; and whereas the United States accordingly concluded that the request by Mexico seeking, by way of indication of provisional measures, to preserve a right to the restoration of the status quo ante was not a request seeking preservation of a right protected by the Vienna Convention, and that therefore the request should be denied;

31. Whereas the United States further contended that the request by Mexico did not satisfy the condition of urgency and did not show that imminent serious harm was likely, because United States proceedings in each of the 51 cases were continuing and none of the Mexican nationals covered by the request for indication of provisional measures was scheduled to be executed; and whereas it pointed out that in some of the cases referred to by Mexico no violation of Article 36 of the Vienna Convention had been established, that in others Mexico would have an opportunity to raise any failure of notification at a later stage in the domestic legal proceedings, and, finally, that review and reconsideration remained available in all the cases;

32. Whereas the United States further maintained that the request by Mexico was too sweeping and did not respect the essential balance of the rights of the Parties because, if it were accepted by the Court, it would prejudice the sovereign right of the United States to operate its criminal justice system; and whereas the United States concluded that the order for the indication of provisional measures requested by Mexico "would constitute a wholly unprecedented and unwarranted interference with the sovereign rights of the United States even as it goes far beyond preserving Mexico's rights under the Convention";

33. Whereas in its second round of oral argument Mexico stated that it could not accept the conclusions derived by the United States from the Court's Judgment in the LaGrand case in regard to the remedies available for breaches of its obligations under Article 36 of the Vienna Convention; whereas Mexico added that the Court would not, however, need to address those issues until its examination of the merits of the case; and whereas it submitted that the purpose of its request was unquestionably to preserve rights arising out of the Vienna Convention and that its request should accordingly be upheld;

34. Whereas Mexico contended that, for the condition of urgency to be met, it was sufficient that there was a "likely" threat of irreparable prejudice, and that in the present case, since execution dates for the Mexican nationals named in the request could be set at any time by the competent authorities of the United States and since, once those dates had been set, those nationals could be executed at very short notice, the condition of urgency was accordingly met;

35. Whereas, finally, Mexico argued that an order of the Court enjoining the United States not to proceed with the execution of the said Mexican nationals could not be considered as capable of causing any real
harm to the legitimate interest of the United States in operating its criminal justice system;

36. Whereas in its second round of oral argument the United States stressed the fact that, following the Court’s Judgment in the LaGrand case, it had put in place a vast programme to ensure compliance with the obligation of notification under Article 36, paragraph 1 (b), of the Vienna Convention and had also taken measures to ensure review and reconsideration in all death penalty cases where that obligation had been breached; and whereas the United States reiterated its view that Mexico’s request for the indication of provisional measures was not consistent with the LaGrand Judgment and that it was seeking to preserve non-existent rights, so that there was neither any risk of irreparable prejudice nor any urgency; whereas the United States further pointed out that, according to the United States Supreme Court, “the clemency power . . . [was] an integral mechanism in the administration of our criminal laws”, and “clemency ‘has provided a fail-safe in our criminal justice system’”;

37. Whereas at the hearings a Member of the Court put the following question to the Agent of the United States:

“Under what circumstances will the Legal Adviser of the State Department notify an appellate court rather than later notify a clemency body of the obligations of the United States consequent upon an admitted violation of Article 36 of the Vienna Convention? Is the matter simply one of timing?”;

whereas, in response to that question, the Agent stated inter alia the following:

“We . . . have made a conscious choice to focus our efforts on clemency proceedings for providing the review and reconsideration this Court called for in LaGrand. [That Judgment] expressly left the choice of means of providing the review and reconsideration to the United States[. . .]. [Clemency proceedings provide a more flexible process that is best suited for achieving, without procedural obstacles, the review and reconsideration this Court called for]”;

and whereas the Agent added that his

“Government would . . . inform a court upon request, at any time, of the international legal obligations of the United States, and how in the particular posture of a given case they [might] or [might] not apply and whether and how they might be carried out under the applicable domestic law in that court”,

while explaining that “a court [might] determine . . . that domestic law

principles still preclude[d] an express judicial remedy for a failure of consular notification”;

* * *

38. Whereas, on a request for the indication of provisional measures, the Court need not finally satisfy itself, before deciding whether or not to indicate such measures, that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

39. Whereas Article I of the Optional Protocol, which Mexico invokes as the basis of jurisdiction of the Court in the present case, is worded as follows:

“Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by a written application made by any party to the dispute being a Party to the present Protocol”;

40. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Mexico and the United States have been parties to the Vienna Convention since 16 June 1965 and 24 November 1969 respectively, and to the Optional Protocol since 15 March 2002 and 24 November 1969 respectively, in each case without reservation;

41. Whereas Mexico has argued that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it has accordingly concluded that the Court has the jurisdiction necessary to indicate the provisional measures requested; and whereas the United States has said that it “does not propose to make an issue now of whether the Court possesses prima facie jurisdiction, although this is without prejudice to its right to contest the Court’s jurisdiction at the appropriate stage later in the case”;

42. Whereas, in view of the foregoing, the Court accordingly considers that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to hear the case;

* * *

43. Whereas in its Application Mexico, as stated previously (see paragraph 8 above), asks the Court to adjudge and declare that, the United States “violated its international legal obligations to Mexico, in its own right and in the exercise of its right of consular protection of its nationals,
as provided by Articles 5 and 36, respectively of the Vienna Convention”; whereas Mexico seeks various measures aimed at remedying these breaches and avoiding any repetition thereof; whereas it contends, the Court should preserve the right to such remedies by calling upon the United States to take all necessary steps to ensure that no Mexican national is executed and that no execution date be set in respect of any such national;

44. Whereas the United States acknowledges that, in certain cases, Mexican nationals have been prosecuted and sentenced without being informed of their rights pursuant to Article 36, paragraph 1 (b), of the Vienna Convention; whereas it argues, however, that in such cases, in accordance with the Court’s Judgment in the LaGrand case, the United States has the obligation “by means of its own choosing, [to] allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention”; whereas it submits that in the specific cases identified by Mexico the evidence indicates the commitment of the United States to providing such review and reconsideration; whereas the United States contends that such review and reconsideration can occur through the process of executive clemency — an institution “deeply rooted in the Anglo-American system of justice” — which may be initiated by the individuals concerned after the judicial process has been completed; whereas it claims that such review and reconsideration has already occurred in several cases during the last two years; that none of the Mexicans “currently under sentence of death will be executed unless there has been a review and reconsideration of the conviction and sentence that takes into account any failure to carry out the obligations of Article 36 of the Vienna Convention”; that, under the terms of the Court’s decision in the LaGrand case, this is a sufficient remedy for its breaches, and that there is accordingly no need to indicate provisional measures intended to preserve the rights to such remedies;

45. Whereas, according to Mexico, the position of the United States amounts to maintaining that “the Vienna Convention entitles Mexico only to review and reconsideration, and that review and reconsideration equals only the ability to request clemency”; whereas “the standardless, secretive and unreviewable process that is called clemency cannot and does not satisfy this Court’s mandate [in the LaGrand case]”;.

46. Whereas there is thus a dispute between the Parties concerning the rights of Mexico and of its nationals regarding the remedies that must be provided in the event of a failure by the United States to comply with its obligations under Article 36, paragraph 1, of the Vienna Convention; whereas that dispute belongs to the merits and cannot be settled at this stage of the proceedings; whereas the Court must accordingly address the issue of whether it should indicate provisional measures to preserve any rights that may subsequently be adjudged on the merits to be those of the Applicant;

47. Whereas the United States argues, however, that it is incumbent upon the Court, pursuant to Article 41 of its Statute, to indicate provisional measures “not to preserve only rights claimed by the Applicant, but ‘to preserve the respective rights of either party’”; that, “[a]fter balancing the rights of both Parties, the scales tip decidedly against Mexico’s request in this case”; that the measures sought by Mexico to be implemented immediately amount to “a sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of United States law”, which “would drastically interfere with United States sovereign rights and implicate important federalism interests”; that this would, moreover, transform the Court into a “general criminal court of appeal”, which the Court has already indicated in the past is not its function; and that the measures requested by Mexico should accordingly be refused;

48. Whereas the Court, when considering a request for the indication of provisional measures, “must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent” (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996 I.C.J. Reports 1996 (1), p. 22, para. 35), without being obliged at this stage of the proceedings to rule on those rights; whereas the issues brought before the Court in this case “do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes”; whereas “the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal” (LaGrand / Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (1), p. 15, para. 25); whereas the Court may indicate provisional measures without infringing these principles; and whereas the argument put forward on these specific points by the United States accordingly cannot be accepted;

49. Whereas

“the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings” (ibid., pp. 14-15, para. 22);

* * *

49. Whereas
50. Whereas, moreover,

"provisional measures under Article 41 of the Statute are indicated pending the final decision" of the Court on the merits of the case, and are therefore only justified if there is urgency in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given" (Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23);

51. Whereas Mexico's principal request is that the Court should order the United States "to take measures sufficient to ensure that no Mexican national be executed and that no date for the execution of a Mexican national be set"; whereas the jurisdiction of the Court is limited in the present case to the dispute between the Parties concerning the interpretation and application of the Vienna Convention with regard to the individuals which Mexico identified as being victims of a violation of the Convention; whereas, accordingly, the Court cannot rule on the rights of Mexican nationals who are not alleged to have been victims of a violation of that Convention;

52. Whereas, however, Mexico argues that 54 of its nationals have been sentenced to death following proceedings that allegedly violated the obligations incumbent on the United States under Article 36, paragraph 1 (b), of the Vienna Convention; whereas Mexico provides a list of those nationals and some information relating to their respective cases; whereas it adds that three of them have had their sentences commuted; whereas at the oral proceedings its Agent requested that the United States be ordered "to refrain from fixing any date for execution and from carrying out any execution in the case of the 51 Mexican nationals covered by the Application, until the Court has been able to decide on the merits of the case";

53. Whereas the United States argues that no execution date has been scheduled with respect to any of the Mexican nationals concerned (see paragraph 31 above); whereas it points out that this is so both for the three individuals specifically named in its request for the indication of provisional measures and in regard to the others; whereas it observes that, in the case of these latter, "any execution date is even more remote"; and whereas it accordingly concludes that the request for the indication of provisional measures is thus premature;

54. Whereas "the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time" (LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I), p. 14, para. 19); whereas, moreover, the Supreme Court of the United States observed, when considering a petition seeking the enforcement of an Order of this Court, that: "It is unfortunate that this matter came before us while proceedings are pending before the ICJ that might have been brought to that court earlier" (Breard v. Greene, 523 US 371, 378 (1998)); whereas, in view of the rules and time-limits governing the granting of clemency and the fixing of execution dates in a number of the states of the United States, the fact that no such dates have been fixed in any of the cases before the Court is not per se a circumstance that should preclude the Court from indicating provisional measures;

55. Whereas it is apparent from the information before the Court in this case that three Mexican nationals, Messrs. César Roberto Fierro Reyna, Roberto Moreno Ramos and Osvaldo Torres Aguilera, are at risk of execution in the coming months, or possibly even weeks; whereas their execution would cause irreparable prejudice to any rights that may subsequently be adjudged by the Court to belong to Mexico; and whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve those rights, as Article 41 of its Statute provides;

56. Whereas the other individuals listed in Mexico's Application, although currently on death row, are not in the same position as the three persons identified in the preceding paragraph of this Order; whereas the Court may, if appropriate, indicate provisional measures under Article 41 of the Statute in respect of those individuals before it renders final judgment in this case;

* * *

57. Whereas it is clearly in the interest of both Parties that their respective rights and obligations be determined definitively as early as possible; whereas it is therefore appropriate that the Court, with the cooperation of the Parties, ensure that a final judgment be reached with all possible expedition;

58. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves; and whereas it leaves unaffected the right of the Governments of Mexico and the United States to submit arguments in respect of those questions;

* * *

59. For these reasons,

THE COURT,

Unanimously,

1. Indicate the following provisional measures:

(a) The United States of America shall take all measures necessary to
ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings;

(b) The Government of the United States of America shall inform the Court of all measures taken in implementation of this Order.

II. Decides that, until the Court has rendered its final judgment, it shall remain seised of the matters which form the subject of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of February, two thousand and three, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Gilbert Guillaume,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge Oda appends a declaration to the Order of the Court.

(Initialized) G.G.
(Initialized) Ph.C.
International Court of Justice

Avena and Other Mexican Nationals
(Mexico v. United States of America)
Judgment (excerpts)

I.C.J. Reports 2004
some seven months after his arrest. The United States further claims that many of the persons concerned were of United States nationality and that at least seven of these individuals “appear to have affirmatively claimed to be United States citizens at the time of their arrest”. These cases were said to be those of Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Ochoa (case No. 18), Salcido (case No. 22), Tafaya (case No. 24), and Alvarez (case No. 30). In the view of the United States no duty of consular information arose in these cases. Further, in the contention of the United States, the cases of Mr. Ayala (case No. 2) and Mr. Salcido (case No. 22) there was no reason to believe that the arrested persons were Mexican nationals at any stage; the information in the case of Mr. Juárez (case No. 10) was given “without delay”.

61. The Court thus now turns to the interpretation of Article 36, paragraph 1 (b), having found in paragraph 57 above that it is applicable to the 52 persons listed in paragraph 16. It begins by noting that Article 36, paragraph 1 (b), contains three separate but interrelated elements: the right of the individual concerned to be informed without delay of his rights under Article 36, paragraph 1 (b); the right of the consular post to be notified without delay of the individual’s detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person.

62. The third element of Article 36, paragraph 1 (b), has not been raised on the facts before the Court. The Court thus begins with the right of an arrested or detained individual to information.

63. The Court finds that the duty upon the detaining authorities to give the Article 36, paragraph 1 (b), information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national. Precisely when this may occur will vary with circumstances. The United States Department of State booklet, Consular Notification and Access — Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, issued to federal, state and local authorities in order to promote compliance with Article 36 of the Vienna Convention points out in such cases that: “most, but not all, persons born outside the United States are not [citizens]. Unfamiliarity with English may also indicate foreign nationality.” The Court notes that when an arrested person himself claims to be of United States nationality, the realization by the authorities that he is not in fact a United States national, or grounds for that realization, is likely to come somewhat later in time.
64. The United States has told the Court that millions of aliens reside, either legally or illegally, on its territory, and moreover that its laws concerning citizenship are generous. The United States has also pointed out that it is a multicultural society, with citizenship being held by persons of diverse appearance, speaking many languages. The Court appreciates that in the United States the language that a person speaks, or his appearance, does not necessarily indicate that he is a foreign national. Nevertheless, and particularly in view of the large numbers of foreign nationals living in the United States, these very circumstances suggest that it would be desirable for enquiry routinely to be made of the individual as to his nationality upon his detention, so that the obligations of the Vienna Convention may be complied with. The United States has informed the Court that some of its law enforcement authorities do routinely ask persons taken into detention whether they are United States citizens. Indeed, were each individual to be told at that time that, should he be a foreign national, he is entitled to ask for his consular post to be contacted, compliance with this requirement under Article 36, paragraph 1 (b), would be greatly enhanced. The provision of such information could parallel the reading of those rights of which any person taken into custody in connection with a criminal offence must be informed prior to interrogation by virtue of what in the United States is known as the “Miranda rule”: these rights include, inter alia, the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed at government expense if the person cannot afford one. The Court notes that, according to the United States, such a practice in respect of the Vienna Convention rights is already being followed in some local jurisdictions.

65. Bearing in mind the complexities explained by the United States, the Court now begins by examining the application of Article 36, paragraph 1 (b), of the Vienna Convention to the 52 cases. In 45 of these cases, the Court has no evidence that the arrested persons claimed United States nationality, or were reasonably thought to be United States nationals, with specific enquiries being made in timely fashion to verify such dual nationality. The Court has explained in paragraph 57 above what enquiries it would have expected to have been made, within a short time period, and what information should have been provided to the Court.

66. Seven persons, however, are asserted by the United States to have stated at the time of arrest that they were United States citizens. Only in the case of Mr. Salcido (case No. 22) has the Court been provided by the United States with evidence of such a statement. This has been acknowledged by Mexico. Further, there has been no evidence before the Court to suggest that there were in this case at the same time also indications of Mexican nationality, which should have caused rapid enquiry by the arresting authorities and the providing of consular information “without delay”. Mexico has accordingly not shown that in the case of Mr. Salcido the United States violated its obligations under Article 36, paragraph 1 (b).

67. In the case of Mr. Ayala (case No. 2), while he was identified in a court record in 1989 (three years after his arrest) as a United States citizen, there is no evidence to show this Court that the accused did indeed claim upon his arrest to be a United States citizen. The Court has not been informed of any enquiries made by the United States to confirm these assertions of United States nationality.

68. In the five other cases listed by the United States as cases where the individuals “appear to have affirmatively claimed to be United States citizens at the time of their arrest”, no evidence has been presented that such a statement was made at the time of arrest.

69. Mr. Avena (case No. 1) is listed in his arrest report as having been born in California. His prison records describe him as of Mexican nationality. The United States has not shown the Court that it was engaged in enquiries to confirm United States nationality.

70. Mr. Benavides (case No. 3) was carrying an Immigration and Naturalization Service immigration card at the time of arrest in 1991. The Court has not been made aware of any reason why the arresting authorities should nonetheless have believed at the time of arrest that he was a United States national. The evidence that his defence counsel in June 1993 informed the court that Mr. Benavides had become a United States citizen is irrelevant to what was understood as to his nationality at time of arrest.

71. So far as Mr. Ochoa is concerned (case No. 18), the Court observes that his arrest report in 1990 refers to him as having been born in Mexico, an assertion that is repeated in a second police report. Some two years later details in his court record refer to him as a United States citizen born in Mexico. The Court is not provided with any further details. The United States has not shown this Court that it was aware of, or was engaged in active enquiry as to, alleged United States nationality at the time of his arrest.

72. Mr. Tafoya (case No. 24) was listed on the police booking sheet as having been born in Mexico. No further information is provided by the United States as to why this was done and what, if any, further enquiries were being made concerning the defendant’s nationality.

73. Finally, the last of the seven persons referred to by the United States in this group, Mr. Alvarez (case No. 30), was arrested in Texas on 20 June 1998. Texas records identified him as a United States citizen. Within three days of his arrest, however, the Texas authorities were
informed that the Immigration and Naturalization Service was holding investigations to determine whether, because of a previous conviction, Mr. Alvarez was subject to deportation as a foreign national. The Court has not been presented with evidence that rapid resolution was sought as to the question of Mr. Alvarez's nationality.

74. The Court concludes that Mexico has failed to prove the violation by the United States of its obligations under Article 36, paragraph 1 (b), in the case of Mr. Salcido (case No. 22), and his case will not be further commented upon. On the other hand, as regards the other individuals who are alleged to have claimed United States nationality on arrest, whose cases have been considered in paragraphs 67 to 73 above, the argument of the United States cannot be upheld.

75. The question nonetheless remains as to whether, in each of the 45 cases referred to in paragraph 65 and of the six cases mentioned in paragraphs 67 to 73, the United States did provide the required information to the arrested persons “without delay”. It is to that question that the Court now turns.

76. The Court has been provided with declarations from a number of the Mexican nationals concerned that attest to their never being informed of their rights under Article 36, paragraph 1 (b). The Court at the outset notes that, in 47 such cases, the United States nowhere challenges this fact of information not being given. Nevertheless, in the case of Mr. Hernández (case No. 34), the United States observes that

“Although the [arresting] officer did not ask Hernández Llanas whether he wanted them to inform the Mexican Consulate of his arrest, it was certainly not unreasonable for him to assume that an escaped convict would not want the Consulate of the country from which he escaped notified of his arrest.”

The Court notes that the clear duty to provide consular information under Article 36, paragraph 1 (b), does not invite assumptions as to what the arrested person might prefer, as a ground for not informing him. It rather gives the arrested person, once informed, the right to say he nonetheless does not wish his consular post to be notified. It necessarily follows that in each of these 47 cases, the duty to inform “without delay” has been violated.

77. In four cases, namely Ayala (case No. 2), Esquivel (case No. 7), Juárez (case No. 10) and Solache (case No. 47), some doubts remain as to whether the information that was given was provided without delay. For these, some examination of the term is thus necessary.

78. This is a matter on which the Parties have very different views. According to Mexico, the timing of the notice to the detained person “is critical to the exercise of the rights provided by Article 36” and the phrase “without delay in paragraph 1 (b) requires “unqualified immediacy”. Mexico further contends that, in view of the object and purpose of Article 36, which is to enable “meaningful consular assistance” and the safeguarding of the vulnerability of foreign nationals in custody,

“consular notification...must occur immediately upon detention and prior to any interrogation of the foreign detainee, so that the consul may offer useful advice about the foreign legal system and provide assistance in obtaining counsel before the foreign national makes any ill-informed decisions or the State takes any action potentially prejudicial to his rights”.

79. Thus, in Mexico’s view, it would follow that in any case in which a foreign national was interrogated before being informed of his rights under Article 36, there would ipso facto be a breach of that Article, however rapidly after the interrogation the information was given to the foreign national. Mexico accordingly includes the case of Mr. Juárez among those where it claims violation of Article 36, paragraph 1 (b), as he was interrogated before being informed of his consular rights, some 40 hours after arrest.

80. Mexico has also invoked the travaux préparatoires of the Vienna Convention in support of its interpretation of the requirement that the arrested person be informed “without delay” of the right to ask that the consular post be notified. In particular, Mexico recalled that the phrase proposed to the Conference by the International Law Commission, “without undue delay”, was replaced by the United Kingdom proposal to delete the word “undue”. The United Kingdom representative had explained that this would avoid the implication that “some delay was permissible” and no delegate had expressed dissent with the USSR and Japanese statements that the result of the amendment would be to require information “immediately”.

81. The United States disputed this interpretation of the phrase “without delay”. In its view it did not mean “immediately, and before interrogation” and such an understanding was supported neither by the terminology, nor by the object and purpose of the Vienna Convention, nor by its travaux préparatoires. In the booklet referred to in paragraph 63 above, the State Department explains that “without delay” means “there should be no deliberate delay” and that the required action should be taken “as soon as reasonably possible under the circumstances”. It was normally to be expected that “notification to consular officers” would have been made “within 24 to 72 hours of the arrest or detention”. The United States further contended that such an interpretation of the words “without delay” would be reasonable in itself and also allow a consistent
interpretation of the phrase as it occurs in each of three different occasions in Article 36, paragraph 1 (b). As for the travaux préparatoires, they showed only that undue or deliberate delay had been rejected as unacceptable.

82. According to the United States, the purpose of Article 36 was to facilitate the exercise of consular functions by a consular officer:

“The significance of giving consular information to a national is thus limited . . . . It is a procedural device that allows the foreign national to trigger the related process of notification . . . . [It] cannot possibly be fundamental to the criminal justice process.”

83. The Court now addresses the question of the proper interpretation of the expression “without delay” in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of “without delay”, as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

84. Article 1 of the Vienna Convention on Consular Relations, which defines certain of the terms used in the Convention, offers no definition of the phrase “without delay”. Moreover, in the different language versions of the Convention, various terms are employed to render the phrases “without delay” in Article 36 and “immediately” in Article 14. The Court observes that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term “without delay” (and also of “immediately”). It is therefore necessary to look elsewhere for an understanding of this term.

85. As for the object and purpose of the Convention, the Court observes that Article 36 provides for consular officers to be free to communicate with nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation. It is not envisaged, either in Article 36, paragraph 1, or elsewhere in the Convention, that consular functions entail a consular officer himself or herself acting as the legal representative or more directly engaging in the criminal justice process. Indeed, this is confirmed by the wording of Article 36, paragraph 2, of the Convention. Thus, neither the terms of the Convention as normally understood, nor its object and purpose, suggest that “without delay” is to be understood as “immediately upon arrest and before interrogation”.

86. The Court further notes that, notwithstanding the uncertainties in the travaux préparatoires, they too do not support such an interpreta-

tion. During the diplomatic conference, the conference’s expert, former Special Rapporteur of the International Law Commission, explained to the delegates that the words “without undue delay” had been introduced by the Commission, after long discussion in both the plenary and drafting committee, to allow for special circumstances which might permit information as to consular notification not to be given at once. Germany, the only one of two States to present an amendment, proposed adding “but at latest within one month”. There was an extended discussion by many different delegates as to what such outer time-limit would be acceptable. During that debate no delegate proposed “immediately”. The shortest specific period suggested was by the United Kingdom, namely “promptly” and no later than “48 hours” afterwards. Eventually, in the absence of agreement on a precise time period, the United Kingdom’s other proposal to delete the word “undue” was accepted as the position around which delegates could converge. It is also of interest that there is no suggestion in the travaux that the phrase “without delay” might have different meanings in each of the three sets of circumstances in which it is used in Article 36, paragraph 1 (b).

87. The Court thus finds that “without delay” is not necessarily to be interpreted as “immediately” upon arrest. It further observes that during the Conference debates on this term, no delegate made any connection with the issue of interrogation. The Court considers that the provision in Article 36, paragraph 1 (b), that the receiving State authorities “shall inform the person concerned without delay of his rights” cannot be interpreted to signify that the provision of such information must necessarily precede any interrogation, so that the commencement of interrogation before the information is given would be a breach of Article 36.

88. Although, by application of the usual rules of interpretation, “without delay” as regards the duty to inform an individual under Article 36, paragraph 1 (b), is not to be understood as necessarily meaning “immediately upon arrest”, there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

89. With one exception, no information as to entitlement to consular notification was given in any of the cases cited in paragraph 77 within any of the various time periods suggested by the delegates to the Conference on the Vienna Convention, or by the United States itself (see paragraphs 81 and 86 above). Indeed, the information was given either not at all or at periods very significantly removed from the time of arrest. In the case of Mr. Juarez (case No. 10), the defendant was informed of his
consular rights 40 hours after his arrest. The Court notes, however, that Mr. Juárez’s arrest report stated that he had been born in Mexico; moreover, there had been indications of his Mexican nationality from the time of his initial interrogation by agents of the Federal Bureau of Investigation (FBI) following his arrest. It follows that Mr. Juárez’s Mexican nationality was apparent from the outset of his detention by the United States authorities. In these circumstances, in accordance with its interpretation of the expression “without delay” (see paragraph 88 above), the Court concludes that the United States violated the obligation incumbent upon it under Article 36, paragraph 1 (b), to inform Mr. Juárez without delay of his consular rights. The Court notes that the same finding was reached by a California Superior Court, albeit on different grounds.

90. The Court accordingly concludes that, with respect to each of the individuals listed in paragraph 16, with the exception of Mr. Salcido (case No. 22; see paragraph 74 above), the United States has violated its obligation under Article 36, paragraph 1 (b), of the Vienna Convention to provide information to the arrested person.

91. As noted above, Article 36, paragraph 1 (b), contains three elements. Thus far, the Court has been dealing with the right of an arrested person to be informed that he may ask for his consular post to be notified. The Court now turns to another aspect of Article 36, paragraph 1 (b). The Court finds the United States is correct in observing that the fact that a Mexican consular post was not notified under Article 36, paragraph 1 (b), does not of necessity show that the arrested person was not informed of his rights under that provision. He may have been informed and declined to have his consular post notified. The giving of the information is relevant, however, for satisfying the element in Article 36, paragraph 1 (b), on which the other two elements therein depend.

92. In only two cases has the United States claimed that the arrested person was informed of his consular rights but asked for the consular post not to be notified. These are Mr. Juárez (case No. 10) and Mr. Solache (case No. 47).

93. The Court is satisfied that when Mr. Juárez (case No. 10) was informed of his consular rights 40 hours after his arrest (see paragraph 89) he chose not to have his consular post notified. As regards Mr. Solache (case No. 47), however, it is not sufficiently clear to the Court, on the evidence before it, that he requested that his consular post should not be notified. Indeed, the Court has not been provided with any reasons as to why, if a request of non-notification was made, the consular post was then notified some three months later.

94. In a further three cases, the United States alleges that the consular post was formally notified of the detention of one of its Mexican nationals without prior information to the individual as to his consular rights. These are Mr. Covarrubias (case No. 6), Mr. Hernández (case No. 34) and Mr. Reyes (case No. 54). The United States further contends that the Mexican authorities were contacted regarding the case of Mr. Loza (case No. 52).

95. The Court notes that, in the case of Mr. Covarrubias (case No. 6), the consular authorities learned from third parties of his arrest shortly after it occurred. Some 16 months later, a court-appointed interpreter requested that the consulate intervene in the case prior to trial. It would appear doubtful whether an interpreter can be considered a competent authority for triggering the interrelated provisions of Article 36, paragraph 1 (b), of the Vienna Convention. In the case of Mr. Reyes (case No. 54), the United States has simply told the Court that an Oregon Department of Justice attorney had advised United States authorities that both the District Attorney and the arresting detective advised the Mexican consular authorities of his arrest. No information is given as to when this occurred, in relation to the date of his arrest. Mr. Reyes did receive assistance before his trial. In these two cases, the Court considers that, even on the hypothesis that the conduct of the United States had no serious consequences for the individuals concerned, it did nonetheless constitute a violation of the obligations incumbent upon the United States by Article 36, paragraph 1 (b).

96. In the case of Mr. Loza (case No. 52), a United States Congressman from Ohio contacted the Mexican Embassy on behalf of Ohio prosecutors, some four months after the accused’s arrest, “to enquire about the procedures for obtaining a certified copy of Loza’s birth certificate”. The Court has not been provided with a copy of the Congressman’s letter and is therefore unable to ascertain whether it explained that Mr. Loza had been arrested. The response from the Embassy (which is also not included in the documentation provided to the Court) was passed by the Congressman to the prosecuting attorney, who then asked the Civil Registry of Guadalajara for a copy of the birth certificate. This request made no specific mention of Mr. Loza’s arrest. Mexico contends that its consulate was never formally notified of Mr. Loza’s arrest, of which it only became aware after he had been convicted and sentenced to death. Mexico includes the case of Mr. Loza among those in which the United States was in breach of its obligation of consular notification. Taking account of all these elements, and in particular of the fact that the Embassy was contacted four months after the arrest, and that the consular post became aware of the defendant’s detention only after he had been convicted and sentenced, the Court concludes that in the case of Mr. Loza the United States violated the obligation of consular notice without delay incumbent upon it under Article 36, paragraph 1 (b).
that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3), Carrera (case No. 4), Contreras (case No. 5), Covarrubias (case No. 6), Esquivel (case No. 7), Gómez (case No. 8), Hoyos (case No. 9), Juárez (case No. 10), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manriquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Mendoza (case No. 17), Ochoa (case No. 18), Parra (case No. 19), Ramírez (case No. 20), Salazar (case No. 21), Sánchez (case No. 23), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Verano (case No. 27), Zamudio (case No. 29), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Gómez (case No. 33), Hernández (case No. 34), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Ramírez (case No. 41), Roche (case No. 42), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45), Flores (case No. 46), Solache (case No. 47), Fong (case No. 48), Camargo (case No. 49), Pérez (case No. 51), Loza (case No. 52), Torres (case No. 53) and Reyes (case No. 54);

(2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);

(3) that by virtue of its breaches of Article 36, paragraph 1 (b), as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 (a), of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals;

(4) that the United States, by virtue of these breaches of Article 36, paragraph 1 (b), also violated the obligation incumbent upon it under paragraph 1 (c) of that Article to enable Mexican consular officers to arrange for legal representation of their nationals in the case of the following individuals: Avena (case No. 1), Ayala (case No. 2), Carrera (case No. 4), Contreras (case No. 5), Gómez (case No. 8), López (case No. 11), Lupercio (case No. 12), Maciel (case No. 13), Manriquez (case No. 14), Fuentes (case No. 15), Martínez (case No. 16), Ochoa (case No. 18), Parra (case No. 19), Salazar (case No. 21), Tafoya (case No. 24), Valdez (case No. 25), Vargas (case No. 26), Alvarez (case No. 30), Fierro (case No. 31), García (case No. 32), Ibarra (case No. 35), Leal (case No. 36), Maldonado (case No. 37), Medellín (case No. 38), Moreno (case No. 39), Plata (case No. 40), Regalado (case No. 43), Arias (case No. 44), Caballero (case No. 45),

Flores (case No. 46), Fong (case No. 48), Pérez (case No. 51), Loza (case No. 52) and Torres (case No. 53).

* * *

ARTICLE 36, PARAGRAPH 2

107. In its third final submission Mexico asks the Court to adjudge and declare that

"the United States violated its obligations under Article 36 (2) of the Vienna Convention by failing to provide meaningful and effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1)."

108. Article 36, paragraph 2, provides:

"The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

109. In this connection, Mexico has argued that the United States

"By applying provisions of its municipal law to defeat or Foreclose remedies for the violation of rights conferred by Article 36 — thus failing to provide meaningful review and reconsideration of sentences imposed in proceedings that violated Article 36 — . . . has violated, and continues to violate, the Vienna Convention."

More specifically, Mexico contends that:

"The United States uses several municipal legal doctrines to prevent finding any legal effect from the violations of Article 36. First, despite this Court’s clear analysis in La Grand, US courts, at both the state and federal level, continue to invoke default doctrines to bar any review of Article 36 violations — even when the national had been unaware of his rights to consular notification and communication and thus his ability to raise their violation as an issue at trial, due to the competent authorities’ failure to comply with Article 36."

110. Against this contention by Mexico, the United States argues that:

"the criminal justice systems of the United States address all errors
in process through both judicial and executive clemency proceedings, relying upon the latter when rules of default have closed out the possibility of the former. That is, the ‘laws and regulations’ of the United States provide for the correction of mistakes that may be relevant to a criminal defendant to occur through a combination of judicial review and clemency. These processes together, working with other competent authorities, give full effect to the purposes for which Article 36 (1) is intended, in conformity with Article 36 (2).
And, insofar as a breach of Article 36 (1) has occurred, these procedures satisfy the remedial function of Article 36 (2) by allowing the United States to provide review and reconsideration of convictions and sentences consistent with LaGrand."

111. The "procedural default" rule in United States law has already been brought to the attention of the Court in the LaGrand case. The following brief definition of the rule was provided by Mexico in its Memorial in this case and has not been challenged by the United States: "a defendant who could have raised, but fails to raise, a legal issue at trial will generally not be permitted to raise it in future proceedings, on appeal or in a petition for a writ of habeas corpus". The rule requires exhaustion of remedies, inter alia, at the state level and before a habeas corpus motion can be filed with federal courts. In the LaGrand case, the rule in question was applied by United States federal courts; in the present case, Mexico also complains of the application of the rule in certain state courts of criminal appeal.

112. The Court has already considered the application of the "procedural default" rule, alleged by Mexico to be a hindrance to the full implementation of the international obligations of the United States under Article 36, in the LaGrand case, when the Court addressed the issue of its implications for the application of Article 36, paragraph 2, of the Vienna Convention. The Court emphasized that "a distinction must be drawn between that rule as such and its specific application in the present case". The Court stated:

"In itself, the rule does not violate Article 36 of the Vienna Convention. The problem arises when the procedural default rule does not allow the detained individual to challenge a conviction and sentence by claiming, in reliance on Article 36, paragraph 1, of the Convention, that the competent national authorities failed to comply with their obligation to provide the requisite consular information ‘without delay’, thus preventing the person from seeking and obtaining consular assistance from the sending State." (I.C.J. Reports 2001, p. 497, para. 90.)

On this basis, the Court concluded that "the procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds" (I.C.J. Reports 2001, p. 497, para. 91). This statement of the Court seems equally valid in relation to the present case, where a number of Mexican nationals have been placed exactly in such a situation.

113. The Court will return to this aspect below, in the context of Mexico’s claims as to remedies. For the moment, the Court simply notes that the procedural default rule has not been revised, nor has any provision been made to prevent its application in cases where it has been the failure of the United States itself to inform that may have precluded counsel from being in a position to have raised the question of a violation of the Vienna Convention in the initial trial. It thus remains the case that the procedural default rule may continue to prevent courts from attaching legal significance to the fact, inter alia, that the violation of the rights set forth in Article 36, paragraph 1, prevented Mexico, in a timely fashion, from retaining private counsel for certain nationals and otherwise assisting in their defence. In such cases, application of the procedural default rule would have the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended", and thus violate paragraph 2 of Article 36. The Court notes moreover that in several of the cases cited in Mexico’s final submissions the procedural default rule has already been applied, and that in others it could be applied at subsequent stages in the proceedings. However, in none of the cases, save for the three mentioned in paragraph 114 below, have the criminal proceedings against the Mexican nationals concerned already reached a stage at which there is no further possibility of judicial re-examination of those cases; that is to say, all possibility is not yet excluded of “review and reconsideration” of conviction and sentence, as called for in the LaGrand case, and as explained further in paragraphs 128 and following below. It would therefore be premature for the Court to conclude at this stage that, in those cases, there is already a violation of the obligations under Article 36, paragraph 2, of the Vienna Convention.

114. By contrast, the Court notes that in the case of three Mexican nationals, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39), and Mr. Torres (case No. 53), conviction and sentence have become final. Moreover, in the case of Mr. Torres the Oklahoma Court of Criminal Appeals has set an execution date (see paragraph 21 above, in fine). The Court must therefore conclude that, in relation to these three individuals, the United States is in breach of the obligations incumbent upon it under Article 36, paragraph 2, of the Vienna Convention.
LEGAL CONSEQUENCES OF THE BREACH

115. Having concluded that in most of the cases brought before the Court by Mexico in the 52 instances, there has been a failure to observe the obligations prescribed by Article 36, paragraph 1 (b), of the Vienna Convention, the Court now proceeds to the examination of the legal consequences of such a breach and of what legal remedies should be considered for the breach.

116. Mexico in its fourth, fifth and sixth submissions asks the Court to adjudicate and declare:

"(4) that pursuant to the injuries suffered by Mexico in its own right and in the exercise of diplomatic protection of its nationals, Mexico is entitled to full reparation for these injuries in the form of restitutio in integrum;

(5) that this restitution consists of the obligation to restore the status quo ante by annulling or otherwise depriving of full force or effect the conviction and sentences of all 52 Mexican nationals; [and]

(6) that this restitution also includes the obligation to take all measures necessary to ensure that a prior violation of Article 36 shall not affect the subsequent proceedings."

117. In support of its fourth and fifth submissions, Mexico argues that "It is well-established that the primary form of reparation available to a State injured by an internationally wrongful act is restitutio in integrum", and that "The United States is therefore obliged to take the necessary action to restore the status quo ante in respect of Mexico’s nationals detained, tried, convicted and sentenced in violation of their internationally recognized rights." To restore the status quo ante, Mexico contends that "restitution here must take the form of annullment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations", and that "It follows from the very nature of restitutio that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system." Mexico therefore asks in its submissions that the convictions and sentences of the 52 Mexican nationals be annulled, and that, in any future criminal proceedings against these 52 Mexican nationals, evidence obtained in breach of Article 36 of the Vienna Convention be excluded.

118. The United States on the other hand argues:

"LaGrand’s holding calls for the United States to provide, in each case, ‘review and reconsideration’ that ‘takes account of’ the viola-

119. The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the Factory at Chorzów case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.) What constitutes “reparation in an adequate form” clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the “reparation in an adequate form” that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows:

"The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is 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, 1928, P.C.I.J., Series A, No. 17, p. 47.)

120. In the LaGrand case the Court made a general statement on the principle involved as follows:

"The Court considers in this respect that if the United States, notwithstanding its commitment to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States." (I.C.J. Reports 2001, pp. 513-514, para. 125.)

121. Similarly, in the present case the Court’s task is to determine what would be adequate reparation for the violations of Article 36. It should be clear from what has been observed above that the internationally wrongful acts committed by the United States were the failure of its
competent authorities to inform the Mexican nationals concerned, to notify Mexican consular posts and to enable Mexico to provide consular assistance. It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of these nationals’ cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice.

122. The Court reaffirms that the case before it concerns Article 36 of the Vienna Convention and not the correctness as such of any conviction or sentencing. The question of whether the violations of Article 36, paragraph 1, are to be regarded as having, in the causal sequence of events, ultimately led to convictions and severe penalties is an integral part of criminal proceedings before the courts of the United States and is for them to determine in the process of review and reconsideration. In so doing, it is for the courts of the United States to examine the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention.

123. It is not to be presumed, as Mexico asserts, that partial or total annulment of conviction or sentence provides the necessary and sole remedy. In this regard, Mexico cites the recent Judgment of this Court in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), in which the “Court ordered the cancellation of an arrest warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs”. However, the present case has clearly to be distinguished from the Arrest Warrant case. In that case, the question of the legality under international law of the act of issuing the arrest warrant against the Congolese Minister for Foreign Affairs by the Belgian judicial authorities was itself the subject-matter of the dispute. Since the Court found that act to be in violation of international law relating to immunity, the proper legal consequence was for the Court to order the cancellation of the arrest warrant in question (I.C.J. Reports 2002, p. 33). By contrast, in the present case it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

124. Mexico has further contended that the right to consular notification and consular communication under the Vienna Convention is a fundamental human right that constitutes part of due process in criminal proceedings and should be guaranteed in the territory of each of the Contracting Parties to the Vienna Convention; according to Mexico, this right, as such, is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right. Whether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.

125. For these reasons, Mexico’s fourth and fifth submissions cannot be upheld.

126. The reasoning of the Court on the fifth submission of Mexico is equally valid in relation to the sixth submission of Mexico. In elaboration of its sixth submission, Mexico contends that,

“As an aspect of restituto in integrum, Mexico is also entitled to an order that in any subsequent criminal proceedings against the nationals, statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded.”

Mexico argues that “The exclusionary rule applies in both common law and civil law jurisdictions and requires the exclusion of evidence that is obtained in a manner that violates due process obligations”, and on this basis concludes that

“The status of the exclusionary rule as a general principle of law permits the Court to order that the United States is obligated to apply this principle in respect of statements and confessions given to United States law enforcement officials prior to the accused Mexican nationals being advised of their consular rights in any subsequent criminal proceedings against them.”

127. The Court does not consider that it is necessary to enter into an examination of the merits of the contention advanced by Mexico that the “exclusionary rule” is “a general principle of law under Article 38 (1) (c) of the . . . Statute” of the Court. The issue raised by Mexico in its sixth submission relates to the question of what legal consequences flow from the breach of the obligations under Article 36, paragraph 1 — a question which the Court has already sufficiently discussed above in relation to the fourth and the fifth submissions of Mexico. The Court is of the view that this question is one which has to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration. For this reason, the sixth submission of Mexico cannot be upheld.

128. While the Court has rejected the fourth, fifth and sixth submissions of Mexico relating to the remedies for the breaches by the United
States of its international obligations under Article 36 of the Vienna Convention, the fact remains that such breaches have been committed, as the Court has found, and it is thus incumbent upon the Court to specify what remedies are required in order to redress the injury done to Mexico and to its nationals by the United States through non-compliance with those international obligations. As has already been observed in paragraph 120, the Court in the *LaGrand* Judgment stated the general principle to be applied in such cases by way of a remedy to redress an injury of this kind (*I.C.J. Reports* 2001, pp. 513-514, para. 125).

129. In this regard, Mexico’s seventh submission also asks the Court to adjudge and declare:

“That to the extent that any of the 52 convictions or sentences are not annulled, the United States shall provide, by means of its own choosing, meaningful and effective review and reconsideration of the convictions and sentences of the 52 nationals, and that this obligation cannot be satisfied by means of clemency proceedings or if any municipal law rule or doctrine [that fails to attach legal significance to an Article 36 (1) violation] is applied.”

130. On this question of “review and reconsideration”, the United States takes the position that it has indeed conformed its conduct to the *LaGrand* Judgment. In a further elaboration of this point, the United States argues that “[t]he Court said in *LaGrand* that the choice of means for allowing the review and reconsideration it called for ‘must be left’ to the United States”, but that “Mexico would not leave this choice to the United States but have the Court undertake the review instead and decide at once that the breach requires the conviction and sentence to be set aside in each case”.

131. In stating in its Judgment in the *LaGrand* case that “the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence” (*I.C.J. Reports* 2001, p. 516, para. 128 (7); emphasis added), the Court acknowledged that the concrete modalities for such review and reconsideration should be left primarily to the United States. It should be underlined, however, that this freedom in the choice of means for such review and reconsideration is not without qualification: as the passage of the Judgment quoted above makes abundantly clear, such review and reconsideration has to be carried out “by taking account of the violation of the rights set forth in the Convention” (*I.C.J. Reports* 2001, p. 514, para. 125), including, in particular, the question of the legal consequences of the violation upon the criminal proceedings that have followed the violation.

132. The United States argues (1) “that the Court’s decision in *LaGrand* in calling for review and reconsideration called for a process to re-examine a conviction and sentence in light of a breach of Article 36”; (2) that, “in calling for a process of review, the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand”; and (3) “that the relief Mexico seeks in this case is flatly inconsistent with the Judgment in *LaGrand*: it seeks precisely the award of a substantive outcome that the *LaGrand* Court declined to provide”.

133. However, the Court wishes to point out that the current situation in the United States criminal procedure, as explained by the Agent at the hearings, is that

“If the defendant alleged at trial that a failure of consular information resulted in harm to a particular right essential to a fair trial, an appeals court can review how the lower court handled that claim of prejudice”;

but that

“If the foreign national did not raise his Article 36 claim at trial, he may face procedural constraints [i.e., the application of the procedural default rule] on raising that particular claim in direct or collateral judicial appeals” (emphasis added).

As a result, a claim based on the violation of Article 36, paragraph 1, of the Vienna Convention, however meritorious in itself, could be barred in the courts of the United States by the operation of the procedural default rule (see paragraph 111 above).

134. It is not sufficient for the United States to argue that “[w]hatever label [the Mexican defendant] places on his claim, his right...must and will be vindicated if it is raised in some form at trial” (emphasis added), and that

“In that way, even though a failure to label the complaint as a breach of the Vienna Convention may mean that he has technically speaking forfeited his right to raise this issue as a Vienna Convention claim, on appeal that failure would not bar him from independently asserting a claim that he was prejudiced because he lacked this critical protection needed for a fair trial.” (Emphasis added.)

The crucial point in this situation is that, by the operation of the procedural default rule as it is applied at present, the defendant is effectively barred from raising the issue of the violation of his rights under Article 36 of the Vienna Convention and is limited to seeking the vindication of his rights under the United States Constitution.

135. Mexico, in the latter part of its seventh submission, has stated that “this obligation [of providing review and reconsideration] cannot be
satisfied by means of clemency proceedings”. Mexico elaborates this point by arguing first of all that “the United States’s reliance on clemency proceedings is wholly inconsistent with its obligation to provide a remedy, as that obligation was found by this Court in LaGrand”. More specifically, Mexico contends:

“First, it is clear that the Court’s direction to the United States in LaGrand clearly contemplated that ‘review and reconsideration’ would be carried out by judicial procedures . . . .

Second, the Court was fully aware that the LaGrand brothers had received a clemency hearing, during which the Arizona Pardons Board took into account the violation of their consular rights. Accordingly, the Court determined in LaGrand that clemency review alone did not constitute the required ‘review and reconsideration’ . . . .

Finally, the Court specified that the United States must ‘allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention’ . . . . it is a basic matter of U.S. criminal procedural law that courts review convictions; clemency panels do not. With the rare exception of pardons based on actual innocence, the focus of capital clemency review is on the propriety of the sentence and not on the underlying conviction.”

Furthermore, Mexico argues that the clemency process is in itself an ineffective remedy to satisfy the international obligations of the United States. It concludes: “clemency review is standardless, secretive, and immune from judicial oversight”.

Finally, in support of its contention, Mexico argues that “the failure of state clemency authorities to pay heed to the intervention of the US Department of State in cases of death-sentenced Mexican nationals refutes the [United States] contention that clemency review will provide meaningful consideration of the violations of rights conferred under Article 36”.

136. Against this contention of Mexico, the United States claims that it “gives ‘full effect’ to the ‘purposes for which the rights accorded under [Article 36, paragraph 1] are intended’ through executive clemency”. It argues that “[t]he clemency process . . . is well suited to the task of providing review and reconsideration”. The United States explains that “Clemency . . . is more than a matter of grace; it is part of the overall scheme for ensuring justice and fairness in the legal process” and that

137. Specifically in the context of the present case, the United States contends that the following two points are particularly noteworthy:

“First, these clemency procedures allow for broad participation by advocates of clemency, including an inmate’s attorney and the sending state’s consular officer . . . . Second, these clemency officials are not bound by principles of procedural default, finality, prejudice standards, or any other limitations on judicial review. They may consider any facts and circumstances that they deem appropriate and relevant, including specifically Vienna Convention claims.”

138. The Court would emphasize that the “review and reconsideration” prescribed by it in the LaGrand case should be effective. Thus it should “take[e] account of the violation of the rights set forth in [the] Convention” (I.C.J. Reports 2001, p. 516, para. 128 (7)) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.

139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of “harm to a particular right essential to a fair trial” — a concept relevant to the enjoyment of due process rights under the United States Constitution — but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration.

140. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of
review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

141. The Court in the *LaGrand* case left to the United States the choice of means as to how review and reconsideration should be achieved, especially in the light of the procedural default rule. Nevertheless, the premise on which the Court proceeded in that case was that the process of review and reconsideration should occur within the overall judicial proceedings relating to the individual defendant concerned.

142. As regards the clemency procedure, the Court notes that this performs an important function in the administration of criminal justice in the United States and is “the historic remedy for preventing miscarriages of justice where judicial process has been exhausted” (*Herrera v. Collins*, 506 US 390 (1993) at pp. 411-412). The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the “existing laws and regulations of the United States”, but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective “review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention”, as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).

143. It may be true, as the United States argues, that in a number of cases “clemency in fact results in pardons of convictions as well as commutations of sentences”. In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of “review and reconsideration” as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures can supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention, as has occurred in the case of the three Mexican nationals referred to in paragraph 114 above.

144. Finally, the Court will consider the eighth submission of Mexico, in which it asks the Court to adjudge and declare:

“That the [United States] shall cease its violations of Article 36 of the Vienna Convention with regard to Mexico and its 52 nationals and shall provide appropriate guarantees and assurances that it shall take measures sufficient to achieve increased compliance with Article 36 (1) and to ensure compliance with Article 36 (2).”

145. In this respect, Mexico recognizes the efforts by the United States to raise awareness of consular assistance rights, through the distribution of pamphlets and pocket cards and by the conduct of training programmes, and that the measures adopted by the United States to that end were noted by the Court in its decision in the *LaGrand* case (*I.C.J. Reports 2001*, pp. 511-513, paras. 121, 123-124). Mexico, however, notes with regret that

“the United States programme, whatever its components, has proven ineffective to prevent the regular and continuing violation by its competent authorities of consular notification and assistance rights guaranteed by Article 36”.

146. In particular, Mexico claims in relation to the violation of the obligations under Article 36, paragraph 1, of the Vienna Convention:

*First*, competent authorities of the United States regularly fail to provide the timely notification required by Article 36 (1) (b) and thereby to *sic* frustrate the communication and access contemplated by Article 36 (1) (a) and the assistance contemplated by Article 36 (1) (c). These violations continue notwithstanding the Court’s judgment in *LaGrand* and the programme described there.

Mexico has demonstrated, moreover, that the pattern of regular non-compliance continues. During the first half of 2003, Mexico has identified at least one hundred cases in which Mexican nationals have been arrested by competent authorities of the United States for serious felonies but not timely notified of their consular notification rights.”

Furthermore, in relation to the violation of the obligations under Article 36, paragraph 2, of the Vienna Convention, Mexico claims:

*Second*, courts in the United States continue to apply doctrines of procedural default and non-retroactivity that prevent those courts from reaching the merits of Vienna Convention claims, and those courts that have addressed the merits of those claims (because no procedural bar applies) have repeatedly held that no remedy is avail-
able for a breach of the obligations of Article 36 ... Likewise, the United States’ reliance on clemency proceedings to meet LaGrand’s requirement of review and reconsideration represents a deliberate decision to allow these legal rules and doctrines to continue to have their inevitable effect. Hence, the United States continues to breach Article 36 (2) by failing to give full effect to the purposes for which the rights accorded under Article 36 are intended.”

147. The United States contradicts this contention of Mexico by claiming that “its efforts to improve the conveyance of information about consular notification are continuing unabated and are achieving tangible results”. It contends that Mexico “fails to establish a ‘regular and continuing’ pattern of breaches of Article 36 in the wake of LaGrand”.

148. Mexico emphasizes the necessity of requiring the cessation of the wrongful acts because, it alleges, the violation of Article 36 with regard to Mexico and its 52 nationals still continues. The Court considers, however, that Mexico has not established a continuing violation of Article 36 of the Vienna Convention with respect to the 52 individuals referred to in its final submissions; it cannot therefore uphold Mexico’s claim seeking cessation. The Court would moreover point out that, as much as these 52 individual cases are at various stages of criminal proceedings before the United States courts, they are in the state of pendent lite, and the Court has already indicated in respect of them what it regards as the appropriate remedy, namely review and reconsideration by reference to the breach of the Vienna Convention.

149. The Mexican request for guarantees of non-repetition is based on its contention that beyond these 52 cases there is a “regular and continuing” pattern of breaches by the United States of Article 36. In this respect, the Court observes that there is no evidence properly before it that would establish a general pattern. While it is a matter of concern that, even in the wake of the LaGrand Judgment, there remain a substantial number of cases of failure to carry out the obligation to furnish consular information to Mexican nationals, the Court notes that the United States has been making considerable efforts to ensure that its law enforcement authorities provide consular information to every arrested person they know or have reason to believe is a foreign national. Especially at the stage of pre-trial consular information, it is noteworthy that the United States has been making good faith efforts to implement the obligations incumbent upon it under Article 36, paragraph 1, of the Vienna Convention, through such measures as a new outreach programme launched in 1998, including the dissemination to federal, state and local authorities of the State Department booklet mentioned above in paragraph 63. The Court wishes to recall in this context what it has said in paragraph 64 about efforts in some jurisdictions to provide the information under Article 36, paragraph 1 (b), in parallel with the reading of the “Miranda rights”.

150. The Court would further note in this regard that in the LaGrand case Germany sought, inter alia, “a straightforward assurance that the United States will not repeat its unlawful acts” (I.C.J. Reports 2001, p. 511, para. 120). With regard to this general demand for an assurance of non-repetition, the Court stated:

“If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard. The programme in question certainly cannot provide an assurance that there will never again be a failure by the United States to observe the obligations of notification under Article 36 of the Vienna Convention. But no State could give such a guarantee and Germany does not seek it. The Court considers that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.” (I.C.J. Reports 2001, pp. 512-513, para. 124.)

The Court believes that as far as the request of Mexico for guarantees and assurances of non-repetition is concerned, what the Court stated in this passage of the LaGrand Judgment remains applicable, and therefore meets that request.

* * *

151. The Court would now re-emphasize a point of importance. In the present case, it has had occasion to examine the obligations of the United States under Article 36 of the Vienna Convention in relation to Mexican nationals sentenced to death in the United States. Its findings as to the duty of review and reconsideration of convictions and sentences have been directed to the circumstance of severe penalties being imposed on foreign nationals who happen to be of Mexican nationality. To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in
International Court of Justice

Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America), Request for the Indication of Provisional Measures Order

*I.C.J. Reports 2008*
REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)

(MEXICO v. UNITED STATES OF AMERICA)
REQUEST FOR THE INDICATION OF PROVISIONAL
MEASURES

ORDER OF 16 JULY 2008

2008

Official citation:
Request for Interpretation of the Judgment of 31 March 2004
in the Case concerning Avena and Other Mexican Nationals
(Mexico v. United States of America) (Mexico v. United States of America),

Mode officiel de citation:
Demande en interprétation de l’arrêt du 31 mars 2004
en l’affaire Avena et autres ressortissants mexicains
(Mexique c. États-Unis d’Amérique) (Mexique c. États-Unis d’Amérique),
REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
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REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

INTERNATIONAL COURT OF JUSTICE

16 JULY 2008

ORDER

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INTERNATIONAL COURT OF JUSTICE

YEAR 2008

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REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)
(MEXICO v. UNITED STATES OF AMERICA)
REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Registrar Couvreur.

The International Court of Justice,
Composed as above,
After deliberation,
Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73 and 74 of the Rules of Court,
Having regard to the Application instituting proceedings filed in the Registry of the Court on 5 June 2008 by the Government of the United Mexican States (hereinafter “Mexico”), whereby, referring to Article 60...
of the Statute and Articles 98 and 100 of the Rules of Court, Mexico requested the Court to interpret paragraph 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (*I.C.J. Reports* 2004 (I), p. 12) (hereinafter “the Avena Judgment”),

*Makes the following Order:*

1. Whereas in its Application Mexico states that in paragraph 153 (9) of the *Avena* Judgment the Court found “that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals” mentioned in the Judgment, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention on Consular Relations (hereinafter “the Vienna Convention”) and paragraphs 138 to 141 of the Judgment; whereas it is alleged that “requests by the Mexican nationals for the review and reconsideration mandated in their cases by the *Avena* Judgment have repeatedly been denied”;

2. Whereas Mexico claims that, since the Court delivered its Judgment in the *Avena* case, “[o]nly one state court has provided the required review and consideration, in the case of Osvaldo Torres Aguilera”, adding that, in the case of Rafael Camargo Ojeda, the State of Arkansas “agreed to reduce Mr. Camargo’s death sentence to life imprisonment in exchange for his agreement to waive his right to review and reconsideration under the *Avena* Judgment”; and whereas, according to Mexico, “[a]ll other efforts to enforce the *Avena* Judgment have failed”;

3. Whereas it is explained in the Application that, on 28 February 2005, the President of the United States of America (hereinafter the “United States”), George W. Bush, issued a Memorandum (also referred to by the Parties as a “determination”); whereas it is stated in the Application that the President’s Memorandum determined that state courts must provide the required review and reconsideration to the 51 Mexican nationals named in the *Avena* Judgment, including Mr. Medellín, notwithstanding any state procedural rules that might otherwise bar review of their claims; whereas the President’s Memorandum reads as follows:

“I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in *Avena*, by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision”;

and whereas a copy of that Memorandum was attached as an exhibit to the brief filed on behalf of the United States as *amicus curiae* in the case of Mr. José Ernesto Medellin Rojas against the State of Texas, brought before the Supreme Court of the United States;

4. Whereas, according to Mexico, on 25 March 2008, in Mr. Medellin’s case, the Supreme Court of the United States, while acknowledging that the *Avena* Judgment constitutes an obligation under international law on the part of the United States, ruled that “the means chosen by the President of the United States to comply were unavailable under the US Constitution” and that “neither the *Avena* Judgment on its own, nor the Judgment in conjunction with the President’s Memorandum, constituted directly enforceable federal law” precluding Texas from “applying state procedural rules that barred all review and reconsideration of Mr. Medellin’s Vienna Convention claim”; and whereas Mexico adds that the Supreme Court did confirm, however, that there are alternative means by which the United States still can comply with its obligations under the *Avena* Judgment, in particular, by the passage of legislation by Congress making a “non-self-executing treaty domestically enforceable” or by “voluntary compliance by the State of Texas”;

5. Whereas, in its Application, Mexico points out that, since the decision of the Supreme Court, a Texas court has declined the stay of execution requested by counsel for Mr. Medellín in order “to allow Congress to pass legislation implementing the United States’s international legal obligations to enforce this Court’s *Avena* Judgment”, and has scheduled Mr. Medellín’s execution for 5 August 2008; whereas, according to Mexico, “Texas has made clear that unless restrained, it will go forward with the execution without providing Mr. Medellin the mandated review and reconsideration”; whereas Mexico asserts that the actions of the Texas court will thereby irreparably breach the United States obligations under the *Avena* Judgment;

6. Whereas it is contended that at least four more Mexican nationals are also “in imminent danger of having execution dates set by the State of Texas without any indication that the Mexican nationals facing execution will receive review and reconsideration”; whereas Mexico states in its Application that, on 29 November 2007, the Supreme Court of California “affirmed the conviction and sentence of Martin Mendoza García and simultaneously rejected his claim that he was entitled to review and reconsideration consistent with *Avena* on the basis of the record on direct appeal”; whereas Mexico also states that, on 31 March 2008, following its decision in Mr. Medellín’s case, the Supreme Court of the United States denied petitions for review and reconsideration under the *Avena* Judgment by seven other Mexican nationals in whose cases this Court had found violations of Article 36 of the Vienna Convention, namely
Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, Ignacio Gómez, Félix Rocha Díaz, Virgilio Maldonado and Roberto Moreno Ramos; and whereas Mexico adds that, on 27 May 2008, the United States Court of Appeals for the Fifth Circuit declined to grant Ignacio Gómez leave to appeal the dismissal of a federal petition for post-conviction relief that was premised in part on the Vienna Convention violation in his case;

7. Whereas Mexico explains that it has sought repeatedly to establish its rights and to secure appropriate relief for its nationals, both before and after the decision of the Supreme Court of the United States, but that its diplomatic démarches have been ineffective; whereas it contends that “all competent authorities of the United States Government at both the state and federal levels acknowledge that the United States is under an international law obligation under Article 94 (1) of the United Nations Charter to comply with the terms of the [Avena] Judgment”, but have failed to take appropriate action or have taken affirmative steps in contravention of that obligation;

8. Whereas, in its Application, Mexico refers to Article 60 of the Statute of the Court which provides that “[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party” and contends, citing the Court’s case law, that the Court’s jurisdiction to entertain a request for interpretation of its own judgment is based directly on this provision;

9. Whereas Mexico asserts that it understands the language of paragraph 153 (9) of the Avena Judgment as establishing “an obligation of result” which is complied with only when review and reconsideration of the convictions and sentences in question has been completed; whereas, according to Mexico, while the United States may use “means of its own choosing”, as stated in paragraph 153 (9), “the obligation to provide review and reconsideration is not contingent on the success of any one means” and therefore the United States cannot “rest on a single means chosen”; and whereas Mexico considers that it flows from this paragraph of the Avena Judgment that the United States must “prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation”; and whereas, according to Mexico, it follows that the conduct of the United States confirms the latter’s understanding that “paragraph 153 (9) imposes only an obligation of means”;

10. Whereas Mexico, in its Application, submits that “anything short of full compliance with the review and reconsideration ordered by this Court in the cases of the 48 Mexican nationals named in the Judgment who are still eligible for review and reconsideration would violate the obligation of result imposed by paragraph 153 (9)”;

11. Whereas Mexico points out that “[h]aving chosen to issue the President’s 2005 determination directing state courts to comply, the United States to date has taken no further action . . . despite the confirmation by its own Supreme Court that other means are available to ensure full compliance”;

12. Whereas Mexico thus contends that there is a dispute between the Parties as to the meaning and scope of the remedial obligation established in paragraph 153 (9) of the Avena Judgment;

13. Whereas, at the end of its Application, Mexico asks the Court to adjudge and declare that “the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’;

and that, pursuant to the foregoing obligation of result,

1. the United States must take any and all steps necessary to provide the reparation of review and reconsideration mandated by the Avena Judgment; and

2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation”;

14. Whereas, on 5 June 2008, after filing its Application, Mexico, referring to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court, also submitted a request for the indication of provisional measures in order “to preserve the rights of Mexico and its nationals” pending the Court’s judgment in the proceedings on the interpretation of the Avena Judgment;

15. Whereas, in its request for the indication of provisional measures, Mexico refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made therein;

16. Whereas Mexico recalls that Mr. José Ernesto Medellín Rojas, a Mexican national, will certainly face execution on 5 August 2008, and that another Mexican national, Mr. César Roberto Fierro Reyna, shortly could receive an execution date on 30 days’ notice, while three other Mexican nationals — Messrs. Rubén Ramírez Cárdenas, Humberto Leal...
García, and Roberto Moreno Ramos — shortly could receive execution dates on 90 days’ notice, in the State of Texas;

17. Whereas Mexico contends that, under Article 41 of the Statute, the Court has the undoubted authority to indicate binding provisional measures “to ensure the status quo pending resolution of the dispute before it”;

18. Whereas, in its request for the indication of provisional measures, Mexico notes that the Court indicated provisional measures to prevent executions in three prior cases involving claims brought under the Vienna Convention by States whose nationals were subject to execution in the United States as a result of criminal proceedings conducted in violation of the Convention; and whereas, according to Mexico, given that the Court indicated provisional measures in the Avena case concerning a dispute relating to the interpretation and application of the Vienna Convention, the Court similarly should act pursuant to Article 41 of the Statute where the dispute concerns the meaning and the scope of the obligations imposed by its own Judgment in this case;

19. Whereas Mexico indicates that “the paramount interest in human life is at stake” and that “that interest would be irreparably harmed if any of the Mexican nationals whose right to review and reconsideration was determined in the Avena Judgment were executed without having received that review and reconsideration”; and whereas Mexico states in the following terms the grounds for its request and the possible consequences if it is denied:

“Unless the Court indicates provisional measures pending this Court’s disposition of Mexico’s Request for Interpretation, Mr. Medellín certainly will be executed, and Messrs. Fierro, Leal García, Moreno Ramos, and Ramírez Cárdenas will be at substantial risk of execution, before the Court has had the opportunity to consider the dispute before it. In that event, Mexico would forever be deprived of the opportunity to vindicate its rights and those of the nationals concerned”;

20. Whereas Mexico claims that, as far as the United States is concerned, any delay in an execution would not be prejudicial to the rights of the United States as all of the above-mentioned Mexican nationals would remain incarcerated and subject to execution once their right to review and reconsideration has been vindicated;

21. Whereas Mexico adds in its request that “[t]here also can be no question about the urgency of the need for provisional measures”;

22. Whereas it concludes that provisional measures are justified in order “both to protect Mexico’s paramount interest in the life of its nationals and to ensure the Court’s ability to order the relief Mexico seeks”;

23. Whereas Mexico asks that, pending judgment on its Request for interpretation, the Court indicate:

“(a) that the Government of the United States take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted [on 5 June 2008];

(b) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a); and

(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation this Court may render with respect to paragraph 153 (9) of its Avena Judgment”;

and whereas Mexico further asks the Court to treat its request for the indication of provisional measures as a matter of the greatest urgency “in view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Mexican national in violation of obligations the United States owes to Mexico”;

24. Whereas on 5 June 2008, the date on which the Application and the request for the indication of provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents and forthwith sent it signed originals of them, in accordance with Article 40, paragraph 2, of the Statute of the Court and with Article 38, paragraph 4, and Article 73, paragraph 2, of the Rules of Court; and whereas the Registrar also notified the Secretary-General of the United Nations of that filing;

25. Whereas, on 5 June 2008, the Registrar also informed the Parties that the Court, in accordance with Article 74, paragraph 3, of the Rules of Court, had fixed 19 June 2008 as the date for the opening of the oral proceedings on the request for the indication of provisional measures;

26. Whereas, by a letter of 12 June 2008, received in the Registry on the same day, the United States Government informed the Court of the appointment of an Agent and a Co-Agent for the case;

27. Whereas, at the public hearings held on 19 and 20 June 2008 in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented:

On behalf of Mexico: by H.E. Mr. Juan Manuel Gómez-Robledo, H.E. Mr. Joel Antonio Hernández García, Ms Sandra Babcock, Ms Catherine Amirfar, Mr. Donald Francis Donovan, H.E. Mr. Jorge Lomónaco Tonda;
On behalf of the United States: by Mr. John B. Belliger, III, Mr. Stephen Mathias, Mr. James H. Thessin, Mr. Michael J. Mattler, Mr. Vaughan Lowe;

and whereas at the hearings a question was put by a Member of the Court to the United States, to which an oral reply was given;

* * *

28. Whereas, in the first round of oral argument, Mexico restated the position set out in its Application and in its request for the indication of provisional measures, and affirmed that the requirements for the indication by the Court of the provisional measures requested had been met in the present case;

29. Whereas Mexico stated that, while it recognized and welcomed the efforts undertaken by the Government of the United States to enforce the Avena Judgment in state courts, those efforts, in its view, had fallen short of what was required by the Judgment; whereas Mexico reiterated that “the Governments of Mexico and the United States [had] divergent views as to the meaning and scope of paragraph 153 (9) of the Avena Judgment, and that a clarification by [the] Court [was] necessary”; and whereas it added that its request for the indication of provisional measures was limited to what was strictly necessary to preserve Mexico’s rights pending the Court’s final judgment on its Request for interpretation;

30. Whereas Mexico insisted that there was an overwhelming risk that authorities of the United States imminently would act to execute Mexican nationals in violation of obligations incumbent upon the United States under the Avena Judgment; whereas it specified in particular that, unless provisional measures were indicated by the Court, one of its nationals, Mr. José Ernesto Medellín Rojas, would be executed; whereas the United States explained that it has faced considerable “domestic law constraints” in achieving the implementation of the Avena Judgment, due to its “federal structure, in which the constituent states … retain[ed] a substantial degree of autonomy, particularly in matters relating to criminal justice”, combined with its “constitutional structure of divided executive, legislative, and judicial functions of government at the federal level”; whereas the United States contended that, despite these constraints, since the Avena Judgment, it has undertaken a series of actions to achieve the implementation of the Court’s Judgment;

31. Whereas at the end of the first round of oral observations Mexico thus requested the Court, “as a matter of utmost urgency”, to issue an order indicating:

“(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén

Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008; and

(b) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a)”;

32. Whereas, in its first round of oral observations, the United States asserted that Mexico had failed to demonstrate that there existed between the United States and Mexico any dispute as to “the meaning or scope of the Court’s decision in Avena”, as required by Article 60 of the Statute, because the United States “entirely agree[d]” with Mexico’s position that the Avena Judgment imposed an international legal obligation of “result” and not merely of “means”; whereas, according to the United States, the Court was being “requested by Mexico to engage in what [was] in substance the enforcement of its earlier judgments and the supervision of compliance with them”; whereas the United States observed that, given the fact that it had withdrawn from the Optional Protocol to the Vienna Convention on Consular Relations on 7 March 2005, a proceeding on interpretation was “potentially the only jurisdictional basis” for Mexico to seise the Court in matters involving the violation of that Convention; whereas the United States argued that, in the “absence of a dispute, the Court lack[ed] prima facie jurisdiction to proceed” and thus provisional measures were “inappropriate in this case”; and whereas the United States further urged that, under its “inherent powers”, the Court should dismiss Mexico’s Application on the basis that it constituted “an abuse of process”, being directed to the implementation of the Avena Judgment, which lay beyond the Court’s judicial function;

33. Whereas the United States explained that it has faced considerable “domestic law constraints” in achieving the implementation of the Avena Judgment, due to its “federal structure, in which the constituent states . . . retain[ed] a substantial degree of autonomy, particularly in matters relating to criminal justice”, combined with its “constitutional structure of divided executive, legislative, and judicial functions of government at the federal level”; whereas the United States contended that, despite these constraints, since the Avena Judgment, it has undertaken a series of actions to achieve the implementation of the Court’s Judgment;

34. Whereas the United States noted in particular that the President of the United States issued a Memorandum in early 2005 to the Attorney General of the United States (see paragraph 3 above) directing that the state courts give effect to the Avena Judgment; whereas, according to the United States, under the terms of the Memorandum, in order to provide the Mexican nationals named in the Avena Judgment with review and reconsideration in state courts of their claims under the Vienna Conven-
tion, "state law procedural default rules were to be deemed inapplicable"; whereas the United States added that "in order to publicize the President's decision, the Attorney General of the United States sent a letter to each of the relevant state Attorneys General notifying them of the President's actions"; whereas the United States pointed out that the United States Federal Department of Justice filed an amicus brief and appeared before the Texas Court of Criminal Appeals to support Mr. Medellín's argument that the President's Memorandum entitled him to the review and reconsideration required by the Avena Judgment; whereas the United States stated that

"despite these unprecedented efforts, the Texas Court of Criminal Appeals still declined to treat the President's determination as binding, and it refused to provide Mr. Medellín the review and reconsideration required by Avena",

concluding that the President “had acted unconstitutionally in seeking to pre-empt Texas state law, even in order to comply with an international law obligation”; whereas, in addition, the United States referred to three filings it has made in support of the Presidential Memorandum, requiring review and reconsideration for “the Avena defendants” in the United States Supreme Court;

35. Whereas the United States indicated that the Supreme Court, in its recent decision, had “rejected the United States arguments and refused to treat the President’s determination as binding on state courts”, concluding that “the President lacked the inherent authority under [the United States Constitution] and that “Congress had not given him the requisite additional authority to order states to comply with the decision of [the International Court of Justice]”; whereas the United States asserted that the Supreme Court reaffirmed the obligation of the United States under international law to comply with the Avena decision; whereas the United States noted however that, in focusing on the status of that obligation in United States domestic law, i.e., “whether the Avena decision was automatically enforceable in United States courts, or whether the President had the authority to direct state courts to comply with the decision”, the Supreme Court concluded that the decisions of the International Court of Justice were not automatically and directly enforceable in United States courts; whereas, according to the United States, the Supreme Court “effectively ruled that the President’s actions to give effect to Avena were unconstitutional under United States domestic law” (emphasis in the original);

36. Whereas the United States claimed that, having “fallen short” in its initial efforts to ensure implementation of the Court’s Judgment in the Avena case, “the United States [was] now urgently considering its alternatives”; whereas the United States submitted that, to that end, a few days before the opening of the hearings,

“Secretary of State Rice and Attorney General Mukasey [had] jointly sent a letter to the Governor of Texas . . . calling attention to the United States continuing international law obligation and formally asking him to work with the federal government to provide the named Avena defendants the review and reconsideration required by the Avena decision”;

and whereas the United States maintained that, since the Avena Judgment, in connection with efforts by the United States federal government to persuade states to give effect to that Judgment, several Mexican nationals named therein had already received review and reconsideration of their convictions and sentences;

37. Whereas the United States argued that, contrary to Mexico’s suggestion, the United States did not believe that it need make no further effort to implement this Court’s Avena Judgment, and asserted that it would “continue to work to give that Judgment full effect, including in the case of Mr. Medellín”;

38. Whereas the United States requested that the Court reject the request of Mexico for the indication of provisional measures of protection and not indicate any such measures, and that the Court dismiss Mexico’s Application for interpretation on grounds of manifest lack of jurisdiction;

39. Whereas in its second round of oral observations Mexico stated that, by scheduling Mr. Medellín’s execution before being afforded the remedy provided for in the Avena Judgment, the State of Texas, a constituent part and a competent authority of the United States, “has unmistakably communicated its disagreement with Mexico’s interpretation of the Judgment” as establishing an international legal obligation of result and has thereby confirmed “the existence of that dispute between Mexico and the competent organs and authorities in the state of Texas” (emphasis in the original); whereas Mexico added that nor “was there any basis for the Court to conclude at this point that there was no difference in view at the federal level” and referred in that connection to the absence of any indication that “the federal legislature [understood] itself bound by Avena to ensure that the nationals covered by the Judgment receive review and reconsideration”;

40. Whereas at the end of its second round of oral observations Mexico made the following request:

“(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto
Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court's Avena Judgment; and

(b) that the Government of the United States inform the Court of all measures taken in implementation of subparagraph (a)";

41. Whereas, in its second round of oral observations, the United States stressed the fact that the United States agreed with the interpretation of paragraph 153 (9) requested by Mexico, “in particular that the Avena Judgment impose[d] an obligation of result’ on the United States” and that accordingly, there was no dispute “as to the meaning or scope” of that Judgment; whereas the United States again expressed its view that “Mexico’s real purpose in these proceedings [was] enforcement, rather than interpretation, of the Avena Judgment”; whereas the United States reiterated that, “since no dispute exist[ed] on the issues on which Mexico [sought] interpretation, there [were] no rights at issue that could be the subject of a dispute”; whereas the United States asserted that, as Mexico had not identified a dispute, Article 60 of the Statute did not provide a jurisdictional basis for its Request for interpretation and that, “in the absence of such a jurisdictional basis, the Court should not proceed to consider the other factors identified by Mexico, and should instead dismiss its request for provisional measures”; whereas, the United States reiterated that, “even putting questions of prima facie jurisdiction aside, Mexico’s request [did] not meet the other criteria for the indication of provisional measures” as there were no rights in dispute;

42. Whereas the United States argued that its actions “[were] consistent with its understanding that the Avena Judgment impose[d] an obligation of result”; whereas it noted that under the United States Constitution, it was the executive branch, under the leadership of the President and the Secretary of State that spoke authoritarian for the United States internationally; whereas the United States explained that, although the acts of its political subdivisions could incur the international responsibility of the United States, that did not mean that these actions were those of the United States for purposes of determining whether there was a dispute with another State; whereas, according to the United States, it cannot be argued that “particular alleged acts or omissions”, such as an omission by the United States Congress to undertake legislation to implement the Avena Judgment or an omission by the State of Texas to implement such legislation, “reflect[ed] a legal dispute as to the interpretation of the Avena Judgment” (emphasis in the original); whereas the United States expressed its regret that its full efforts thus far had not arrived at a full resolution of the matter and stated that it would continue to work with Mexico to provide review and reconsideration to the named Avena defendants;

43. Whereas at the close of its second round of oral observations, the United States reiterated the request made in the first round (see paragraph 38 above);

* * *

44. Whereas the Court’s jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case; and whereas it follows that, even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a request for interpretation;

45. Whereas in the case of a request for the indication of provisional measures made in the context of a request for interpretation under Article 60 of the Statute, the Court has to consider whether the conditions laid down by that Article for the Court to entertain a request for interpretation appear to be satisfied; whereas Article 60 provides that: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”; and whereas this provision is supplemented by Article 98 of the Rules of Court, paragraph 1 of which reads: “In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation . . .”; 

46. Whereas, therefore, by virtue of the second sentence of Article 60, the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a “dispute as to the meaning or scope of the said judgment”;

47. Whereas Mexico requests the Court to interpret paragraph 153 (9) of the operative part of the Judgment delivered by the Court on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America); whereas a request for interpretation must relate to a dispute between the parties relating to the meaning or scope of the operative part of the judgment and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part (Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. II, 1927, P.C.I.J., Series A, No. 13, p. 11; Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999 (I), p. 35, para. 10);

48. Whereas Mexico asks the Court to confirm its understanding that the language in that provision of the Avena Judgment establishes an obligation of result that obliges the United States, including all its component organs at all levels, to provide the requisite review and reconsidera-
tion irrespective of any domestic law impediment; whereas Mexico further submits that the

“obligation imposed by the Avena Judgment requires the United States to prevent the execution of any Mexican national named in the Judgment unless and until that review and reconsideration has been completed and it has been determined whether any prejudice resulted from the Vienna Convention violations found by this Court” (see also paragraph 9 above);

whereas, in Mexico’s view, the fact that

“[n]either the Texas executive, nor the Texas legislature, nor the federal executive, nor the federal legislature has taken any legal steps at this point that would stop the execution of Mr. Medellín from going forward . . . reflects a dispute over the meaning and scope of [the] Avena” Judgment;

49. Whereas, according to Mexico, “by its actions thus far, the United States understands the Judgment to constitute merely an obligation of means, not an obligation of result” despite the formal statements by the United States before the Court to the contrary; whereas Mexico contends that notwithstanding the Memorandum issued by the President of the United States in 2005, whereby he directed state courts to provide review and reconsideration consistent with the Avena Judgment, “petitions by Mexican nationals for the review and reconsideration mandated in their cases have repeatedly been denied by domestic courts”; whereas Mexico claims that the decision by the Supreme Court of the United States in Mr. Medellín’s case on 25 March 2008 has rendered the President’s Memorandum without force in state courts; and whereas

“[a]part from having issued the President’s 2005 Memorandum, a means that fell short of achieving its intended result, the United States to date has not taken the steps necessary to prevent the executions of Mexican nationals until the obligation of review and reconsideration is met” (emphasis in the original);

50. Whereas the United States contends that Mexico’s understanding of paragraph 153 (9) of the Avena Judgment as an “obligation of result”, i.e., that the United States is subject to a binding obligation to provide review and reconsideration of the convictions and sentences of the Mexican nationals named in the Judgment, “is precisely the interpretation that the United States holds concerning the paragraph in question” (emphasis in the original); and whereas, while admitting that, because of the structure of its Government and its domestic law, the United States faces substantial obstacles in implementing its obligation under the Avena Judgment, the United States confirmed that “it has clearly accepted that the obligation to provide review and recon-

sideration is an obligation of result and it has sought to achieve that result”;

51. Whereas, in the view of the United States, in the absence of a dispute with respect to the meaning and scope of paragraph 153 (9) of the Avena Judgment, Mexico’s “claim is not capable of falling within the provisions of Article 60” and thus it would be “inappropriate for the Court to grant relief, including provisional measures, in respect to that claim”; whereas the United States contends that the Court lacks “jurisdiction ratione materiae” to entertain Mexico’s Application and accordingly lacks “the prima facie jurisdiction required for the indication of provisional measures”;

52. Whereas the United States submits that, in light of the circumstances, the Court “should give serious consideration to dismissing Mexico’s Request for interpretation in its entirety at this stage of the proceedings”;

53. Whereas the French and English versions of Article 60 of the Statute are not in total harmony; whereas the French text uses the term “contestation” while the English text refers to a “dispute”; whereas the term “contestation” in the French text has a wider meaning than the term used in the English text; whereas Article 60 of the Statute of the International Court of Justice is identical to Article 60 of the Statute of the Permanent Court of International Justice; whereas the drafters of the Statute of the Permanent Court of International Justice chose to use in the French text of Article 60 a term (“contestation”) which is different from the term (“différend”) used notably in Article 36, paragraph 2, and in Article 38 of the Statute; whereas, although in their ordinary meaning, both terms in a general sense denote opposing views, the term “contestation” is wider in scope than the term “différend” and does not require the same degree of opposition; whereas, compared to the term “différend”, the concept underlying the term “contestation” is more flexible in its application to a particular situation; and whereas a dispute (“contestation” in the French text) under Article 60 of the Statute, understood as a difference of opinion between the parties as to the meaning and scope of a judgment rendered by the Court, therefore does not need to satisfy the same criteria as would a dispute (“différend” in the French text) as referred to in Article 36, paragraph 2, of the Statute; whereas, in the present circumstances, a meaning shall be given that best reconciles the French and English texts of Article 60 of its Statute, bearing in mind its object; whereas this is so notwithstanding that the English texts of Article 36, paragraph 2, and Articles 38 and 60 of the Statute all employ the same word, “dispute”; and whereas the term “dispute” in English also may have a more flexible meaning than that generally accorded to it in Article 36, paragraph 2, of the Statute;

54. Whereas the question of the meaning of the term “dispute” (“contestation”) as employed in Article 60 of the Statute has been addressed in the jurisprudence of the Court’s predecessor; whereas “the manifestation
of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required” for the purposes of Article 60, nor is it required that “the dispute should have manifested itself in a formal way”; whereas recourse could be had to the Permanent Court as soon as the interested States had in fact shown themselves as holding opposing views in regard to the meaning or scope of a judgment of the Court (Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow), Judgment No. 11, 1927, P.C.I.J. Series A. No. 13, pp. 10-11); and whereas this reading of Article 60 was confirmed by the present Court in the case concerning Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya) (Judgment, I.C.J. Reports 1985, pp. 217-218, para. 46);

55. Whereas the Court needs now to determine whether there appears to be a dispute between the Parties within the meaning of Article 60 of the Statute; whereas, according to the United States, its executive branch, which is the only authority entitled to represent the United States internationally, understands paragraph 153 (9) of the Avena Judgment as an obligation of result; whereas, in Mexico’s view, the fact that other federal and state authorities have not taken any steps to prevent the execution of Mexican nationals before they have received review and reconsideration of their convictions and sentences reflects a dispute over the meaning and scope of the Avena Judgment; whereas, while it seems both Parties regard paragraph 153 (9) of the Avena Judgment as an international obligation of result, the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities;

56. Whereas, in light of the positions taken by the Parties, there appears to be a difference of opinion between them as to the meaning and scope of the Court’s finding in paragraph 153 (9) of the operative part of the Judgment and thus recourse could be had to the Court under Article 60 of the Statute;

57. Whereas, in view of the foregoing, it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation; whereas it follows that the submission of the United States, that the Application of Mexico be dismissed in limine “on grounds of manifest lack of jurisdiction”, can not be upheld; and whereas it follows also that the Court may address the present request for the indication of provisional measures;

* * *

58. Whereas the Court, when considering a request for the indication of provisional measures, “must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent” (Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I), p. 22, para. 35); whereas a link must therefore be established between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the principal request submitted to the Court;

59. Whereas Mexico contends that its request for the indication of provisional measures is intended to preserve the rights that Mexico asserts in its Request for interpretation of paragraph 153 (9) of the Avena Judgment; whereas, according to Mexico, the indication of provisional measures would be required to preserve the said rights during the pendency of the proceedings, as “in executing Mr. Medellín or others, the United States will forever deprive these nationals of the correct interpretation of the Judgment” (emphasis in the original); whereas, in Mexico’s view, paragraph 153 (9) establishes an obligation of result incumbent upon the United States, namely it “must not execute any Mexican national named in the Judgment unless and until review and reconsideration is completed and either no prejudice as a result of the treaty violation is found or any prejudice is remedied”;

60. Whereas Mexico argues that, given the dispute between the Parties as to the meaning and scope of paragraph 153 (9) of the Avena Judgment, “there can be no doubt that the provisional relief requested arises from the rights that Mexico seeks to protect and preserve until this Court clarifies the obligation imposed by [that] paragraph”;

61. Whereas the United States submits that Mexico’s request for the indication of provisional measures aims to prohibit the United States from carrying out sentences with regard to Mexican nationals named therein prior to the conclusion of the Court’s proceedings on Mexico’s Request for interpretation; whereas the United States contends that, in its Application, Mexico asks the Court to interpret the Avena Judgment to mean that the United States must not carry out sentences “unless the individual affected has received review and reconsideration and it is determined that no prejudice resulted from the violation of the Vienna Convention”, rather than an absolute prohibition on the United States carrying out sentences in regard to each of the individuals mentioned in Avena; whereas the United States claims that, by focusing in the request for the indication of provisional measures on the carrying out of the sentence and not on its review and reconsideration, Mexico seeks to protect rights that are not asserted in its Application for interpretation;

62. Whereas the United States asserts that, as is clear from the Court’s case law, “any provisional measures indicated must be designed to preserve [the] rights” which are the subject of the principal request submitted
to the Court; and whereas it contends that the provisional measures requested by Mexico do not satisfy the Court's test because they go beyond the subject of the proceedings before the Court on the Request for interpretation;

63. Whereas, in proceedings on interpretation, the Court is called upon to clarify the meaning and the scope of what the Court decided with binding force in a judgment (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 402; Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, p. 223, para. 56); whereas Mexico seeks clarification of the meaning and the scope of paragraph 153 (9) of the operative part of the 2004 Judgment in the Avena case, whereby the Court found that the United States is under an obligation to provide, by means of its own choosing, review and reconsideration consistent with paragraphs 138 to 141 of that Judgment;

64. Whereas, therefore, the rights which Mexico seeks to protect by its request for the indication of provisional measures (see paragraph 40 above) have a sufficient connection with the Request for interpretation; whereas Mexico's principal request is that the Court should order that the United States "take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos [are] executed only after review and reconsideration consistent with paragraphs 138 to 141 of [that] Judgment";

65. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute "presupposes that irreparable prejudices shall not be caused to rights which are the subject of a dispute in judicial proceedings. In the absence of an order of provisional measures, the Court may indicate a factual or legal situation which indicates circumstances making it likely that such irreparable prejudice would be caused" (I.C.J. Reports 1999 (I), p. 15, para. 22);

66. Whereas the power of the Court to indicate provisional measures in the procedure before this Court is exercised by order only if there is a danger of irreparable prejudice which "is sufficiently probable to make it likely that, if the Court does not decide in such a case, irreparable prejudice to the rights of a party will be caused" (I.C.J. Reports 1999 (I), p. 15, para. 22).

67. Whereas Mexico claims that there is a danger that irreparable prejudice will be caused to the rights of the Mexican nationals subject to the Avena Judgment unless the Court requires measures to ensure that those rights are protected pending the conclusion of the proceedings concerning the Request for the interpretation of paragraph 153 (9) of that Judgment;

68. Whereas Mexico asserts that it faces a real danger of irreparable prejudice to its own rights, that the risk of irreparable prejudice is considerable, and that the measures requested by Mexico in its Request for provisional measures and reconsideration are necessary to avoid irreparable prejudice to its rights and those of its nationals;

69. Whereas Mexico contends that the Court has not been able to determine whether the United States has taken adequate steps to ensure that the rights of the Mexican nationals subject to the Avena Judgment are protected pending resolution of the Request for interpretation; whereas Mexico states that the Court is called upon to determine whether the United States has taken adequate steps to protect the rights of the Mexican nationals according to the measure provided for in paragraph 153 (9) of the operative part of the Judgment in that case;

70. Whereas Mexico requests the Court to "specify that the obligation to take all measures necessary to ensure that the execution of a Mexican national subject to the Avena Judgment does not go forward only applies to all competent organs of the United States and all its constituent subdivisions, including all branches of government, and any official, state or federal, exercising governmental authority in the Avena case" (emphasis in the original).
and to order that the United States inform the Court of the measures taken:
71. Whereas the United States argues that, as in the present case there are no rights in dispute, "none of the requirements for provisional measures are met" (emphasis in the original);
72. Whereas the execution of a national, the meaning and scope of whose rights are in question, before the Court delivers its judgment on the Request for interpretation "would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims" (Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998, p. 257, para. 37);
73. Whereas it is apparent from the information before the Court in this case that Mr. José Ernesto Medellín Rojas, a Mexican national, will face execution on 5 August 2008 and other Mexican nationals, Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos, are at risk of execution in the coming months; whereas their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which is in question; and whereas it could be that the said Mexican nationals will be executed before this Court has delivered its judgment on the Request for interpretation and therefore there undoubtedly is urgency;
74. Whereas the Court accordingly concludes that the circumstances require that it indicate provisional measures to preserve the rights of Mexico, as Article 41 of its Statute provides;
75. Whereas the Court is fully aware that the federal Government of the United States has been taking many diverse and insistent measures in order to fulfil the international obligations of the United States under the Avena Judgment;
76. Whereas the Court notes that the United States has recognized that, were any of the Mexican nationals named in the request for the indication of provisional measures to be executed without the necessary review and reconsideration required under the Avena Judgment, that would constitute a violation of United States obligations under international law; whereas, in particular, the Agent of the United States declared before the Court that "[t]o carry out Mr. Medellín's sentence without affording him the necessary review and reconsideration obviously would be inconsistent with the Avena Judgment";
77. Whereas the Court further notes that the United States has recognized that "it is responsible under international law for the actions of its political subdivisions", including "federal, state, and local officials", and that its own international responsibility would be engaged if, as a result of acts or omissions by any of those political subdivisions, the United States was unable to respect its international obligations under the Avena Judgment; whereas, in particular, the Agent of the United States acknowledged before the Court that "the United States would be responsible, clearly, under the principle of State responsibility for the internationally wrongful actions of [state] officials";
78. Whereas the Court regards it as in the interest of both Parties that any difference of opinion as to the interpretation of the meaning and scope of their rights and obligations under paragraph 153 (9) of the Avena Judgment be resolved as early as possible; whereas it is therefore appropriate that the Court ensure that a judgment on the Request for interpretation be reached with all possible expedition;
79. Whereas the decision given in the present proceedings on the request for the indication of provisional measures in no way prejudices any question that the Court may have to deal with relating to the Request for interpretation;
80. For these reasons,

The Court,
I. By seven votes to five,
Finds that the submission by the United States of America seeking the dismissal of the Application filed by the United Mexican States can not be upheld;
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;
AGAINST: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;
II. Indicates the following provisional measures:
(a) By seven votes to five,
The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America);
IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Abraham, Sepúlveda-Amor, Bennouna;
AGAINST: Judges Buergenthal, Owada, Tomka, Keith, Skotnikov;

(b) By eleven votes to one,
The Government of the United States of America shall inform the Court of the measures taken in implementation of this Order;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;
AGAINST: Judge Buergenthal;

III. By eleven votes to one,
Decides that, until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters which form the subject of this Order.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Owada, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;
AGAINST: Judge Buergenthal.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixteenth day of July, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Rosalyn Higgins,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge Buergenthal appends a dissenting opinion to the Order of the Court; Judges Owada, Tomka and Keith append a joint dissenting opinion to the Order of the Court; Judge Skotnikov appends a dissenting opinion to the Order of the Court.

(Initialled) R.H.
(Initialled) Ph.C.
International Court of Justice

Request for the Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America) Judgment

I.C.J. Reports 2009
REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)
(MEXICO v. UNITED STATES OF AMERICA)
JUDGMENT OF 19 JANUARY 2009

Official citation:
Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009, p. 3
REQUEST FOR INTERPRETATION
OF THE JUDGMENT OF 31 MARCH 2004
IN THE CASE CONCERNING
AVENA AND OTHER MEXICAN NATIONALS
(MEXICO v. UNITED STATES OF AMERICA)

(MEXICO v. UNITED STATES OF AMERICA)

Article 60 of the Statute of the Court — Independent basis of jurisdiction.
Conditions on the exercise of jurisdiction to entertain a request for interpretation — Question of the existence of a dispute as to the meaning or scope of paragraph 153 (9) of the Judgment of 31 March 2004 — For the Court to determine whether a dispute exists — No dispute as to whether paragraph 153 (9) lays down an obligation of result.

Question of the existence of a dispute as to those upon whom the obligation of result specifically falls — Two possible approaches based on the Parties' positions — Possible existence of a dispute as to those upon whom the obligation specifically falls — Possible absence of a dispute on this point failing a sufficiently precise indication.

Question of the direct effect of the obligation established in paragraph 153 (9) — No decision in the Judgment of 31 March 2004 as to the direct effect of the obligation — Question of direct effect therefore cannot be the subject of a request for interpretation — Reiteration of the principle that considerations of domestic law cannot in any event relieve the Parties of obligations deriving from judgments of the Court.

* * *

Question of breach by the United States of its legal obligation to comply with the Order indicating provisional measures of 16 July 2008 — Court's jurisdiction to rule on this question in proceedings on a request for interpretation.
The Court, after deliberation, delivers the following Judgment:

1. On 5 June 2008, the United Mexican States (hereinafter “Mexico”) filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter “the United States”), whereby, referring to Article 60 of the Statute and Articles 135, 153 (9) and 154 of the Rules of Court, the United States are asked to provide the review and reconsideration of the convictions and sentences of Messrs. José Ernesto Medellín Rojas, César Humberto Láscar García, and Roberto Moreno Ramírez, as ordered by the Court on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (I.C.J. Reports 2004 (I), p. 12) (hereinafter “the Avena Judgment”).

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately transmitted to the Government of the United States by the Registrar; and, pursuant to Article 40, paragraph 3, all States entitled to appear before the Court were notified of the Application.

3. On 5 June 2008, after filing its Application, Mexico, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a request for the Court to interpret paragraph 153 (9) of the Avena Judgment. Mexico requested the Court to interpret paragraph 153 (9) of the Avena Judgment, as well as to interpret the rights of Mexico and its nationals “pending the Court's judgment in the proceedings on the interpretation of the Avena Judgment.”

By an Order of 16 July 2008 (Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals, Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008), the Court, having rejected the submission by the United States seeking the dismissal of the Application filed by Mexico on 5 June 2008 and its removal from the Court’s General List, indicated the following provisional measures (pp. 331-332, para. 80 (II)):

(a) The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Humberto Láscar García, and Roberto Moreno Ramírez are not executed pending the Court’s judgment on the Application of Mexico.

(b) The Government of the United States of America shall inform the Court of the measures taken in implementation of the Order on 16 July 2008.

It also decided that “until the Court has rendered its judgment on the Request for interpretation, it shall remain seised of the matters” which form the subject of the Order (p. 332, para. 80 (III)).

4. By letters dated 16 July 2008, the Registrar informed the Parties that the Court, on 29 August 2008, had fixed the time-limit for the filing of Written Observations on Mexico’s Request for interpretation as 29 August 2008.

5. By a letter dated 1 August 2008 and received in the Registry the same day, the Agent of the United States, referring to paragraph 80 (II) of the Order of 16 July 2008, informed the Court of the measures which the United States “had taken” to implement that Order.

6. By a letter dated 28 August 2008 and received in the Registry the same day, the Agent of Mexico, informing the Court of the execution on 5 August 2008 of Mr. José Ernesto Medellín Rojas in the State of Texas, informed the Court that, “pursuant to Article 153 (9) of the Judgment delivered by the Court on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Mexico filed an Application for provisional measures on 5 June 2008, which the Court, after deliberation, delivered on 16 July 2008.”

7. On 29 August 2008, within the time-limit fixed, the United States filed its Written Observations on Mexico’s Request for interpretation.

8. By letters dated 2 September 2008, the Registrar informed the Parties that the Court had decided to afford each of them the opportunity of furnishing written explanations on the merits of the Request for interpretation, as well as to set time-limits for the filing of such explanations. These were filed by each Party within the time-limits thus fixed.

9. In the Application, the following requests were made by Mexico:

“The Government of Mexico asks the Court to adjudge and declare that the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’; and that, pursuant to the foregoing obligation of result,

1. the United States must take any and all steps necessary to provide the repair and reparation of review and reconsideration mandated by the Avena Judgment; and

2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.”

10. In the course of the proceedings, the following submissions were presented by the Parties:

On behalf of Mexico:

The Government of Mexico asks the Court to adjudge and declare that the obligations incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitute an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide review and reconsideration of the convictions and sentences but leaving it the means of its own choosing; and that, pursuant to the foregoing obligation of result,

1. the United States must take any and all steps necessary to provide the repair of review and reconsideration mandated by the Avena Judgment; and

2. the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.”

On behalf of the United States:

The United States shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Humberto Láscar García, and Roberto Moreno Ramírez are not executed pending the Court’s judgment on the Application of Mexico.

The Government of the United States shall inform the Court of the measures taken in implementation of the Order on 16 July 2008.
Based on the foregoing, the Government of Mexico asks the Court to adjudge and declare as follows:

(a) That the correct interpretation of the obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment is that it is an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’; and that, pursuant to the interpretation of the foregoing obligation of result,

(1) the United States, acting through all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to provide the repairation of review and reconsideration mandated by the Avena Judgment in paragraph 153 (9); and

(2) the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government authority, must take all measures necessary to ensure that no Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation;

(b) That the United States breached the Court’s Order of 16 July 2008 and the Avena Judgment by executing José Ernesto Medellin Rojas without having provided him review and reconsideration consistent with the terms of the Avena Judgment; and

(c) That the United States is required to guarantee that no other Mexican national entitled to review and reconsideration under the Avena Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation.

On behalf of the United States,
in its Written Observations submitted on 29 August 2008:

“On the basis of the facts and arguments set out above, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States is dismissed, but if the Court shall decline to dismiss the application, that the Court adjudge and declare an interpretation of the Avena Judgment in accordance with paragraph 62 above.” (Para. 63.)

Paragraph 60 of the Written Observations of the United States includes the following:

“And the United States agrees with Mexico’s requested interpretation; it agrees that the Avena Judgment imposes an ‘obligation of result’. There is thus nothing for the Court to adjudicate, and Mexico’s application must be dismissed.”

Paragraph 62 of the Written Observations of the United States includes the following:

“the United States requests that the Court interpret the Judgment as Mexico has requested — that is, as follows:

[T]he obligation incumbent upon the United States under paragraph 153 (9) of the Avena Judgment constitutes an obligation of result as it is clearly stated in the Judgment by the indication that the United States must provide ‘review and reconsideration of the convictions and sentences’ but leaving it the ‘means of its own choosing’;

in the further written explanations submitted to the Court on 6 October 2008:

“On the basis of the facts and arguments set out above and in the United States’ initial Written Observations on the Application for Interpretation, the Government of the United States of America requests that the Court adjudge and declare that the application of the United Mexican States for interpretation of the Avena Judgment is dismissed. In the alternative and as subsidiary submissions in the event that the Court should decline to dismiss the application in its entirety, the United States requests that the Court adjudge and declare:

(a) that the following supplemental requests by Mexico are dismissed:

(1) that the Court declare that the United States breached the Court’s July 16 Order;

(2) that the Court declare that the United States breached the Avena Judgment; and

(3) that the Court order the United States to issue a guarantee of non-repetition;

(b) an interpretation of the Avena Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States.”

11. The Court recalls that in paragraph 153 (9) of the Avena Judgment the Court had found that:

“the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) above, by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment”.

12. Mexico asked for an interpretation as to whether paragraph 153 (9) expresses an obligation of result and requested that the Court should so state, as well as issue certain orders to the United States “pursuant to the foregoing obligation of result” (see paragraph 9 above).
13. Mexico’s Request for interpretation of paragraph 153 (9) of the Court’s Judgment of 31 March 2004 was made by reference to Article 60 of the Statute. That Article provides that “[t]he judgment is final and without appeal. In the event of dispute [‘contestation’ in the French version] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”

14. The United States informed the Court that it agreed that the obligation in paragraph 153 (9) was an obligation of result and, there being no dispute between the Parties as to the meaning or scope of the words of which Mexico requested an interpretation, Article 60 of the Statute did not confer jurisdiction on the Court to make the interpretation (Order, p. 322, para. 41). In its Written Observations of 29 August 2008, the United States also contended that the absence of a dispute about the meaning or scope of paragraph 153 (9) rendered Mexico’s Application inadmissible.

15. The Court notes that its Order of 16 July 2008 on provisional measures was not made on the basis of prima facie jurisdiction. Rather, the Court stated that “the Court’s jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case” (ibid., p. 323, para. 44).

The Court also affirmed that the withdrawal by the United States from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes since the rendering of the Avena Judgment had no bearing on the Court’s jurisdiction under Article 60 of the Statute (ibid., p. 323, para. 44).

16. In its Order of 16 July 2008, the Court had addressed whether the conditions laid down in Article 60 “for the Court to entertain a request for interpretation appeared to be satisfied” (ibid., p. 323, para. 45), observing that “the Court may entertain a request for interpretation of any judgment rendered by it provided that there is a ‘dispute as to the meaning or scope of [the said] judgment’” (ibid., p. 323, para. 46).

17. In the same Order, the Court pointed out that “the French and English versions of Article 60 of the Statute are not in total harmony” and that the existence of a dispute/‘contestation’ under Article 60 was not subject to satisfaction of the same criteria as that of a dispute (“différend” in the French text) as referred to in Article 36, paragraph 2, of the Statute (ibid., p. 325, para. 53). The Court nonetheless observed that “it seems both Parties regard paragraph 153 (9) of the Avena Judgment as an international obligation of result” (ibid., p. 326, para. 55).

18. However, the Court also observed that “the Parties nonetheless apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities” (Order, p. 326, para. 55).

19. The Court stated that the decision rendered on the request for the indication of provisional measures “in no way prejudges any question that the Court may have to deal with relating to the Request for interpretation” (ibid., p. 331, para. 79).

20. Accordingly, in the present procedure it is appropriate for the Court to review again whether there does exist a dispute over whether the obligation in paragraph 153 (9) of the Avena Judgment is an obligation of result. The Court will also at this juncture need to consider whether there is indeed a difference of opinion between the Parties as to whether the obligation in paragraph 153 (9) of the Avena Judgment falls upon all United States federal and state authorities.


22. As recalled above in paragraphs 4 and 8, by letters dated 16 July 2008 and 2 September 2008, the Registrar informed the Parties that the Court had afforded the United States and Mexico the opportunity of furnishing Written Observations and further written explanations pursuant to Article 98, paragraphs 3 and 4, of the Rules of Court.

23. The Court has duly considered the observations and further written explanations of the Parties regarding the existence of any dispute requiring interpretation as to whether the obligation to provide judicial review and reconsideration of the convictions and sentences of the Mexican nationals referred to in the Avena Judgment is an obligation of result.

24. Mexico referred in particular to the actions of the United States federal Executive, claiming that certain actions reflected the United States disagreement with Mexico over the meaning or scope of the Avena Judgment. According to Mexico, this difference of views manifested itself in the position taken by the United States Government in the Supreme Court: that the Avena Judgment was not directly enforceable under domestic law and was not binding on domestic courts without action by the President of the United States; and further that the obligation under Article 94 of the United Nations Charter to comply with judgments of
the Court fell solely upon the political branches of the States parties to
the Charter. In Mexico’s view,

“the operative language [of the Avena Judgment] establishes an obli-
gation of result reaching all organs of the United States, including the federal and state judiciaries, that must be discharged irrespective of domestic law impediments”.

Mexico maintains that the United States Government’s narrow reading of the means for implementing the Judgment led to its failure to take all the steps necessary to bring about compliance by all authorities concerned with the obligation borne by the United States. In particular, Mexico noted that the United States Government had not sought to intervene in support of Mr. Medellín’s petition for a stay of execution before the United States Supreme Court. This course of conduct is alleged to reflect a fundamental disagreement between the Parties concerning the obligation of the United States to bring about a specific result by any necessary means. Mexico further argues that the existence of a dispute is also shown by the fact that the competent executive, legislative and judicial organs at the federal and Texas state levels have taken positions in conflict with Mexico’s as to the meaning or scope of paragraph 153 (9) of the Avena Judgment.

25. The United States has, in its Written Observations of 29 August 2008 and its further written explanations of 6 October 2008, insisted that each of the matters brought to the attention of the Court by Mexico concerns not a dispute regarding whether the Parties perceive the obligations of paragraph 153 (9) as an obligation of result, but Mexico’s dissatisfaction with the implementation to date of that obligation by the United States. The United States claims that it has consistently agreed with Mexico’s interpretation of paragraph 153 (9) of the Avena Judgment. Specifically, it concurs that subparagraph 9 requires it to take all necessary steps to ensure that no Mexican national named in the Judgment is executed without having received the prescribed review and reconsideration and without a determination having been made that he has suffered no prejudice from the violation of the Convention. In particular, the United States contends that, in accordance with the discretion left to the United States by the Court as to the choice of means of compliance with the Judgment, the President elected to comply by, *inter alia*, determining that the state courts were to give effect to the Judgment, as set out in a Memorandum of 28 February 2005 to the Attorney General of the United States. The executive branch thus argued in the case Medellín *v.* Texas in the Supreme Court that the President’s determination was lawful and binding on the state courts. According to the United States, no finding as to the existence of a difference of views between the Parties can be inferred from the controversy before the Supreme Court as to whether or not the Court’s judgments are self-executing, because that is strictly a matter of United States domestic law. The Supreme Court found that the Avena Judgment created an international obligation incum-

bent upon the United States. Further, the United States argues that positions taken by other governmental officials in the United States cannot provide any basis for a finding of a divergence of views between the Parties in respect of the interpretation of the Avena Judgment; it points out that Mexico’s argument in this regard is founded on positions taken by organs without the authority to express the State’s official position on the international plane. The fact that Texas, or any other constituent part of the United States, may hold a different interpretation of the Court’s Judgment is therefore irrelevant to the question before the Court.

26. The United States on several occasions reiterated that the relevant obligation was one of result, and that while the Avena Judgment allowed it a choice of means, it was certain that the obligation had to be complied with.

27. In its Order of 16 July 2008 the Court observed that “it seems both Parties regard paragraph 153 (9) as an international obligation of result” (Order, p. 326, para. 55). Its observations on the matter being provisional, the Court has reviewed the contentions of the Parties in the Written Observations of 29 August 2008 and the further written explanations of 17 September and 6 October 2008 as to whether they both accept that the obligation in paragraph 153 (9) is one of result — that is to say, an obligation which requires a specific outcome. This means, in the particular case, the obligation upon the United States to provide review and reconsideration consistent with paragraphs 138 to 141 of the Avena Judgment to those Mexican nationals named in the Avena Judgment who remain on death row without having had the benefit of such review and reconsideration. In addition, Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramirez Cárdenas, Humberto Leal Garcia, and Roberto Moreno Ramos were the subject of the Order on provisional measures relating to that obligation issued by the Court on 16 July 2008. The Court observes that this obligation of result is one which must be met within a reasonable period of time. Even serious efforts of the United States, should they fall short of providing review and reconsideration consistent with paragraphs 138 to 141 of the Avena Judgment, would not be regarded as fulfilling this obligation of result.

28. The United States has insisted that it fully accepts that paragraph 153 (9) of the Avena Judgment constitutes an obligation of result. It therefore continues to assert that there is no dispute over whether paragraph 153 (9) expresses an obligation of result, and thus no dispute within the meaning of the condition in Article 60 of the Statute. Mexico contends, making reference to certain omissions of the federal government to act and of certain actions and statements of organs of government or other public authorities, that in reality the United States does not accept that it is under an obligation of result; and that therefore there is indeed a dispute under Article 60.

29. It is for the Court itself to decide whether a dispute within the meaning of Article 60 of the Statute does indeed exist (see Interpretation
of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13, p. 12).

To this end, the Court has in particular examined the Written Observations and further written explanations of the Parties to ascertain their views in the light of the comments of the Court in paragraph 55 of the Order that they

“apparently hold different views as to the meaning and scope of that obligation of result, namely, whether that understanding is shared by all United States federal and state authorities and whether that obligation falls upon those authorities”.

30. The Court observes that whether, by reference to the elements described above, there is a dispute under Article 60 of the Statute, the resolution of which requires an interpretation of the provisions of paragraph 153 (9) of the Avena Judgment, can be perceived in two ways.

31. On the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute. Mexico observes that, in Medellín v. Texas (Supreme Court Reporter, Vol. 128, 2008, p. 1346), “the Federal Executive argued [in the United States Supreme Court] that Article 94 (1) [of the United Nations Charter] was directed only to the political branches of States Party . . . rather than to the State Party as a whole”, and adds that “[t]here is no support for that reading of Article 94 (1) in either its text, its object and purpose, or principles of general international law”. Mexico maintains that it was on the basis of this “erroneous interpretation” that

“the [Supreme] Court found that the expression of the obligation to comply in Article 94 (1) . . . precluded the judicial branch — the authority best suited to implement the obligation imposed by Avena — from taking steps to comply”,

the Supreme Court being of the view that the Charter provision referred to “a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision” (ibid., p. 1358). In Mexico’s contention, it thus follows that the highest judicial authority in the United States has understood the Judgment in Avena as not laying down an obligation of result binding on all constituent organs of the United States, including the federal and state judicial authorities. From this perspective, not only is the obligation in paragraph 153 (9) not really regarded as an obligation of result, but, argues Mexico, such an interpretation puts to one side the finding in the Avena Judgment that:

“in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the [Vienna Convention on Consular Relations] has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.” (Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), pp. 65-66, para. 140.)

Further, Mexico contends that this understanding by the Supreme Court is inconsistent with the interpretation of the Avena Judgment as imposing an obligation of result incumbent on all constituent organs of the United States, including the judiciary.

32. From this viewpoint, the wording in Mexico’s concluding submissions — wording introduced in its further written explanations of 17 September 2008 — was directed to affirming that the obligation in paragraph 153 (9) of the Avena Judgment is incumbent on all the constituent organs to be seen as comprising the United States (see paragraph 10 above).

Mexico moreover rejects the argument of the State of Texas that Mr. Medellín had, prior to his execution, received the review and reconsideration required by paragraph 153 (9) of the Avena Judgment from state and federal courts.

33. According to Mexico, the United States, by word and deed, has contradicted its avowed acceptance of review and reconsideration as an obligation of result. Reference is made to the choice of the United States Government not to appear at the Supreme Court hearings on Mr. Medellín’s petition for a stay of execution. Mexico also points to the very tardy attempts to engage Congress in ensuring that all constituent elements do indeed act upon this obligation.

34. Further, Mexico contends that the Supreme Court found that the obligation within paragraph 153 (9) could not be directly enforced by the judiciary on the basis of a Presidential memorandum nor otherwise without intervention of the legislature. In Mexico’s view, this necessarily means that the obligation is not really regarded as one of result — a viewpoint not shared by the United States.

35. The Court observes that these elements could suggest a dispute between the Parties within the sense of Article 60 of the Statute.

36. On the other hand, there are factors that suggest, on the contrary,
that there is no dispute between the Parties. The Court notes — without necessarily agreeing with certain points made by the Supreme Court in its reasoning regarding international law — that the Supreme Court has stated that the *Avena* Judgment creates an obligation that is binding on the United States. This is so notwithstanding that it has said that the obligation has no direct effect in domestic law, and that it cannot be given effect by a Presidential Memorandum.

37. Referring to the Court’s statement in its Order of 16 July 2008 that there seemed to be a dispute as to the scope of the obligation in paragraph 153 (9), and upon whom precisely it fell, the United States reiterated in its Written Observations of 29 August 2008 that the federal government both “spoke for” and had responsibility for all organs and constituent elements of governmental authority. While that statement seems to be directed at matters different from what the Court perceived as the possible dispute in paragraph 55 of its Order of 16 July 2008, it could be said that Mexico addressed this question only somewhat indirectly in its further written explanations of 17 September 2008.

38. The Court notes that Article 98 (2) of the Rules of Court stipulates that when a party makes a request for interpretation of a judgment, “the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated”.

Mexico has had the opportunity to indicate the precise points in dispute as to the meaning or scope of the *Avena* Judgment, first in its Application of 5 June 2008 and then in the submissions made at the conclusion of its further written explanations of 17 September 2008.

The Application made reference to a dispute about whether the obligation in paragraph 153 (9) of the *Avena* Judgment was one of result; the United States rapidly signalled its agreement that the obligation incumbent upon it was an obligation of result. The matters emphasized by Mexico seemed particularly directed to the question of implementation by the United States of the obligations incumbent upon it as a consequence of the *Avena* Judgment. The various passages in the further written explanations of Mexico of 17 September 2008, while referring to certain actions and statements of the constituent organs of the United States and perceived failures to act in certain regards by the federal government, nonetheless remain very non-specific as to what the claimed dispute precisely is. Further, it is difficult to discern, save by inference, Mexico’s position regarding the existence of a dispute as to whether the obligation of result falls upon all state and federal authorities and as to whether they share an understanding that it does so fall.

39. The Court observes that, in its Application of 5 June 2008, Mexico simply asked that the Court affirm that the obligation incumbent upon the United States paragraph 153 (9) constitutes an obligation of result.

When Mexico formulated its submissions in the oral hearings on the request for the indication of provisional measures, it submitted:

“(a) that the United States, acting through all its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising governmental authority, take all measures necessary to ensure that José Ernesto Medellín, César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending the conclusion of the proceedings instituted by Mexico on 5 June 2008, unless and until the five Mexican nationals have received review and reconsideration consistent with paragraphs 138 through 141 of this Court’s *Avena* Judgment.”

40. Mexico had a further opportunity to indicate the precise points it regarded as in dispute when it reformulated its concluding submissions in paragraphs 86 (a) (1) and (2) of its further written explanations of 17 September 2008 (see paragraph 32 above).

41. The Court observes it could be argued that the claim in paragraph 86 (a) (1) that the United States “acting through all its competent organs . . . must take all measures necessary to provide the repairation of review and reconsideration” does not say that there is an obligation of result falling upon the various competent organs, constituent subdivisions and public authorities, but only that the United States will act through these in itself fulfilling the obligations incumbent on it under paragraph 153 (9).

The same wording of “the United States, acting through all its competent organs and all its constituent subdivisions” appears in paragraph 86 (a) (2) of Mexico’s concluding submissions. Whether in terms of meeting the requirements of Article 98 (2) of the Rules, or more generally, it could be argued that in the end Mexico has not established the existence of any dispute between itself and the United States. Moreover, the United States has made clear that it can agree with the first concluding submission (point (a)) of Mexico, requesting in its own concluding submissions, as a subsidiary submission, that the Court adjudge and declare “(b) an interpretation of the *Avena* Judgment in accordance with paragraph 86 (a) of Mexico’s Response to the Written Observations of the United States”.

Mexico did not specify that the obligation of the United States under the *Avena* Judgment was directly binding upon its organs, subdivisions or
officials, although this might be inferred from the arguments it presented, in particular in its further written explanations.

42. The Court notes that, having regard to all these elements, two views may be discerned as to whether or not there is a dispute within the meaning of Article 60 of the Statute.

43. Be that as it may, the Court considers that there would be a further obstacle to granting the request of Mexico even if a dispute in the present case were ultimately found to exist within the meaning of Article 60 of the Statute. The Parties’ different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the Avena Judgment envisages that a direct effect is to be given to the obligation contained therein.

44. The Avena Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the Avena Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court’s original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950, p. 402).

45. Mexico’s argument, as described in paragraph 31 above, concerns the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered, not the “meaning or scope” of the Avena Judgment, as Article 60 of the Court’s Statute requires. By virtue of its general nature, the question underlying Mexico’s Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60. Whether or not there is a dispute, it does not bear on the interpretation of the Avena Judgment, in particular of paragraph 153 (9).

46. For these reasons, the Court cannot accede to Mexico’s Request for interpretation.

47. Before proceeding to the additional requests of Mexico, the Court observes that considerations of domestic law which have so far hindered the implementation of the obligation incumbent upon the United States, cannot relieve it of its obligation. A choice of means was allowed to the United States in the implementation of its obligation and, failing success within a reasonable period of time through the means chosen, it must rapidly turn to alternative and effective means of attaining that result.

48. In the context of the proceedings instituted by the Application requesting interpretation, Mexico has presented three additional claims to the Court. First, Mexico asks the Court to adjudge and declare that the United States breached the Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín on 5 August 2008 without having provided him with the review and reconsideration required under the Avena Judgment. Second, Mexico also regards that execution as having constituted a breach of the Avena Judgment itself. Third, Mexico requests the Court to order the United States to provide guarantees of non-repetition.

49. The United States argues that the Court lacks jurisdiction to entertain the supplemental requests made by Mexico. As regards Mexico’s claim concerning the alleged breach of the Order of 16 July 2008, the United States is of the opinion, first, that the lack of a basis of jurisdiction for the Court to adjudicate Mexico’s Request for interpretation extends to this ancillary claim. Second, and in the alternative, the United States suggests that such a claim, in any event, goes beyond the jurisdiction of the Court under Article 60 of the Statute. Similarly, the United States submits that there is no basis of jurisdiction for the Court to entertain Mexico’s claim relating to an alleged violation of the Avena Judgment. Finally, the United States disputes the Court’s jurisdiction to order guarantees of non-repetition.

50. Concerning Mexico’s claim that the United States breached the Court’s Order indicating provisional measures of 16 July 2008 by executing Mr. Medellín, the Court observes that in that Order it found that “it appears that the Court may, under Article 60 of the Statute, deal with the Request for interpretation” (Order, p. 326, para. 57). The Court then indicated in its Order that:

“The United States of America shall take all measures necessary to ensure that Messrs. José Ernesto Medellín Rojas, César Roberto Fierro Reyna, Rubén Ramirez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos are not executed pending judgment on
the Request for interpretation submitted by the United Mexican States, unless and until these five Mexican nationals receive review and reconsideration consistent with paragraphs 138 to 141 of the Court's Judgment delivered on 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America).” (Order, p. 331, para. 80 (II) (a).)

51. There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court’s competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.

52. Mr. Medellín was executed in the State of Texas on 5 August 2008 after having unsuccessfully filed an application for a writ of habeas corpus and applications for stay of execution and after having been refused a stay of execution through the clemency process. Mr. Medellín was executed without being afforded the review and reconsideration provided for by paragraphs 138 to 141 of the Avena Judgment, contrary to what was directed by the Court in its Order indicating provisional measures of 16 July 2008.

53. The Court thus finds that the United States did not discharge its obligation under the Court’s Order of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas.

54. The Court further notes that the Order of 16 July 2008 stipulated that five named persons were to be protected from execution until they received review and reconsideration or until the Court had rendered its Judgment upon Mexico’s Request for interpretation. The Court recalls that the obligation upon the United States not to execute Messrs. César Roberto Fierro Reyna, Rubén Ramírez Cárdenas, Humberto Leal García, and Roberto Moreno Ramos pending review and reconsideration being afforded to them is fully intact by virtue of subparagraphs (4), (5), (6), (7) and (9) of paragraph 153 of the Avena Judgment itself. The Court further notes that the other persons named in the Avena Judgment are also to be afforded review and reconsideration in the terms there specified.

55. The Court finally recalls that, as the United States has itself acknowledged, until all of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of paragraph 153 of the Avena Judgment have had their convictions and sentences reviewed and reconsidered, by taking account of Article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the Avena Judgment, the United States has not complied with the obligation incumbent upon it.

* * *

56. As regards the additional claim by Mexico asking the Court to declare that the United States breached the Avena Judgment by executing José Ernesto Medellín Rojas without having provided him review and reconsideration consistent with the terms of that Judgment, the Court notes that the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and that that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret.

57. In view of the above, the Court finds that the additional claim by Mexico concerning alleged violations of the Avena Judgment must be dismissed.

* * *

58. Lastly, Mexico requests the Court to order the United States to provide guarantees of non-repetition (point (2) (c) of Mexico’s submissions) so that none of the Mexican nationals mentioned in the Avena Judgment is executed without having benefited from the review and reconsideration provided for by the operative part of that Judgment.

59. The United States disputes the jurisdiction of the Court to order it to furnish guarantees of non-repetition, principally inasmuch as the Court lacks jurisdiction under Article 60 of the Statute to entertain Mexico’s Request for interpretation or, in the alternative, since the Court cannot, in any event, order the provision of such guarantees within the context of interpretation proceedings.

60. The Court finds it sufficient to reiterate that its Avena Judgment remains binding and that the United States continues to be under an obligation fully to implement it.

* * *

61. For these reasons,

THE COURT,

(1) By eleven votes to one,

Finds that the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its
Judgment of 31 March 2004 in the case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), including paragraph 153 (9), and thus cannot give rise to the interpretation requested by the United Mexican States;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: Judge Sepúlveda-Amor;

(2) Unanimously,

Finds that the United States of America has breached the obligation incumbent upon it under the Order indicating provisional measures of 16 July 2008, in the case of Mr. José Ernesto Medellín Rojas;

(3) By eleven votes to one,

Reaffirms the continuing binding character of the obligations of the United States of America under paragraph 153 (9) of the Avena Judgment and takes note of the undertakings given by the United States of America in these proceedings;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov;

AGAINST: Judge Abraham;

(4) By eleven votes to one,

Declines, in these circumstances, the request of the United Mexican States for the Court to order the United States of America to provide guarantees of non-repetition;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: Judge Sepúlveda-Amor;

(5) By eleven votes to one,

Rejects all further submissions of the United Mexican States.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Koroma, Buergenthal, Owada, Tomka, Abraham, Keith, Bennouna, Skotnikov;

AGAINST: Judge Sepúlveda-Amor.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of January, two thousand and nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the United Mexican States and the Government of the United States of America, respectively.

(Signed) Rosalyn Higgins,
President.

(Signed) Philippe Couvreur,
Registrar.

Judges Koroma and Abraham append declarations to the Judgment of the Court; Judge Sepúlveda-Amor appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.H.

(Initialled) Ph.C.

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