The Hague, The Netherlands
22 June – 31 July 2015

INTERNATIONAL ORGANIZATIONS
PROFESSOR LAURENCE BOISSON DE CHAZOURNES

Codification Division of the United Nations Office of Legal Affairs

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**INTERNATIONAL ORGANIZATIONS**
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18. Behrami and Behrami v. France and Saramati v. France, Germany and Norway (Nos. 71412/01 and 78166/01), Decision, ECHR, 2 May 2007

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2. Articles of Agreement of the International Monetary Fund, 1944
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5. Agreement Relating to the International Telecommunications Satellite Organization, 1971
11. Charter of the Association of Southeast Asian Nations, 2007
12. Statement of the Chairman of the Drafting Committee regarding the topic Responsibility of International Organizations, International Law Commission, sixty-third session, 3 June 2011
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15. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 73-98


17. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Joined Cases C-402/05 P and C-415/05 P), Judgment, ECJ, 3 September 2008

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ARTICLE I

Purposes

The purposes of the Bank are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.

(ii) To promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors; and when private capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

(iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects, large and small alike, will be dealt with first.

(v) To conduct its operations with due regard to the effect of international investment on business conditions in the territories of members and, in the immediate postwar years, to assist in bringing about a smooth transition from a wartime to a peacetime economy.

The Bank shall be guided in all its decisions by the purposes set forth above.

ARTICLE II

Membership in and Capital of the Bank

SECTION 1. Membership

(a) The original members of the Bank shall be those members of the International Monetary Fund which accept membership in the Bank before the date specified in Article XI, Section 2 (e).

(b) Membership shall be open to other members of the Fund, at such times and in accordance with such terms as may be prescribed by the Bank.

SECTION 2. Authorized Capital

(a) The authorized capital stock of the Bank shall be $10,000,000,000, in terms of United States dollars of the weight and fineness in effect on July 1, 1944. The capital stock shall be divided into 100,000 shares (1) having a par value of $100,000 each, which shall be available for subscription only by members.

(b) The capital stock may be increased when the Bank deems it advisable by a three-fourths majority of the total voting power.

SECTION 3. Subscription of Shares

(a) Each member shall subscribe shares of the capital stock of the Bank. The minimum number of shares to be subscribed by the original members shall be those set forth in Schedule A. The minimum number of shares to be subscribed by other members shall be determined by the Bank, which shall reserve a sufficient portion of its capital stock for subscription by such members.

(b) The Bank shall prescribe rules laying down the conditions under which members may subscribe shares of the authorized capital stock of the Bank in addition to their minimum subscriptions.

1. As of April 27, 1988, the authorized capital stock of the Bank had been increased to 1,420,500 shares.

(c) If the authorized capital stock of the Bank is increased, each member shall have a reasonable opportunity to subscribe, under such conditions as the Bank shall decide, a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Bank, but no member shall be obligated to subscribe any part of the increased capital.

SECTION 4. Issue Price of Shares

Shares included in the minimum subscriptions of original members shall be issued at par. Other shares shall be issued at par unless the Bank by a majority of the total voting power decides in special circumstances to issue them on other terms.

SECTION 5. Division and Calls of Subscribed Capital

The subscription of each member shall be divided into two parts as follows:

(i) twenty percent shall be paid or subject to call under Section 7 (i) of this Article as needed by the Bank for its operations;

(ii) the remaining eighty percent shall be subject to call by the Bank only when required to meet obligations of the Bank created under Article IV, Sections 1 (a) (ii) and (iii).

Calls on unpaid subscriptions shall be uniform on all shares.

SECTION 6. Limitation on Liability

Liability on shares shall be limited to the unpaid portion of the issue price of the shares.

SECTION 7. Method of Payment of Subscriptions for Shares

Payment of subscriptions for shares shall be made in gold or United States dollars and in the currencies of the members as follows:
(i) under Section 5 (i) of this Article, two percent of the price of each share shall be payable in gold or United States dollars, and, when calls are made, the remaining eighteen percent shall be paid in the currency of the member;

(ii) when a call is made under Section 5 (ii) of this Article, payment may be made at the option of the member either in gold, in United States dollars or in the currency required to discharge the obligations of the Bank for the purpose for which the call is made;

(iii) when a member makes payments in any currency under (i) and (ii) above, such payments shall be made in amounts equal in value to the member's liability under the call. This liability shall be a proportionate part of the subscribed capital stock of the Bank as authorized and defined in Section 2 of this Article.

SECTION 8. Time of Payment of Subscriptions

(a) The two percent payable on each share in gold or United States dollars under Section 7 (i) of this Article, shall be paid within sixty days of the date on which the Bank begins operations, provided that

(i) any original member of the Bank whose metropolitan territory has suffered from enemy occupation or hostilities during the present war shall be granted the right to postpone payment of one-half percent until five years after that date;

(ii) an original member who cannot make such a payment because it has not recovered possession of its gold reserves which are still seized or immobilized as a result of the war may postpone an payment until such date as the Bank shall decide.

(b) The remainder of the price of each share payable under Section 7 (i) of this Article shall be paid as and when called by the Bank, provided that

(i) the Bank shall, within one year of its beginning operations, call not less than eight percent of the price of the share in addition to the payment of two percent referred to in (a) above;

(ii) not more than five percent of the price of the share shall be called in any period of three months.

SECTION 9. Maintenance of Value of Certain Currency Holdings of the Bank

(a) Whenever (i) the par value of a member's currency is reduced, or (ii) the foreign exchange value of a member's currency has, in the opinion of the Bank, depreciated to a significant extent within that member's territories, the member shall pay to the Bank within a reasonable time an additional amount of its own currency sufficient to maintain the value, as of the time of initial subscription, of the amount of the currency of such member which is held by the Bank and derived from currency originally paid in to the Bank by the member under Article II, Section 7 (i), from currency referred to in Article IV, Section 2 (b), or from any additional currency furnished under the provisions of the present paragraph, and which has not been repurchased by the member for gold or for the currency of any member which is acceptable to the Bank.

(b) Whenever the par value of a member's currency is increased, the Bank shall return to such member within a reasonable time an amount of that member's currency equal to the increase in the value of the amount of such currency described in (a) above.

(c) The provisions of the preceding paragraphs may be waived by the Bank when a uniform proportionate change in the par values of the currencies of all its members is made by the International Monetary Fund.

SECTION 10. Restriction on Disposal of Shares

Shares shall not be pledged or encumbered in any manner whatever and they shall be transferable only to the Bank.

IBRD Articles of Agreement III
General Provisions Relating to Loans and Guarantees

SECTION 1. Use of Resources

(a) The resources and the facilities of the Bank shall be used exclusively for the benefit of members with equitable consideration to projects for development and projects for reconstruction alike.

(b) For the purpose of facilitating the restoration and reconstruction of the economy of members whose metropolitan territories have suffered great devastation from enemy occupation or hostilities, the Bank, in determining the conditions and terms of loans made to such members, shall pay special regard to lightening the financial burden and expediting the completion of such restoration and reconstruction.

SECTION 2. Dealings between Members and the Bank

Each member shall deal with the Bank only through its Treasury, central bank, stabilization fund or other similar fiscal agency, and the Bank shall deal with members only by or through the same agencies.

SECTION 3. Limitations on Guarantees and Borrowings of the Bank

The total amount outstanding of guarantees, participations in loans and direct loans made by the Bank shall not be increased at any time, if by such increase the total would exceed one hundred percent of the unimpaired subscribed capital, reserves and surplus of the Bank.

SECTION 4. Conditions on which the Bank may Guarantee or Make Loans

The Bank may guarantee, participate in, or make loans to any member or any political sub-division thereof and any business, industrial, and agricultural enterprise in the territories of a member, subject to the following conditions:

(i) When the member in whose territories the project is located is not itself the borrower, the member or the central bank or some comparable agency of the member which is acceptable to the Bank, fully guarantees the repayment of the principal and the payment of interest and other charges on the loan.

(ii) The Bank is satisfied that in the prevailing market conditions the borrower would be unable otherwise to obtain the loan under conditions which in the opinion of the Bank are reasonable for the borrower.

(iii) A competent committee, as provided for in Article V, Section 7, has submitted a written report recommending the project after a careful study of the merits of the proposal.

(iv) In the opinion of the Bank the rate of interest and other charges are reasonable and such rate, charges and the schedule for repayment of principal are appropriate to the project.

(v) In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan;
and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

(vi) In guaranteeing a loan made by other investors, the Bank receives suitable compensation for its risk.

(vii) Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development.

SECTION 5. Use of Loans Guaranteed, Participated in or Made by the Bank

(a) The Bank shall impose no conditions that the proceeds of a loan shall be spent in the territories of any particular member or members.

(b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

(c) In the case of loans made by the Bank, it shall open an account in the name of the borrower and the amount of the loan shall be credited to this account in the currency or currencies in which the loan is made. The borrower shall be permitted by the Bank to draw on this account only to meet expenses in connection with the project as they are actually incurred.

SECTION 6. Loans to the International Finance Corporation(1)

(a) The Bank may make, participate in, or guarantee loans to the International Finance Corporation, an affiliate of the Bank, for use in its lending operations. The total amount outstanding of such loans, participations and guarantees shall not be increased if, at the time or as a result thereof, the aggregate amount of debt (including the guarantee of any debt) incurred by the said Corporation from any source and then outstanding shall exceed an amount equal to four times its unimpaired subscribed capital and surplus.

(b) The provisions of Article III, Sections 4 and 5 (c) and of Article IV, Section 3 shall not apply to loans, participations and guarantees authorized by this Section.

IBRD Article IV

Operations

SECTION 1. Methods of Making or Facilitating Loans

(a) The Bank may make or facilitate loans which satisfy the general conditions of Article III in any of the following ways:

(i) By making or participating in direct loans out of its own funds corresponding to its unimpaired paid-up capital and surplus and, subject to Section 6 of this Article, to its reserves.

(ii) By making or participating in direct loans out of funds raised in the market of a member, or otherwise borrowed by the Bank.

(iii) By guaranteeing in whole or in part loans made by private investors through the usual investment channels.

(b) The Bank may borrow funds under (a) (ii) above or guarantee loans under (a) (iii) above only with the approval of the member in whose markets the funds are raised and the member in whose currency the loan is denominated, and only if those members agree that the proceeds may be exchanged for the currency of any other member without restriction.

SECTION 2. Availability and Transferability of Currencies

(a) Currencies paid into the Bank under Article II, Section 7 (i), shall be loaned only with the approval in each case of the member whose currency is involved; provided, however, that if necessary, after the Bank’s subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank’s own borrowings, or to meet the Bank’s liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(b) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made with currencies referred to in (a) above shall be exchanged for the currencies of other members or released only with the approval in each case of the members whose currencies are involved; provided, however, that if necessary, after the Bank’s subscribed capital has been entirely called, such currencies shall, without restriction by the members whose currencies are offered, be used or exchanged for the currencies required to meet contractual payments of interest, other charges or amortization on the Bank’s own borrowings, or to meet the Bank’s liabilities with respect to such contractual payments on loans guaranteed by the Bank.

(c) Currencies received by the Bank from borrowers or guarantors in payment on account of principal of direct loans made by the Bank under Section 1 (a) (ii) of this Article, shall be held and used, without restriction by the members, to make amortization payments, or to anticipate payment of or repurchase part or all of the Bank’s own obligations.

(d) All other currencies available to the Bank, including those raised in the market or otherwise borrowed under Section 1 (a) (ii) of this Article, those obtained by the sale of gold, those received as payments of interest and other charges for direct loans made under Sections 1 (a) (i) and (ii), and those received as payments of commissions and other charges under Section 1 (a) (iii), shall be used or exchanged for other currencies or gold required in the operations of the Bank without restriction by the members whose currencies are offered.

(e) Currencies raised in the markets of members by borrowers on loans guaranteed by the Bank under Section 1 (a) (iii) of this Article, shall also be used or exchanged for other currencies without restriction by such members.

SECTION 3. Provision of Currencies for Direct Loans

The following provisions shall apply to direct loans under Sections I (a) (i) and (ii) of this Article:

(a) The Bank shall furnish the borrower with such currencies of members, other than the member in whose territories the project is located, as are needed by the borrower for expenditures to be made in the territories of such other members to carry out the purposes of the loan.

(b) The Bank may, in exceptional circumstances when local currency required for the purposes of the loan cannot be raised by the borrower on reasonable terms, provide the borrower as part of the loan with an appropriate amount of that currency.

(c) The Bank, if the project gives rise indirectly to an increased need for foreign exchange by the member in whose territories the project is located, may in exceptional circumstances provide the borrower as part of the loan with an appropriate amount of gold or foreign exchange not in excess of the borrower’s local expenditure in connection with the purposes of the loan.

(d) The Bank may, in exceptional circumstances, at the request of a member in whose territories a portion of the loan is spent, repurchase with gold or foreign exchange a part of that member’s currency thus spent but in no case shall the part so repurchased exceed the amount by which the expenditure of the loan in those territories gives rise to an increased need for foreign exchange.
SECTION 4. Payment Provisions for Direct Loans

Loan contracts under Section 1 (a) (i) or (ii) of this Article shall be made in accordance with the following payment provisions:

(a) The terms and conditions of interest and amortization payments, maturity and dates of payment of each loan shall be determined by the Bank. The Bank shall also determine the rate and any other terms and conditions of commission to be charged in connection with such loan.

In the case of loans made under Section 1 (a) (ii) of this Article during the first ten years of the Bank's operations, this rate of commission shall be not less than one percent per annum and not greater than one and one-half percent per annum, and shall be charged on the outstanding portion of any such loan. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already made and to future loans, if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(b) Guarantee commissions shall be paid directly to the Bank by the borrower.

(c) Guarantees by the Bank shall provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and by the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(d) The Bank shall have power to determine any other terms and conditions of the guarantee.

SECTION 5. Guarantees

(a) In guaranteeing a loan placed through the usual investment channels, the Bank shall charge a guarantee commission payable periodically on the amount of the loan outstanding at a rate determined by the Bank. During the first ten years of the Bank's operations, this rate shall be not less than one percent per annum and not greater than one and one-half percent per annum. At the end of this period of ten years, the rate of commission may be reduced by the Bank with respect both to the outstanding portions of loans already guaranteed and to future loans if the reserves accumulated by the Bank under Section 6 of this Article and out of other earnings are considered by it sufficient to justify a reduction. In the case of future loans the Bank shall also have discretion to increase the rate of commission beyond the above limit, if experience indicates that an increase is advisable.

(b) Guarantee commissions shall be paid directly to the Bank by the borrower.

(c) Guarantees by the Bank shall provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and by the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(d) The Bank shall have power to determine any other terms and conditions of the guarantee.

SECTION 6. Special Reserve

The amount of commissions received by the Bank under Sections 4 and 5 of this Article shall be set aside as a special reserve, which shall be kept available for meeting liabilities of the Bank in accordance with Section 7 of this Article. The special reserve shall be held in such liquid form, permitted under this Agreement, as the Executive Directors may decide.

SECTION 7. Methods of Meeting Liabilities of the Bank in Case of Defaults

In cases of default on loans made, participated in, or guaranteed by the Bank:

(a) The Bank shall make such arrangements as may be feasible to adjust the obligations under the loans, including arrangements under or analogous to those provided in Section 4 (c) of this Article.

(b) The payments in discharge of the Bank's liabilities on borrowings or guarantees under Section 1 (a) (ii) and (iii) of this Article shall be charged:

(i) first, against the special reserve provided in Section 6 of this Article;

(ii) then, to the extent necessary and at the discretion of the Bank, against the other reserves, surplus and capital available to the Bank.

(c) Whenever necessary to meet contractual payments of interest, other charges or amortization on the Bank's own borrowings, or to meet the Bank's liabilities with respect to similar payments on loans guaranteed by it, the Bank may call an appropriate amount of the unpaid subscriptions of members in accordance with Article II, Sections 5 and 7. Moreover, if it believes that a default may be of long duration, the Bank may call an additional amount of such unpaid subscriptions not to exceed in any one year one percent of the total subscriptions of the members for the following purposes:

(i) To redeem prior to maturity, or otherwise discharge its liability on, all or part of the outstanding principal of any loan guaranteed by it in respect of which the debtor is in default.

(ii) To repurchase, or otherwise discharge its liability on, all or part of its own outstanding borrowings.

SECTION 8. Miscellaneous Operations

In addition to the operations specified elsewhere in this Agreement, the Bank shall have the power:

(i) To buy and sell securities it has issued and to buy and sell securities which it has guaranteed or in which it has invested, provided that the Bank shall obtain the approval of the member in whose territories the securities are to be bought or sold.
(ii) To guarantee securities in which it has invested for the purpose of facilitating their sale.

(iii) To borrow the currency of any member with the approval of that member.

(iv) To buy and sell such other securities as the Directors by a three-fourths majority of the total voting power may deem proper for the investment of all or part of the special reserve under Section 6 of this Article.

In exercising the powers conferred by this Section, the Bank may deal with any person, partnership, association, corporation or other legal entity in the territories of any member.

SECTION 9. Warning to be Placed on Securities

Every security guaranteed or issued by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any government unless expressly stated on the security.

SECTION 10. Political Activity Prohibited

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

IBRD Article V

Organization and Management

SECTION 1. Structure of the Bank

The Bank shall have a Board of Governors, Executive Directors, a President and such other officers and staff to perform such duties as the Bank may determine.

SECTION 2. Board of Governors

(a) All the powers of the Bank shall be vested in the Board of Governors consisting of one governor and one alternate appointed by each member in such manner as it may determine. Each governor and each alternate shall serve for five years, subject to the pleasure of the member appointing him, and may be reappointed. No alternate may vote except in the absence of his principal. The Board shall select one of the Governors as chairman.

(b) The Board of Governors may delegate to the Executive Directors authority to exercise any powers of the Board, except the power to:

(i) Admit new members and determine the conditions of their admission;

(ii) Increase or decrease the capital stock;

(iii) Suspend a member;

(iv) Decide appeals from interpretations of this agreement given by the Executive Directors;

(v) Make arrangements to cooperate with other international organizations (other than informal arrangements of a temporary and administrative character);

(vi) Decide to suspend permanently the operations of the Bank and to distribute its assets;

(vii) Determine the distribution of the net income of the Bank.

(c) The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board or called by the Executive Directors. Meetings of the Board shall be called by the Directors whenever requested by five members or by members having one quarter of the total voting power.

(d) A quorum for any meeting of the Board of Governors shall be a majority of the Governors, exercising not less than two-thirds of the total voting power.

(e) The Board of Governors may by regulation establish a procedure whereby the Executive Directors, when they deem such action to be in the best interests of the Bank, may obtain a vote of the Governors on a specific question without calling a meeting of the Board.

(f) The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.

(g) Governors and alternates shall serve as such without compensation from the Bank, but the Bank shall pay them reasonable expenses incurred in attending meetings.

(h) The Board of Governors shall determine the remuneration to be paid to the Executive Directors and the salary and terms of the contract of service of the President.

SECTION 3. Voting

(a) Each member shall have two hundred fifty votes plus one additional vote for each share of stock held.

(b) Except as otherwise specifically provided, all matters before the Bank shall be decided by a majority of the votes cast.

SECTION 4. Executive Directors

(a) The Executive Directors shall be responsible for the conduct of the general operations of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors.

(b) There shall be twelve Executive Directors, who need not be governors, and of whom:

(i) five shall be appointed, one by each of the first five members referred to in (i) above.

(ii) seven shall be elected according to Schedule B by all the Governors other than those appointed by the first five members referred to in (i) above.

For the purpose of this paragraph, "members" means governments of countries whose names are set forth in Schedule A, whether they are original members or become members in accordance with Article 11, Section 1(b). When governments of other countries become members, the Board of Governors may, by a four-fifths majority of the total voting power, increase the total number of directors by increasing the number of directors to be elected.

Executive Directors shall be appointed or elected every two years. (c) Each executive director shall appoint an alternate with full power to act for him when he is not present. When the executive directors appointing them are present, alternates may participate in meetings but shall not vote.

(d) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than ninety days before the end of his term, another director shall be elected for the remainder of the term by the governors who elected the former director. A majority of the votes cast shall be required for election. While the office remains vacant, the alternate of the former director shall exercise his powers, except that of appointing an alternate.
The Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

A quorum for any meeting of the Executive Directors shall be a majority of the Directors, exercising not less than one-half of the total voting power.

Each appointed director shall be entitled to cast the number of votes allotted under Section 3 of this Article to the member appointing him. Each elected director shall be entitled to cast the number of votes which counted toward his election. All the votes which a director is entitled to cast shall be cast as a unit.

The Board of Governors shall adopt regulations under which a member not entitled to appoint a director under (b) above may send a representative to attend any meeting of the Executive Directors when a request made by, or a matter particularly affecting, that member is under consideration.

The Executive Directors may appoint such committees as they deem advisable. Membership of such committees need not be limited to governors or directors or their alternates.

SECTION 5. President and Staff

The Executive Directors shall select a President who shall not be a governor or an executive director or an alternate for either. The President shall be Chairman of the Executive Directors, but shall have no vote except a deciding vote in case of an equal division. He may participate in meetings of the Board of Governors, but shall not vote at such meetings. The President shall cease to hold office when the Executive Directors so decide.

The President shall be chief of the operating staff of the Bank and shall conduct, under the direction of the Executive Directors, the ordinary business of the Bank. Subject to the general control of the Executive Directors, he shall be responsible for the organization, appointment and dismissal of the officers and staff.

The President, officers and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

In appointing the officers and staff the President shall subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible.

SECTION 6. Advisory Council

There shall be an Advisory Council of not less than seven persons selected by the Board of Governors including representatives of banking, commercial, industrial, labor, and agricultural interests, and with as wide a national representation as possible. In those fields where specialized international organizations exist, the members of the Council representative of those fields shall be selected in agreement with such organizations. The Council shall advise the Bank on matters of general policy. The Council shall meet annually and on such other occasions as the Bank may request.

Councillors shall serve for two years and may be reappointed. They shall be paid their reasonable expenses incurred on behalf of the Bank.

SECTION 7. Loan Committees

The committees required to report on loans under Article III, Section 4, shall be appointed by the Bank. Each such committee shall include an expert selected by the governor representing the member in whose territories the project is located and one or more members of the technical staff of the Bank.

SECTION 8. Relationship to Other International Organizations

(a) The Bank, within the terms of this Agreement, shall cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields. Any arrangements for such cooperation which would involve a modification of any provision of this Agreement may be effected only after amendment to this Agreement under Article VIII.

(b) In making decisions on applications for loans or guarantees relating to matters directly within the competence of any international organization of the types specified in the preceding paragraph and participated in primarily by members of the Bank, the Bank shall give consideration to the views and recommendations of such organization.

SECTION 9. Location of Offices

(a) The principal office of the Bank shall be located in the territory of the member holding the greatest number of shares.

(b) The Bank may establish agencies or branch offices in the territories of any member of the Bank.

SECTION 10. Regional Offices and Councils

(a) The Bank may establish regional offices and determine the location of, and the areas to be covered by, each regional office.

(b) Each regional office shall be advised by a regional council representative of the entire area and selected in such manner as the Bank may decide.

SECTION 11. Depositories

(a) Each member shall designate its central bank as a depository for all the Bank's holdings of its currency or, if it has no central bank, it shall designate such other institution as may be acceptable to the Bank.

(b) The Bank may hold other assets, including gold, in depositories designated by the five members having the largest number of shares and in such other designated depositories as the Bank may select. Initially, at least one-half of the gold holdings of the Bank shall be held in the depository designated by the member in whose territory the Bank has its principal office, and at least forty percent shall be held in the depositories designated by the remaining four members referred to above, each of such depositories to hold, initially, not less than the amount of gold paid on the shares of the member designating it. However, all transfers of gold by the Bank shall be made with due regard to the costs of transport and anticipated requirements of the Bank. In an emergency the Executive Directors may transfer all or any part of the Bank's gold holdings to any place they can be adequately protected.

SECTION 12. Form of Holdings of Currency

The Bank shall accept from any member, in place of any part of the member's currency, paid in to the Bank under Article 11, Section 7 (i), or to meet amortization payments on loans made with such currency, and not needed by the Bank in its operations, notes or similar obligations issued by the Government of the member or the depository designated by such member, which shall be non-negotiable, non-interest-bearing and payable at their par value on demand by credit to the account of the Bank in the designated depository.

SECTION 13. Publication of Reports and Provision of Information

(a) The Bank shall publish an annual report containing an audited statement of its accounts and shall circulate to members at intervals of three months or less a summary statement of its financial position and a profit and loss statement showing the results of its operations.
(b) The Bank may publish such other reports as it deems desirable to carry out its purposes.

(c) Copies of all reports, statements and publications made under this section shall be distributed to members.

SECTION 14. Allocation of Net Income

(a) The Board of Governors shall determine annually what part of the Bank's net income, after making provision for reserves, shall be allocated to surplus and what part, if any, shall be distributed.

(b) If any part is distributed, up to two percent non-cumulative shall be paid, as a first charge against the distribution for any year, to each member on the basis of the average amount of the loans outstanding during the year made under Article IV, Section 1 (a) (i), out of currency corresponding to its subscription. If two percent is paid as a first charge, any balance remaining to be distributed shall be paid to all members in proportion to their shares. Payments to each member shall be made in its own currency, or if that currency is not available in other currency acceptable to the member. If such payments are made in currencies other than the member's own currency, the transfer of the currency and its use by the receiving member after payment shall be without restriction by the members.

IBRD Article VI
Withdrawal and Suspension of Membership: Suspension of Operations

SECTION 1. Right of Members to Withdraw

Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office. Withdrawal shall become effective on the date such notice is received.

SECTION 2. Suspension of Membership

If a member fails to fulfill any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing.

While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations.

SECTION 3. Cessation of Membership in International Monetary Fund

Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member.

Section 4. Settlement of Accounts with Governments Ceasing to be Members

(a) When a government ceases to be a member, it shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before it ceased to be a member are outstanding; but it shall cease to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank.

(b) At the time a government ceases to be a member, the Bank shall arrange for the repurchase of its shares as a part of the settlement of accounts with such government in accordance with the provisions of (c) and (d) below. For this purpose the repurchase price of the shares shall be the value shown by the books of the Bank on the day the government ceases to be a member.

(c) The payment for shares repurchased by the Bank under this section shall be governed by the following conditions:

(i) Any amount due to the government for its shares shall be withheld so long as the government, its central bank or any of its agencies remains liable, as borrower or guarantor, to the Bank and such amount may, at the option of the Bank, be applied on any such liability as it matures. No amount shall be withheld on account of the liability of the government resulting from its subscription for shares under Article H, Section 5 (ii). In any event, no amount due to a member for its shares shall be paid until six months after the date upon which the government ceases to be a member.

(ii) Payments for shares may be made from time to time, upon their surrender by the government, to the extent by which the amount due as the repurchase price in (b) above exceeds the aggregate of liabilities on loans and guarantees in (c) (i) above until the former member has received the full repurchase price.

(iii) Payments shall be made in the currency of the country receiving payment or at the option of the Bank in gold.

(iv) If losses are sustained by the Bank on any guarantees, participations in loans, or loans which were outstanding on the date when the government ceased to be a member, and the amount of such losses exceeds the amount of the reserve provided against losses on the date when the government ceased to be a member, such government shall be obligated to repay upon demand the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the repurchase price was determined. In addition, the former member government shall remain liable on any call for unpaid subscriptions under Article H, Section 5 (ii), to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares was determined.

(d) If the Bank suspends permanently its operations under Section 5 (b) of this Article, within six months of the date upon which any government ceases to be a member, all rights of such government shall be determined by the provisions of Section 5 of this Article.

SECTION 5. Suspension of Operations and Settlement of Obligations

(a) In an emergency the Executive Directors may suspend temporarily operations in respect of new loans and guarantees pending an opportunity for further consideration and action by the Board of Governors.

(b) The Bank may suspend permanently its operations in respect of new loans and guarantees by a vote of a majority of the Governors, exercising a majority of the total voting power. After such suspension of operations the Bank shall forthwith cease all activities, except those incident to the orderly realization, conservation, and preservation of its assets and settlement of its obligations.

(c) The liability of all members for uncalled subscriptions to the capital stock of the Bank and in respect of the depreciation of their own currencies shall continue until all claims of creditors, including all contingent claims, shall have been discharged.

(d) All creditors holding direct shall be paid out of the assets of the Bank, and then out of payments to the Bank on calls on unpaid subscriptions. Before making any payments to creditors holding direct claims, the Executive Directors shall make such arrangements as are necessary, in their judgment, to insure a distribution to holders of contingent claims ratably with creditors holding direct claims.

(e) No distribution shall be made to members on account of their subscriptions to the capital stock of the Bank until

(i) all liabilities to creditors have been discharged or provided for, and
(ii) a majority of the Governors, exercising a majority of the total voting power, have decided to make a distribution.

(f) After a decision to make a distribution has been taken under (e) above, the Executive Directors may by a two-thirds majority vote make successive distributions of the assets of the Bank to members until all of the assets have been distributed. This distribution shall be subject to the prior settlement of all outstanding claims of the Bank against each member

(g) Before any distribution of assets is made, the Executive Directors shall fix the proportionate share of each member according to the ratio of its shareholding to the total outstanding shares of the Bank.

(h) The Executive Directors shall value the assets to be distributed as at the date of distribution and then proceed to distribute in the following manner:

(i) There shall be paid to each member in its own obligations or those of its official agencies or legal entities within its territories, insofar as they are available for distribution, an amount equivalent in value to its proportionate share of the total amount to be distributed.

(ii) Any balance due to a member after payment has been made under (i) above shall be paid, in its own currency, insofar as it is held by the Bank, up to an amount equivalent in value to such balance.

(iii) Any balance due to a member after payment has been made under (i) and (ii) above shall be paid in gold or currency acceptable to the member, insofar as they are held by the Bank, up to an amount equivalent in value to such balance.

(iv) Any remaining assets held by the Bank after payments have been made to members under (i), (ii), and (iii) above shall be distributed pro rata among the members.

IBRD Article VII
Status, Immunities and Privileges

SECTION 1. Purposes of the Article
To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member.

SECTION 2. Status of the Bank
The Bank shall possess full juridical personality, and, in particular, the capacity:

(i) to contract;

(ii) to acquire and dispose of immovable and movable property;

(iii) to institute legal proceedings.

SECTION 3. Position of the Bank with Regard to Judicial Process
Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

SECTION 4. Immunity of Assets from Seizure
Property and assets of the Bank, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action.

SECTION 5. Immunity of Archives
The archives of the Bank shall be inviolable.

SECTION 6. Freedom of Assets from Restrictions
To the extent necessary to carry out the operations provided for in this Agreement and subject to the provisions of this Agreement, all property and assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature.

SECTION 7. Privilege for Communications
The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

SECTION 8. Immunities and Privileges of Officers and Employees
All governors, executive directors, alternates, officers and employees of the Bank

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;

(ii) not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

SECTION 9. Immunities from Taxation
(a) The Bank, its assets, property, income and its operations and transactions authorized by this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from liability for the collection or payment of any tax or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

(c) No taxation of any kind shall be levied on any obligation or security issued by the Bank (including any dividend or interest thereon) by whomsoever held:

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or
(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No taxation of any kind shall be levied on any obligation or security guaranteed by the Bank (including any dividend or interest thereon) by whomsoever held:

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

SECTION 10. Application of Article

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken.

IBRD Article VIII

Amendments

(a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having eighty-five percent (1) of the total voting power, have accepted the proposed amendments, the Bank shall certify the fact by formal communication addressed to an members.

(b) Notwithstanding (a) above, acceptance by an members is required in the case of any amendment modifying:

(i) the right to withdraw from the Bank provided in Article VI, Section 1;

(ii) the right secured by Article U, Section 3 (c);

(iii) the limitation on liability provided in Article II, Section 6.

(c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.

IBRD Article IX

Interpretation

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article V, Section 4 (h).

(b) In any case where the Executive Directors have given a decision under (a) above, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors.

3. "Eighty-five percent" was substituted to "four-fifths" by amendment effective February 16, 1989.

(c) Whenever a disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Bank. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

IBRD Article X

Approval Deemed Given

Whenever the approval of any member is required before any act may be done by the Bank, except in Article VIII, approval shall be deemed to have been given unless the member presents an objection within such reasonable period as the Bank may fix in notifying the member of the proposed act.

IBRD Article XI

Final Provisions

SECTION 1. Entry into Force

This Agreement shall enter into force when it has been signed on behalf of governments whose minimum subscriptions comprise not less than sixty-five percent of the total subscriptions set forth in Schedule A and when the instruments referred to in Section 2 (a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

SECTION 2. Signature

(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

(b) Each government shall become a member of the Bank as from the date of the deposit on its behalf of the instrument referred to in (a) above, except that no government shall become a member before this Agreement enters into force under Section 1 of this Article.

(c) The Government of the United States of America shall inform the governments of all countries whose names are set forth in Schedule A, and all governments whose membership is approved in accordance with Article II, Section 1 (b), of all signatures of this Agreement and of the deposit of all instruments referred to in (a) above.

(d) At the time this Agreement is signed on its behalf, each government shall transmit to the Government of the United States of America one one-hundredth of one percent of the price of each share in gold or United States dollars for the purpose of meeting administrative expenses of the Bank. This payment shall be credited on account of the payment to be made in accordance with Article II Section 8 (a). The Government of the United States of America shall hold such funds in a special deposit account and shall transmit them to the Board of Governors of the Bank when the initial meeting has been called under Section 3 of this Article.
If this Agreement has not come into force by December 31, 1945, the Government of the United States of America shall return such funds to the governments that transmitted them.

(e) This Agreement shall remain open for signature at Washington on behalf of the governments of the countries whose names are set forth in Schedule A until December 31, 1945.

(f) After December 31, 1945, this Agreement shall be open for signature on behalf of the government of any country whose membership has been approved in accordance with Article II, Section 1 (b).

(g) By their signature of this Agreement, all governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under their protection, suzerainty, or authority and all territories in respect of which they exercise a mandate.

(h) In the case of governments whose metropolitan territories have been under enemy occupation, the deposit of the instrument referred to in (a) above may be delayed until one hundred and eighty days after the date on which these territories have been liberated. If, however, it is not deposited by any such government before the expiration of this period, the signature affixed on behalf of that government shall become void and the portion of its subscription paid under (d) above shall be returned to it.

(i) Paragraphs (d) and (h) shall come into force with regard to each signatory government as from the date of its signature.

SECTION 3. Inauguration of the Bank

(a) As soon as this Agreement enters into force under Section 1 of this Article, each member shall appoint a governor and the member to whom the largest number of shares is allocated in Schedule A shall call the first meeting of the Board of Governors.

(b) At the first meeting of the Board of Governors, arrangements shall be made for the selection of provisional executive directors. The governments of the five countries, to which the largest number of shares are allocated in Schedule A, shall appoint provisional executive directors. If one or more of such governments have not become members, the executive directorships which they would be entitled to fill shall remain vacant until they become members, or until January 1, 1946, whichever is the earlier. Seven provisional executive directors shall be elected in accordance with the provisions of Schedule B and shall remain in office until the date of the first regular election of executive directors which shall be held as soon as practicable after January 1, 1946.

(c) The Board of Governors may delegate to the provisional executive directors any powers except those which may not be delegated to the Executive Directors.

(d) The Bank shall notify members when it is ready to commence operations.

DONE at Washington, in a single copy which shall remain deposited in the archives of the Government of the United States of America, which shall transmit certified copies to all governments whose names are set forth in Schedule A and to all governments whose membership is approved in accordance with Article II, Section 1 (b).

IBRD Schedule 1

<table>
<thead>
<tr>
<th>Country</th>
<th>Subscription (millions of dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>200.0</td>
</tr>
<tr>
<td>Belgium</td>
<td>225.0</td>
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<tr>
<td>Bolivia</td>
<td>7.0</td>
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<tr>
<td>Brazil</td>
<td>105.0</td>
</tr>
<tr>
<td>Canada</td>
<td>325.0</td>
</tr>
<tr>
<td>Chile</td>
<td>35.0 Netherlands</td>
</tr>
<tr>
<td>China</td>
<td>600.0 New Zealand</td>
</tr>
<tr>
<td>Colombia</td>
<td>35.0 Nicaragua</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>2.0 Norway</td>
</tr>
<tr>
<td>Cuba</td>
<td>35.0 Panama</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>125.0 Paraguay</td>
</tr>
<tr>
<td>Denmark</td>
<td>175.0</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>15.0 Philippine Commonwealth</td>
</tr>
<tr>
<td>Ecuador</td>
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</tr>
<tr>
<td>El Salvador</td>
<td>1.0 Union of Soviet Socialist</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1,200.0</td>
</tr>
<tr>
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<td>450.0 United Kingdom</td>
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<td>Haiti</td>
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<tr>
<td>Honduras</td>
<td>1.0 Yugoslavia</td>
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<tr>
<td>Iceland</td>
<td>1.0</td>
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<tr>
<td>India</td>
<td>400.0</td>
</tr>
<tr>
<td>Total</td>
<td>9,100.0</td>
</tr>
</tbody>
</table>

(a) The quota of Denmark shall be determined by the Bank after Denmark accepts membership in accordance with these Articles of Agreement.

IBRD Schedule B

Election of Executive Directors

1. The election of the elective executive directors shall be by ballot of the Governors eligible to vote under Article V, Section 4 (b).

2. In balloting for the elective executive directors, each governor eligible to vote shall cast for one person all of the votes to which the member appointing him is entitled under Section 3 of Article V. The seven persons receiving the greatest number of votes shall be executive directors, except that no person who receives less than fourteen percent of the total of the votes which can be cast (eligible votes) shall be considered elected.

3. When seven persons are not elected on the first ballot, a second ballot shall be held in which the person who received the lowest number of votes shall be ineligible for election and in which there shall vote only (a) those governors who voted in the first ballot for a person not elected and (b) those governors whose votes for a person elected are deemed under 4 below to have raised the votes cast for that person above fifteen percent of the eligible votes.

4. In determining whether the votes cast by a governor are to be deemed to have raised the total of any person above fifteen percent of the eligible votes, the fifteen percent shall be deemed to include, first, the
votes of the governor casting the largest number of votes for such person, then the votes of the governor casting the next largest number, and so on until fifteen percent is reached.

5. Any governor, part of whose votes must be counted in order to raise the total of any person above fourteen percent shall be considered as casting all of his votes for such person even if the total votes for such person thereby exceed fifteen percent.

6. If, after the second ballot, seven persons have not been elected, further ballots shall be held on the same principles until seven persons have been elected, provided that after six persons are elected, the seventh may be elected by a simple majority of the remaining votes and shall be deemed to have been elected by all such votes.
No. 4. CONVENTION1 ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS, ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 13 FEBRUARY 1946

Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that 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 and that 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 connection with the Organization.

Consequently the General Assembly, by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

Article I
JURIDICAL PERSONALITY

SECTION 1. The United Nations shall possess juridical personality. It shall have the capacity:

(a) To contract;
(b) To acquire and dispose of immovable and movable property;
(c) To institute legal proceedings.

Article II
PROPERTY, FUNDS AND ASSETS

SECTION 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

SECTION 3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

SECTION 4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

SECTION 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;
(b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

SECTION 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

SECTION 7. The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;
(b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;

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1 Came into force (see page 263 of this volume) on 17 September 1946 as regards United Kingdom of Great Britain and Northern Ireland by the deposit of the instrument of accession.
(c) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

SECTION 8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article III

FACILITIES IN RESPECT OF COMMUNICATIONS

SECTION 9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephones, press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

SECTION 10. The United Nations shall have the right to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV

THE REPRESENTATIVES OF MEMBERS

SECTION 11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;
SECTION 15. The provisions of Sections 11, 12 and 13 are not applicable as between a representative and the authorities of the state of which he is a national or of which he is or has been the representative.

SECTION 16. In this article the expression “representatives” shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations.

Article V

Officials

SECTION 17. The Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.

SECTION 18. Officials of the United Nations shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;
(b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations;
(c) Be immune from national service obligations;
(d) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration;
(e) Be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned;
(f) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys;
(g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

SECTION 19. In addition to the immunities and privileges specified in Section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

SECTION 20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case, where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

SECTION 21. The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

Article VI

Experts on Missions for the United Nations

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 the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;
(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;
(c) Inviolability for all papers and documents;
(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

**SECTION 29.** Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

**Article VII**

**UNITED NATIONS LAISSEZ-PASSER**

**SECTION 24.** The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

**SECTION 25.** Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

**SECTION 26.** Similar facilities to those specified in Section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations.

**SECTION 27.** The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

**SECTION 28.** The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

**Article VIII**

**SETTLEMENTS OF DISPUTES**

**SECTION 29.** The United Nations shall make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

**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.

**Final Article**

**SECTION 31.** This convention is submitted to every Member of the United Nations for accession.

**SECTION 32.** Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

**SECTION 33.** The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

**SECTION 34.** It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

**SECTION 35.** This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United
Nations, or until a revised general convention has been approved by the
General Assembly and that Member has become a party to this revised
convention.

SECTION 36. The Secretary-General may conclude with any Member or
Members supplementary agreements adjusting the provisions of this conve-
nion so far as that Member or those Members are concerned. These supple-
mentary agreements shall in each case be subject to the approval of the
General Assembly.
Constitution of the World Health Organization, 1946
CONSTITUTION OF THE WORLD HEALTH ORGANIZATION

THE STATES Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all.

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

ACCEP廷G THESE PRINCIPLES, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of the Charter of the United Nations.

CHAPTER I – OBJECTIVE

Article 1

The objective of the World Health Organization (hereinafter called the Organization) shall be the attainment by all peoples of the highest possible level of health.

CHAPTER II – FUNCTIONS

Article 2

In order to achieve its objective, the functions of the Organization shall be:

(a) to act as the directing and co-ordinating authority on international health work;

(b) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate;

(c) to assist Governments, upon request, in strengthening health services;

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;

(e) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups, such as the peoples of trust territories;

(f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;

(g) to stimulate and advance work to eradicate epidemic, endemic and other diseases;

(h) to promote, in co-operation with other specialized agencies where necessary, the prevention of accidental injuries;

(i) to promote, in co-operation with other specialized agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene;

(j) to promote co-operation among scientific and professional groups which contribute to the advancement of health;

(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform
such duties as may be assigned thereby to the Organization and are consistent with its objective;

(l) to promote maternal and child health and welfare and to foster the ability to live harmoniously in a changing total environment;

(m) to foster activities in the field of mental health, especially those affecting the harmony of human relations;

(n) to promote and conduct research in the field of health;

(o) to promote improved standards of teaching and training in the health, medical and related professions;

(p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;

(q) to provide information, counsel and assistance in the field of health;

(r) to assist in developing an informed public opinion among all peoples on matters of health;

(s) to establish and revise as necessary international nomenclatures of diseases, of causes of death and of public health practices;

(t) to standardize diagnostic procedures as necessary;

(u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;

(v) generally to take all necessary action to attain the objective of the Organization.

CHAPTER III – MEMBERSHIP AND ASSOCIATE MEMBERSHIP

Article 3

Membership in the Organization shall be open to all States.

Article 4

Members of the United Nations may become Members of the Organization by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes.

Article 5

The States whose Governments have been invited to send observers to the International Health Conference held in New York, 1946, may become Members by signing or otherwise accepting this Constitution in accordance with the provisions of Chapter XIX and in accordance with their constitutional processes provided that such signature or acceptance shall be completed before the first session of the Health Assembly.

Article 6

Subject to the conditions of any agreement between the United Nations and the Organization, approved pursuant to Chapter XVI, States which do not become Members in accordance with Articles 4 and 5 may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly.

Article 7

If a Member fails to meet its financial obligations to the Organization or in other exceptional circumstances, the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.

Article 8

Territories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members by the Health Assembly upon application made on behalf of such territory or group of territories by the Member or other authority having responsibility for their international relations. Representatives of Associate Members to the Health Assembly should be qualified by their technical competence in the field of health and should be chosen from the native population. The nature and extent of the rights and obligations of Associate Members shall be determined by the Health Assembly.

CHAPTER IV – ORGANS

Article 9

The work of the Organization shall be carried out by:

(a) The World Health Assembly (herein called the Health Assembly);

(b) The Executive Board (hereinafter called the Board);

(c) The Secretariat.

1 The amendment to this Article adopted by the Eighteenth World Health Assembly (resolution WHA18.48) has not yet come into force.
CHAPTER V – THE WORLD HEALTH ASSEMBLY

Article 10

The Health Assembly shall be composed of delegates representing Members.

Article 11

Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate. These delegates should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration of the Member.

Article 12

Alternates and advisers may accompany delegates.

Article 13

The Health Assembly shall meet in regular annual session and in such special sessions as may be necessary. Special sessions shall be convened at the request of the Board or of a majority of the Members.

Article 14

The Health Assembly, at each annual session, shall select the country or region in which the next annual session shall be held, the Board subsequently fixing the place. The Board shall determine the place where a special session shall be held.

Article 15

The Board, after consultation with the Secretary-General of the United Nations, shall determine the date of each annual and special session.

Article 16

The Health Assembly shall elect its President and other officers at the beginning of each annual session. They shall hold office until their successors are elected.

Article 17

The Health Assembly shall adopt its own rules of procedure.

Article 18

The functions of the Health Assembly shall be:

(a) to determine the policies of the Organization;
(b) to name the Members entitled to designate a person to serve on the Board;
(c) to appoint the Director-General;
(d) to review and approve reports and activities of the Board and of the Director-General and to instruct the Board in regard to matters upon which action, study, investigation or report may be considered desirable;
(e) to establish such committees as may be considered necessary for the work of the Organization;
(f) to supervise the financial policies of the Organization and to review and approve the budget;
(g) to instruct the Board and the Director-General to bring to the attention of Members and of international organizations, governmental or non-governmental, any matter with regard to health which the Health Assembly may consider appropriate;
(h) to invite any organization, international or national, governmental or non-governmental, which has responsibilities related to those of the Organization, to appoint representatives to participate, without right of vote, in its meetings or in those of the committees and conferences convened under its authority, on conditions prescribed by the Health Assembly; but in the case of national organizations, invitations shall be issued only with the consent of the Government concerned;
(i) to consider recommendations bearing on health made by the General Assembly, the Economic and Social Council, the Security Council or Trusteeship Council of the United Nations, and to report to them on the steps taken by the Organization to give effect to such recommendations;
(j) to report to the Economic and Social Council in accordance with any agreement between the Organization and the United Nations;
(k) to promote and conduct research in the field of health by the personnel of the Organization, by the establishment of its own institutions or by co-operation with official or non-official institutions of any Member with the consent of its Government;
(l) to establish such other institutions as it may consider desirable;
(m) to take any other appropriate action to further the objective of the Organization.
Article 19
The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organization. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes.

Article 20
Each Member undertakes that it will, within eighteen months after the adoption by the Health Assembly of a convention or agreement, take action relative to the acceptance of such convention or agreement. Each Member shall notify the Director-General of the action taken, and if it does not accept such convention or agreement within the time limit, it will furnish a statement of the reasons for non-acceptance. In case of acceptance, each Member agrees to make an annual report to the Director-General in accordance with Chapter XIV.

Article 21
The Health Assembly shall have authority to adopt regulations concerning:

(a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
(b) nomenclatures with respect to diseases, causes of death and public health practices;
(c) standards with respect to diagnostic procedures for international use;
(d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
(e) advertising and labeling of biological, pharmaceutical and similar products moving in international commerce.

Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of the Health Assembly before the notice has been given of their adoption by the Health Assembly of regulations adopted pursuant to Article 21.

Article 22
Article 23
The Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organization.

CHAPTER VI – THE EXECUTIVE BOARD

Article 24
The Board shall consist of thirty-four persons designated by as many Members. The Health Assembly, taking into account an equitable geographical distribution of the Members entitled to designate a person to serve on the Board, provided that, of such Members, not less than three shall be elected from each of the regional organizations established pursuant to Article 44. Each of these Members should appoint to the Board a person technically qualified in the field of health, who may be accompanied by alternates and advisers.

Article 25
The Members shall be elected for three years and may be re-elected, provided that of the Members elected at the first session of the Health Assembly held after the coming into force of the amendment to this Constitution increasing the membership of the Board from thirty-two to thirty-four the term of office of the additional Members elected shall, insofar as may be necessary, be of such lesser duration as shall facilitate the election of at least one Member from each regional organization in each year.

Article 26
The Board shall meet at least twice a year and shall determine the place of each meeting.

Article 27
The Board shall elect its Chairman from among its members and shall determine the place of each meeting.

Article 28
The functions of the Board shall be:

(a) to give effect to the decisions and policies of the Health Assembly;
(b) to act as the executive organ of the Health Assembly;
(c) to adopt its own rules of procedure.

Article 29
The Board shall consist of thirty-four persons designated by as many Members.

Article 30
The Health Assembly shall have authority to make recommendations to the Board in accordance with Chapter XIV.

Article 31
The Health Assembly shall have authority to make recommendations to the Members with respect to any matter within the competence of the Organization.
(c) to perform any other functions entrusted to it by the Health Assembly;

(d) to advise the Health Assembly on questions referred to it by that body and on matters assigned to the Organization by conventions, agreements and regulations;

(e) to submit advice or proposals to the Health Assembly on its own initiative;

(f) to prepare the agenda of meetings of the Health Assembly;

(g) to submit to the Health Assembly for consideration and approval a general programme of work covering a specific period;

(h) to study all questions within its competence;

(i) to take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

Article 29

The Board shall exercise on behalf of the whole Health Assembly the powers delegated to it by that body.

CHAPTER VII – THE SECRETARIAT

Article 30

The Secretariat shall comprise the Director-General and such technical and administrative staff as the Organization may require.

Article 31

The Director-General shall be appointed by the Health Assembly on the nomination of the Board on such terms as the Health Assembly may determine. The Director-General, subject to the authority of the Board, shall be the chief technical and administrative officer of the Organization.

Article 32

The Director-General shall be ex-officio Secretary of the Health Assembly, of the Board, of all commissions and committees of the Organization and of conferences convened by it. He may delegate these functions.

Article 33

The Director-General or his representative may establish a procedure by agreement with Members, permitting him, for the purpose of discharging his duties, to have direct access to their various departments, especially to their health administrations and to national health organizations, governmental or non-governmental. He may also establish direct relations with international organizations whose activities come within the competence of the Organization. He shall keep regional offices informed on all matters involving their respective areas.

Article 34

The Director-General shall prepare and submit to the Board the financial statements and budget estimates of the Organization.

Article 35

The Director-General shall appoint the staff of the Secretariat in accordance with staff regulations established by the Health Assembly. The paramount consideration in the employment of the staff shall be to assure that the efficiency, integrity and internationally representative character of the Secretariat shall be maintained at the highest level. Due regard shall be paid also to the importance of recruiting the staff on as wide a geographical basis as possible.

Article 36

The conditions of service of the staff of the Organization shall conform as far as possible with those of other United Nations organizations.

Article 37

In the performance of their duties the Director-General and the staff shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organization on its part undertakes to respect the exclusively international character of the Director-General and the staff and not to seek to influence them.

CHAPTER VIII – COMMITTEES

Article 38

The Board shall establish such committees as the Health Assembly may direct and, on its own initiative or on the proposal of the Director-General, may establish any other committees considered desirable to serve any purpose within the competence of the Organization.
Article 39
The Board, from time to time and in any event annually, shall review the necessity for continuing each committee.

Article 40
The Board may provide for the creation of or the participation by the Organization in joint or mixed committees with other organizations and for the representation of the Organization in committees established by such other organizations.

Chapter IX – Conferences

Article 41
The Health Assembly or the Board may convene local, general, technical or other special conferences to consider any matter within the competence of the Organization and may provide for the representation at such conferences of international organizations and, with the consent of the Government concerned, of national organizations, governmental or nongovernmental. The manner of such representation shall be determined by the Health Assembly or the Board.

Article 42
The Board may provide for representation of the Organization at conferences in which the Board considers that the Organization has an interest.

Chapter X – Headquarters

Article 43
The location of the headquarters of the Organization shall be determined by the Health Assembly after consultation with the United Nations.

Chapter XI – Regional Arrangements

Article 44
(a) The Health Assembly shall from time to time define the geographical areas in which it is desirable to establish a regional organization.

(b) The Health Assembly may, with the consent of a majority of the Members situated within each area so defined, establish a regional organization to meet the special needs of such area. There shall not be more than one regional organization in each area.

Article 45
Each regional organization shall be an integral part of the Organization in accordance with this Constitution.

Article 46
Each regional organization shall consist of a regional committee and a regional office.

Article 47
Regional committees shall be composed of representatives of the Member States and Associate Members in the region concerned. Territories or groups of territories within the region, which are not responsible for the conduct of their international relations and which are not Associate Members, shall have the right to be represented and to participate in regional committees. The nature and extent of the rights and obligations of these territories or groups of territories in regional committees shall be determined by the Health Assembly in consultation with the Member or other authority having responsibility for the international relations of these territories and with the Member States in the region.

Article 48
Regional committees shall meet as often as necessary and shall determine the place of each meeting.

Article 49
Regional committees shall adopt their own rules of procedure.

Article 50
The functions of the regional committee shall be:
(a) to formulate policies governing matters of an exclusively regional character;
(b) to supervise the activities of the regional office;
(c) to suggest to the regional office the calling of technical conferences and such additional work or investigation in health matters as in the opinion of the regional committee would promote the objective of the Organization within the region;
(d) to co-operate with the respective regional committees of the United Nations and with those of other specialized agencies and with other regional international organizations having interests in common with the Organization;
(e) to tender advice, through the Director-General, to the Organization on international health matters which have wider than regional significance;

(f) to recommend additional regional appropriations by the Governments of the respective regions if the proportion of the central budget of the Organization allotted to that region is insufficient for the carrying-out of the regional functions;

(g) such other functions as may be delegated to the regional committee by the Health Assembly, the Board or the Director-General.

Article 51

Subject to the general authority of the Director-General of the Organization, the regional office shall be the administrative organ of the regional committee. It shall, in addition, carry out within the region the decisions of the Health Assembly and of the Board.

Article 52

The head of the regional office shall be the Regional Director appointed by the Board in agreement with the regional committee.

Article 53

The staff of the regional office shall be appointed in a manner to be determined by agreement between the Director-General and the Regional Director.

Article 54

The Pan American Sanitary Organization, represented by the Pan American Sanitary Bureau and the Pan American Sanitary Conferences, and all other inter-governmental regional health organizations in existence prior to the date of signature of this Constitution, shall in due course be integrated with the Organization. This integration shall be effected as soon as practicable through common action based on mutual consent of the competent authorities expressed through the organizations concerned.

Chapter XII – Budget and Expenses

Article 55

The Director-General shall prepare and submit to the Board the budget estimates of the Organization. The Board shall consider and submit to the Health Assembly such budget estimates, together with any recommendations the Board may deem advisable.

1 Renamed “Pan American Health Organization” by decision of the XV Pan American Sanitary Conference, September-October 1958.

Article 56

Subject to any agreement between the Organization and the United Nations, the Health Assembly shall review and approve the budget estimates and shall apportion the expenses among the Members in accordance with a scale to be fixed by the Health Assembly.

Article 57

The Health Assembly or the Board acting on behalf of the Health Assembly may accept and administer gifts and bequests made to the Organization provided that the conditions attached to such gifts or bequests are acceptable to the Health Assembly or the Board and are consistent with the objective and policies of the Organization.

Article 58

A special fund to be used at the discretion of the Board shall be established to meet emergencies and unforeseen contingencies.

Chapter XIII – Voting

Article 59

Each Member shall have one vote in the Health Assembly.

Article 60

(a) Decisions of the Health Assembly on important questions shall be made by a two-thirds majority of the Members present and voting. These questions shall include: the adoption of conventions or agreements; the approval of agreements bringing the Organization into relation with the United Nations and inter-governmental organizations and agencies in accordance with Articles 69, 70 and 72; amendments to this Constitution.

(b) Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting.

(c) Voting on analogous matters in the Board and in committees of the Organization shall be made in accordance with paragraphs (a) and (b) of this Article.

Chapter XIV – Reports Submitted by States

Article 61

Each Member shall report annually to the Organization on the action taken and progress achieved in improving the health of its people.
Article 62

Each Member shall report annually on the action taken with respect to recommendations made to it by the Organization and with respect to conventions, agreements and regulations.

Article 63

Each Member shall communicate promptly to the Organization important laws, regulations, official reports and statistics pertaining to health which have been published in the State concerned.

Article 64

Each Member shall provide statistical and epidemiological reports in a manner to be determined by the Health Assembly.

Article 65

Each Member shall transmit upon the request of the Board such additional information pertaining to health as may be practicable.

CHAPTER XV – LEGAL CAPACITY, PRIVILEGES AND IMMUNITIES

Article 66

The Organization shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its objective and for the exercise of its functions.

Article 67

(a) The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions.

(b) Representatives of Members, persons designated to serve on the Board and technical and administrative personnel 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.

Article 68

Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members.

CHAPTER XVI – RELATIONS WITH OTHER ORGANIZATIONS

Article 69

The Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations. The agreement or agreements bringing the Organization into relation with the United Nations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 70

The Organization shall establish effective relations and co-operate closely with such other inter-governmental organizations as may be desirable. Any formal agreement entered into with such organizations shall be subject to approval by a two-thirds vote of the Health Assembly.

Article 71

The Organization may, on matters within its competence, make suitable arrangements for consultation and co-operation with non-governmental international organizations and, with the consent of the Government concerned, with national organizations, governmental or non-governmental.

Article 72

Subject to the approval by a two-thirds vote of the Health Assembly, the Organization may take over from any other international organization or agency whose purpose and activities lie within the field of competence of the Organization such functions, resources and obligations as may be conferred upon the Organization by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organizations.

CHAPTER XVII – AMENDMENTS

Article 73

Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes.
CHAPTER XVIII – INTERPRETATION

Article 74

The Chinese, English, French, Russian and Spanish texts of this Constitution shall be regarded as equally authentic.

Article 75

Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.

Article 76

Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

Article 77

The Director-General may appear before the Court on behalf of the Organization in connexion with any proceedings arising out of any such request for an advisory opinion. He shall make arrangements for the presentation of the case before the Court, including arrangements for the argument of different views on the question.

CHAPTER XIX – ENTRY-INTO-FORCE

Article 78

Subject to the provisions of Chapter III, this Constitution shall remain open to all States for signature or acceptance.

Article 79

(a) States may become parties to this Constitution by:

(i) signature without reservation as to approval;
(ii) signature subject to approval followed by acceptance; or
(iii) acceptance.

(b) Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

Article 80

This Constitution shall come into force when twenty-six Members of the United Nations have become parties to it in accordance with the provisions of Article 79.

Article 81

In accordance with Article 102 of the Charter of the United Nations, the Secretary-General of the United Nations will register this Constitution when it has been signed without reservation as to approval on behalf of one State or upon deposit of the first instrument of acceptance.

Article 82

The Secretary-General of the United Nations will inform States parties to this Constitution of the date when it has come into force. He will also inform them of the dates when other States have become parties to this Constitution.

IN FAITH WHEREOF the undersigned representatives, having been duly authorized for that purpose, sign this Constitution.

DONE in the City of New York this twenty-second day of July 1946, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. The original texts shall be deposited in the archives of the United Nations. The Secretary-General of the United Nations will send certified copies to each of the Governments represented at the Conference.

The amendment to this Article adopted by the Thirty-first World Health Assembly (resolution WHA31.188) has not yet come into force.
Agreement between the
International Committee of the Red Cross and the
Swiss Federal Council to determine the legal status of
the Committee in Switzerland, 1993
International Committee of the Red Cross
Agreement between the International Committee of the Red Cross and the Swiss Federal Council to determine the legal status of the Committee in Switzerland

30-04-1993 Article, International Review of the Red Cross, No. 293
Full text of the headquarters agreement, signed 19 March 1993, between the ICRC and the government of Switzerland.

The International Committee of the Red Cross, on the one hand, and the Swiss Federal Council, on the other, wishing to determine the legal status of the Committee in Switzerland and, to that end, to regulate their relations in a headquarters agreement, have agreed on the following provisions:

I. STATUS, PRIVILEGES AND IMMUNITIES OF THE ICRC

Article 1

Personality

The Federal Council recognizes the international juridical personality and the legal capacity in Switzerland of the International Committee of the Red Cross (hereinafter referred to as the Committee or the ICRC), whose functions are laid down in the Geneva Conventions of 1949 and the Additional Protocols of 1977 and in the Statutes of the International Red Cross and Red Crescent Movement.

Article 2

Freedom of action of the ICRC

The Swiss Federal Council guarantees the ICRC independence and freedom of action.

Article 3

Inviolability of premises

The buildings or parts of buildings and the adjoining ground used for the purposes of the ICRC, by whomsoever they may be owned, shall be inviolable. No agent of the Swiss public authority may enter them without the express consent of the Committee. Only the President or his duly authorized representative shall be competent to waive this right of inviolability.

Article 4

Inviolability of archives

The archives of the ICRC and, in general, all documents and data media belonging to it or in its possession shall be inviolable at all times, wherever they may be.

Article 5

Immunity from legal process and execution

1. In the conduct of its business, the ICRC shall enjoy immunity from legal process and execution, except:
   a) in so far as this immunity is formally waived, in a specific case, by the President of the ICRC or his duly authorized representative;
   b) in respect of civil liability proceedings brought against the ICRC for damage caused by any vehicle belonging to it or circulating on its behalf;
   c) in respect of a dispute, on relations of service, between the Committee and its staff, former staff or their rightful claimants;
   d) in respect of seizure, by court order, of salaries, wages and other emoluments owed by the ICRC to a member of its staff;
   e) in respect of a dispute between the ICRC and the pension fund or provident fund referred to in Article 10, paragraph 1, of the present agreement;
   f) in respect of a counter-claim directly related to principal proceedings brought by the ICRC; and
   g) in respect of execution of a settlement by arbitration pursuant to Article 22 of the present agreement.

2. The buildings or parts of buildings, the adjoining ground and the assets owned by the ICRC or used by it for its purposes, wherever they may be and by whomsoever they may be held, shall be immune from any measure of execution, expropriation or requisition.

Article 6

Fiscal position

1. The ICRC, its assets, income and other property shall be exempt from direct federal, cantonal and communal taxation. With regard to immovable property, however, such exemption shall apply only to that which is owned by the Committee and which is occupied by its services, and to income derived therefrom.

2. The ICRC shall be exempt from indirect federal, cantonal and communal taxation. Exemption from federal purchase tax shall be granted only for purchases intended for the official use of the Committee, and in so far as the amount invoiced for one same and single purchase exceeds five hundred Swiss francs.
3. The ICRC shall be exempt from all federal, cantonal and communal charges which do not represent charges for specific services rendered.

4. If necessary, the exemptions mentioned above may be applied by way of reimbursement at the request of the ICRC and in accordance with a procedure to be determined by the ICRC and the competent Swiss authorities.

Article 7

Customs position

The customs clearance of articles intended for the official use of the ICRC shall be governed by the Ordinance of 13 November 1985 on the customs privileges of international organizations, of the States in their relations with such organizations and of special Missions of foreign States. [1]

Article 8

Free disposal of funds

The Committee may receive, hold, convert and transfer funds of any kind, gold, any currency, specie and other securities, and may dispose of them freely both within Switzerland and in its relations with other countries.

Article 9

Communications

1. The ICRC shall enjoy for its official communications treatment not less favourable than that accorded to the international organizations in Switzerland, to the extent compatible with the International Telecommunication Convention of 6 November 1982. [2]

2. The ICRC shall have the right to dispatch and receive its correspondence, including data media, by duly identified courier or bags which shall have the same privileges and immunities as diplomatic couriers and bags.

3. No censorship shall be applied to the duly authenticated official correspondence and other official communications of the ICRC.

4. Operation of telecommunication installations must be coordinated from the technical standpoint with the Swiss PTT. [3]

Article 10

Pension fund

1. Any pension fund or provident fund established by the ICRC and officially operating on behalf of the President, the members of the Committee or ICRC staff shall, with or without separate legal status, be accorded the same exemptions, privileges and immunities as the ICRC itself with regard to its movable property.

2. Funds and foundations, with or without separate legal status, administered under the auspices of the ICRC and devoted to its official purposes, shall be given the benefit of the same exemptions, privileges and immunities as the ICRC itself with regard to their movable property. Funds set up after the entry into force of the present agreement shall enjoy the same privileges and immunities, subject to the agreement of the competent Federal authorities.

II. PRIVILEGES AND IMMUNITIES GRANTED TO PERSONS SERVING THE ICRC IN AN OFFICIAL CAPACITY

Article 11

Privilèges et immunités granted to the President and the members of the Committee and to ICRC staff and experts

The President and the members of the Committee, and ICRC staff and experts, irrespective of nationality, shall enjoy the following privileges and immunities:

a) immunity from legal process, even when they are no longer in office, in respect of words spoken or written and acts performed in the exercise of their functions;

b) inviolability for all papers and documents.

Article 12

Privilèges et immunités granted to staff not of Swiss nationality

In addition to the privileges and immunities mentioned in Article 11, ICRC staff who are not of Swiss nationality shall:

a) be exempt from national service obligations in Switzerland;

b) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and aliens' registration;

c) be accorded the same privileges in respect of exchange and transfer facilities for their assets in Switzerland and in other countries as are accorded to officials of the other international organizations;

d) be given, together with their relatives dependent on them and their domestic staff, the same repatriation facilities as are accorded to officials of the international organizations;

e) remain subject to the law on old-age and survivors' insurance and continue to pay AVS/AI/APG [4] contributions and unemployment and accident insurance contributions.

Article 13

Exceptions to immunity from legal process and execution

The persons referred to in Article 11 of the present agreement shall not enjoy immunity from legal process in the event of civil liability proceedings brought against them for damage caused by any vehicle belonging to them or driven by them or in the event of offences under federal road traffic regulations punishable by fine.

Article 14

Military service of Swiss staff

1. In a limited number of cases, leave of absence from military service (leave for foreign countries) may be granted to Swiss staff holding executive office at ICRC headquarters; persons granted such leave shall be dispensed from compulsory training service, inspections and shooting practice.
2. For the other Swiss staff of the ICRC, applications for dispensation from or rescheduling of training service, providing all due reasons and counter-signed by the staff member concerned, may be submitted by the ICRC to the Federal Department of Foreign Affairs for transmission to the Federal Military Department, which will give them favourable consideration.

3. Finally, a limited number of dispensations from active service will be granted to ICRC staff in order to enable the institution to continue its work even during a period of mobilization.

Article 15

Object of immunities

1. The privileges and immunities provided for in the present agreement are not designed to confer any personal benefits on those concerned. They are established solely to ensure, at all times, the free functioning of the ICRC and the complete independence of the persons concerned in discharging their duties.

2. The President of the ICRC must waive the immunity of staff member or expert in any case where he considers that such immunity would impede the course of justice and could be waive without prejudice to the interests of the ICRC. The Assembly of the Committee shall have the power to waive the immunity of the President or of the Committee members.

Article 16

Entry, stay and departure

The Swiss authorities shall take all necessary measures to facilitate the entry into, the stay in, and the departure from Swiss territory of persons, irrespective of their nationality, serving the ICRC in an official capacity.

Article 17

Identity cards

1. The Federal Department of Foreign Affairs shall give the ICRC, for the President, each member of the Committee and each staff member, an identity card bearing the photograph of the holder. This card, authenticated by the Federal Department of Foreign Affairs and the ICRC, shall serve to identify the holder vis-à-vis all federal, cantonal and communal authorities.

2. The ICRC shall transmit regularly to the Federal Department of Foreign Affairs a list of the members of the Committee and staff of the ICRC who are assigned to the organization's headquarters on a lasting basis, indicating for each person the date of birth, nationality, residence in Switzerland or in another country, and the post held.

Article 18

Prevention of abuses

The ICRC and the Swiss authorities shall cooperate at all times to facilitate the proper administration of justice, secure the observance of police regulations and prevent any abuse in connection with the privileges and immunities provided for in this agreement.

Article 19

Disputes of a private nature

The ICRC shall make provision for appropriate modes of settlement of:

a) disputes arising out of contracts to which the ICRC is or becomes party and other disputes of a private law character;

b) disputes involving any ICRC staff member who by reason of his or her official position enjoys immunity, if such immunity has not been waived under the provisions of Article 15.

III. NON-RESPONSIBILITY OF SWITZERLAND

Article 20

Non-responsibility of Switzerland

Switzerland shall not incur, by reason of the activity of the ICRC on its territory any international responsibility for acts or omissions of the ICRC or its staff.

IV. FINAL PROVISIONS

Article 21

Execution

The Federal Department of Foreign Affairs is the Swiss authority which is entrusted with the execution of this agreement.

Article 22

Settlement of disputes

1. Any divergence of opinion concerning the application or interpretation of this agreement which has not been settled by direct negotiations between the parties may be submitted by either party to an arbitral tribunal composed of three members, including the chairman thereof.

2. The Swiss Federal Council and the ICRC shall each appoint one member of the tribunal.

3. The members so appointed shall choose their chairman.

4. In the event of disagreement between the members on the choice of chairman, the chairman shall be chosen, at the request of the members of the tribunal, by the President of the International Court of Justice or, if the latter is unavailable, by the Vice-President, or if he in turn is unavailable, by the longest-serving member of the Court.

5. The tribunal shall he seized of a dispute by either party by petition.

6. The tribunal shall lay down its own procedure.

7. The arbitration award shall be binding on the parties to the dispute.

Article 23
Revision
1. The present agreement may be revised at the request of either party.
2. In this event, the two parties shall consult each other concerning the amendments to be made to its provisions.

Article 24
Denunciation
The present agreement may be denounced by either party, giving two years' notice in writing.

Article 25
Entry into force
The present agreement enters into force on the date of its signature.

Done at Berne, on 19 March 1993, in two copies in French.

For the International Committee of the Red Cross
The President: Cornelio Sommaruga

For the Swiss Federal Council
The Head of the Federal Department of Foreign Affairs: René Felber

Notes
1. RS 631.145.0
2. RS 0.784.16
3. PTT - Post, Telegraph and Telephones (ed.)
4. Old-age, survivors', disability and loss of earnings insurance (ed.).
Agreement Establishing the World Trade Organization, 1994
The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations, and to the establishment of an integrated, more viable and durable multilateral trading system, consistent with their respective needs and concerns at different levels of economic development, and Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system, Agree as follows:

**Article I Establishment of the Organization**
The World Trade Organization (hereinafter referred to as the "WTO") is hereby established.

**Article II Scope of the WTO**
1. The WTO shall provide the common institutional framework for the conduct of the trade relations among its Members.
2. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements referred to as the "DSU" in Annex 2.
4. The WTO shall administer the Trade Policy Review Mechanism referred to as the "TPRM" provided for in Annex 3 to this Agreement.
5. The WTO shall provide a forum for the implementation, administration and operation of the General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994".

**Article III Functions of the WTO**
1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Plurilateral Trade Agreements, as may be decided by the Ministerial Conference.
2. The WTO shall also provide the framework for the implementation, administration and operation of the General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994".
3. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement.
4. The WTO shall also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
5. The WTO shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements referred to as the "DSU" in Annex 2.
6. The WTO shall also provide the framework for the implementation, administration and operation of the General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994".

**Article IV Structure of the WTO**
1. There shall be a Ministerial Conference composed of representatives of all the Members which shall meet at least once every two years. The Ministerial Conference shall have the authority to exercise all powers of the WTO and the consensus of all the Members shall be necessary for the exercise of such powers.
2. There shall be a General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994". The WTO shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements referred to as the "DSU" in Annex 2.
3. The WTO shall also provide the framework for the implementation, administration and operation of the General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994".
4. The WTO shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements referred to as the "DSU" in Annex 2.
5. The WTO shall also provide the framework for the implementation, administration and operation of the General Agreement on Tariffs and Trade 1994 referred to as the "GATT 1994".
3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TRPR. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the plurilateral trade agreements shall carry out the functions assigned to them under those agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V

Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as "the Secretariat") headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII

Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

   (a) the scale of contributions apportioning the expenses of the WTO among its Members; and
   (b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.
Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of its Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by a majority of the Members.

2. The WTO may adopt additional general rules on decision-making in a manner that would not undermine the provisions of this Article.

3. Any decision by the WTO concerning the exclusion of Members from the functioning of the WTO shall be taken only by consensus.

4. Any decision by the WTO concerning the exclusion of Members from the functioning of the WTO shall be taken only by consensus.

5. The WTO may conclude a headquarters agreement.
Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Original Membership

Art. XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Accession

Art. XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Non-application of Multilateral Trade Agreements between particular Members

Art. XIII

Non-application of Multilateral Trade Agreements between particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.
Article XIV

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.
LIST OF ANNEXES

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

General Agreement on Tariffs and Trade 1994
Agreement on Agriculture
Agreement on the Application of Sanitary and Phytosanitary Measures
Agreement on Textiles and Clothing
Agreement on Technical Barriers to Trade
Agreement on Trade-Related Investment Measures
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX 2

Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 3

Trade Policy Review Mechanism

ANNEX 4

Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement
Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State, 2007
Federal Act
on the Privileges, Immunities and Facilities and the
Financial Subsidies granted by Switzerland as a Host State
("Host State Act", "HSA")

of 22 June 2007 (Status as at 1 January 2008)

The Federal Assembly of the Swiss Confederation,
on the basis of Article 54 paragraph 1, of the Federal Constitution,1
and having considered the Dispatch to Parliament of the Federal Council dated
13 September 2006,2
decrees:

Chapter 1: Subject Matter

Art. 1
1 This Act regulates, in the sphere of host state policy:
a. the granting of privileges, immunities and facilities;
b. the granting of financial subsidies and the provision of other support measures.

2 Privileges, immunities, facilities, and financial subsidies arising under international law or other federal statutes are unaffected.

Chapter 2: Privileges, Immunities and Facilities

Section 1: Beneficiaries

Art. 2
1 The Confederation may grant privileges, immunities and facilities to the following institutional beneficiaries:
   a. intergovernmental organisations;
   b. international institutions;
   c. quasi-governmental international organisations;
   d. diplomatic missions;
   e. consular posts;
   f. permanent missions or other representations to intergovernmental organisations;
   g. special missions;
   h. international conferences;
   i. secretariats or other bodies established under an international treaty;
   j. independent commissions;
   k. international courts;
   l. arbitration tribunals;
   m. other international bodies.

2 The Confederation may grant privileges, immunities and facilities to the following natural persons ("individual beneficiaries"):
a. individuals who, whether on a permanent or a temporary basis, are called to act in an official capacity at one of the institutional beneficiaries referred to in paragraph 1 above;
b. eminent persons carrying out an international mandate;
c. individuals entitled to accompany one of the individual beneficiaries referred to in letters a or b, including private household employees.

Section 2: Content, Scope of Application and Duration

Art. 3
1 The privileges and immunities include:
a. inviolability of the person, premises, property, archives, documents, correspondence and diplomatic bag;
b. immunity from legal proceedings and the enforcement of judgments;
c. exemption from direct taxes;
d. exemption from indirect taxes;
e. exemption from customs duties and other import taxes;
f. freedom to acquire, receive, hold, transfer and convert funds, currencies, cash and other movable property;
g. freedom of communication, movement and travel;

h. exemption from the Swiss social security system;

i. exemption from Swiss entry and residence requirements;

j. exemption from all personal services, from all public service and from all military duties or obligations of any kind.

2 The facilities include:

a. the procedures for access to the employment market for the individual beneficiaries referred to in Article 2, paragraph 2, letters a and c above;

b. the right to use a flag and an emblem;

c. the right to issue laissez passer and to have them accepted as travel documents by the Swiss authorities;

d. facilities of registration of vehicles.

3 The Federal Council may accord additional facilities of a more minor nature than those set out in paragraph 2 above.

Art. 4 Scope of application

1 The personal and material scope of application of the privileges, immunities and facilities shall be determined case by case in the light of:

a. international law, Switzerland’s international obligations, and international practice;

b. the beneficiary’s legal status and the importance of its role in international relations.

2 Exemption from direct taxes may be granted to all the beneficiaries referred to in Article 2 above. However, in the case of individual beneficiaries within the meaning of Article 2, paragraph 2 who are Swiss nationals, the exemption shall be granted only if the institutional beneficiary to which they are called has adopted an internal tax system of its own, provided that this condition is in accordance with international law.

3 Exemption from indirect taxes may be granted to all beneficiaries referred to in Article 2 above. However, individual beneficiaries within the meaning of Article 2 paragraph 2 shall be exempted from value added tax and mineral oil tax only if they hold diplomatic status.

4 Exemption from customs duties and other import taxes may be granted to all the beneficiaries referred to in Article 2.

5 The Federal Council shall issue regulations on entry into Switzerland, residence and work for the individual beneficiaries referred to in Article 2, paragraph 2, subject to what is permissible under international law.

Art. 5 Duration

The duration of privileges, immunities and facilities may be limited.

Section 3: Requirements for Granting Privileges, Immunities and Facilities

Art. 6 General requirements

An institutional beneficiary may be accorded privileges, immunities and facilities if:

a. it has its headquarters or a branch in Switzerland or carries out activities in Switzerland;

b. its purposes are not for profit and are of international utility;

c. its carries out activities in the sphere of international relations; and

d. its presence in Switzerland is of special interest to Switzerland.

Art. 7 International institutions

An international institution may be accorded privileges, immunities and facilities if it:

a. has structures similar to those of an intergovernmental organisation;

b. performs functions of a governmental nature or functions typically assigned to an intergovernmental organisation; and

c. enjoys international recognition in the international legal order, and in particular under an international treaty, a resolution of an intergovernmental organisation or a policy document adopted by a group of States.

Art. 8 Quasi-governmental international organisations

A quasi-governmental international organisation may be accorded privileges, immunities and facilities if:

a. a majority of its members are states, organisations governed by public law, or entities performing functions of a governmental nature;

b. it has structures similar to those of an intergovernmental organisation; and

c. it operates in two or more States.

Art. 9 International conferences

An international conference may be accorded privileges, immunities and facilities if:

a. it is convened under the aegis of an intergovernmental organisation, an international institution, a quasi-governmental international organisation, a secretariat or any other body established by an international treaty, under the aegis of Switzerland or at the initiative of a group of States; and
b. a majority of participants represent States, intergovernmental organisations, international institutions, quasi-governmental international organisations, secretariats or other bodies established by international treaty.

Art. 10 Secretariats or other bodies established by international treaty
A secretariat or other body may be accorded privileges, immunities and facilities if it is established under an international treaty which assigns to it certain tasks with a view to the implementation of that treaty.

Art. 11 Independent commissions
An independent commission may be accorded privileges, immunities and facilities if:
   a. its legitimacy derives from a resolution of an intergovernmental organisation or of an international institution, or if it was established by a group of States or by Switzerland;
   b. it enjoys broad political and financial support among the international community;
   c. its mandate is to examine an issue of importance to the international community;
   d. its mandate is limited in time; and
   e. the granting of privileges, immunities and facilities contributes substantially to the fulfilment of its mandate.

Art. 12 International courts
An international court may be accorded privileges, immunities and facilities if it is established under an international treaty or by a resolution of an intergovernmental organisation or of an international institution.

Art. 13 Arbitration tribunals
An arbitration tribunal may be accorded privileges, immunities and facilities if:
   a. it is established under an arbitration clause in an international treaty or under an agreement between the subjects of international law who are parties to the arbitration; and
   b. the parties to the arbitration referred to in letter a above can show a particular need for the arbitration tribunal to sit in Switzerland.

Art. 14 Other international bodies
Any other international body may by way of exception be accorded privileges, immunities and facilities if:

Chapter 3: Acquisition of Land and Buildings for Official Purposes

Art. 16 Acquisition of land and buildings
1 Institutional beneficiaries, within the meaning of Article 2 paragraph 1, may acquire land and buildings for the purposes of their official activities. The area of the property concerned must not exceed what is necessary for those purposes.
2 The acquirer must submit an application to the Federal Department of Foreign Affairs ("the Department") and a copy of the same to the relevant authority in the canton concerned.
3 The Department shall consult the relevant authority in the canton concerned and verify that the acquirer is an institutional beneficiary within the meaning of Article 2 paragraph 1, and that the acquisition is for official purposes. It shall then issue a ruling. Approval of the application is conditional on the necessary authorisations, i.e. building permits and safety clearance being obtained from the competent authorities.
4 Entry in the land register of an acquisition of land or buildings within the meaning of paragraph 1 above is conditional on approval having been given in accordance with paragraph 3 above.
Art. 17 Definitions

1 The acquisition of land and buildings is understood to be any acquisition of a title to a building, part of a building or a piece of land, a right of habitation or a usufruct to a building or a part thereof, or the acquisition of other rights which confer on the holder equivalent status to that of owner, such as a long-term lease of land or buildings if the terms of such lease go beyond the scope of practice in civil matters.
2 A change of use is deemed an acquisition for these purposes.
3 Land and buildings for official purposes are buildings or parts of buildings together with the curtilage thereof which are used for the purpose of carrying out the official activities of the institutional beneficiary.

Chapter 4: Financial Subsidies and other Support Measures

Art. 18 Purposes

The aim of financial subsidies and other support measures is in particular to:

a. facilitate the installation, work, integration and security in Switzerland of the beneficiaries referred to in Article 19;
b. promote the reputation of Switzerland as a host state;
c. further Swiss bids to host to the beneficiaries referred to in Article 2;
d. promote activities in the area of host state policy.

Art. 19 Beneficiaries

Financial subsidies and other support measures may be granted to:

a. the beneficiaries referred to in Article 2;
b. international non-governmental organisations (Chapter 5);
c. associations and foundations whose activities serve the purposes set out in Article 18.

Art. 20 Modalities

Financial subsidies and other support measures provided by the Confederation may take the form of:

a. financial subsidies on a one-off or recurring basis;
b. grants to the institutional beneficiaries referred to in Article 2 paragraph 1, either directly or via the Building Foundation for International Organisations (FIPOI) in Geneva, interest-free building loans repayable within 50 years;
c. financial contributions to international conferences in Switzerland;
d. one-off or recurring subsidies in-kind such as personnel, premises or equipment;
e. the creation of associations or foundations governed by private law and participation in such associations or foundations;
f. instructions to the relevant police authorities to implement further security measures going beyond those already adopted by Switzerland to meet its security obligations under international law in the Federal Act of 21 March 1997 on Measures to Safeguard Internal Security.

Art. 21 Due compensation to the cantons

The Confederation may pay due compensation to the cantons for tasks they carry out under Article 20 letter f that do not fall within their competence under the Federal Constitution.

Art. 22 Finance

The funds necessary to implement this Act will be provided for in the budget. A guarantee credit will be sought in the case of a commitment for which funding extends beyond a single budget year.

Art. 23 Conditions, procedures and detailed rules

The Federal Council shall lay down the conditions, procedures and detailed rules for the granting of financial subsidies and other support measures.

Chapter 5: International Non-Governmental Organisations

Art. 24 Principles

1 International non-governmental organisations (INGOs) may establish themselves in Switzerland in accordance with Swiss law.
2 The Confederation may facilitate the establishment or the activities of an INGO in Switzerland subject to the applicable law. It may accord an INGO the financial subsidies and other support measures provided for under this Act.
3 INGOs may be entitled to benefits provided for under other federal acts, in particular the tax exemption provided for under the Federal Act of 14 December 1990 on Direct Federal Taxation and the simplified procedures for the hiring of foreign personnel provided for under Swiss legislation.
4 INGOs are not eligible for the privileges, immunities and facilities contemplated by this Act.
Art. 25 Definition
An INGO, for the purposes of this Act, is an organisation:

- with the legal form of an association or a foundation formed in accordance with Swiss law;
- whose members are natural persons of different nationalities or legal persons formed in accordance with the national laws of different States;
- which is genuinely active in several States;
- whose objectives are charitable or in the public interest within the meaning of Article 56, letter g, of the Federal Act of 14 December 1990 on Direct Federal Taxation;
- which operates in conjunction with an intergovernmental organisation or international institution, for example by having observer status at such organisation or institution; and
- whose presence in Switzerland is of special interest to Switzerland.

Chapter 6: Powers

Art. 26 Granting of privileges, immunities and facilities and of financial subsidies and other support measures
1 The Federal Council shall:
   - grant the privileges, immunities and facilities;
   - grant the financial subsidies and adopt the other support measures within the limit of the relevant budget appropriations.

2 The Federal Council may enter into international treaties concerning:
   - the granting of privileges, immunities and facilities;
   - the tax treatment of beneficiaries within the meaning of Article 2;
   - the status of Swiss employees of institutional beneficiaries within the meaning of Article 2 paragraph 1, for the purposes of Swiss social insurance;
   - the granting of financial subsidies and other support measures, subject to the budgetary prerogative of the Federal Assembly;
   - cooperation with neighbouring States in the area of host state policy.

3 The Federal Council may delegate to the Department the power:
   - to grant privileges, immunities and facilities of limited duration;
   - to grant financial subsidies of limited duration, to fund international conferences in Switzerland and to provide subsidies in-kind of limited duration in accordance with Article 20;
   - to instruct the relevant police authorities to implement further security measures in accordance with Article 20, letter f.

Art. 27 Terms of employment of individual beneficiaries
1 The Federal Council may issue standard contracts of employment or otherwise regulate the conditions of employment in Switzerland of the individual beneficiaries referred to in Article 2 paragraph 2, insofar as permissible under international law. It may, in particular, set minimum wages.

2 The Federal Council shall, in particular, lay down the basic pay and working conditions of the private household employees referred to in Article 2 paragraph 2, as well as the social security arrangements for such employees in the event of illness, accident, invalidity or unemployment, insofar as permissible under international law.

Art. 28 Settlement of private-law disputes in cases of immunity from legal and enforcement proceedings
When entering into a headquarters agreement with an institutional beneficiary within the meaning of Article 2 paragraph 1, the Federal Council shall ensure that the beneficiary adopt appropriate measures with a view to the satisfactory settlement of:
   - disputes arising out of contracts to which the institutional beneficiary may be a party and of other private-law disputes;
   - disputes involving staff of the institutional beneficiary who enjoy immunity by reason of their official capacity, unless that immunity is waived.

Art. 29 Participation of the cantons
1 Before entering into any agreement to grant privileges, immunities and facilities for a duration of not less than one year or unlimited in time, the Federal Council shall consult with the canton in which the beneficiary is based and with the neighbouring cantons.

2 If the privileges, immunities and facilities entail any exception to the tax law of the canton in which the beneficiary is based, the Federal Council’s decision shall be taken in consultation with the canton in question.

5 SR 642.11
The cantons shall participate, within the meaning of the Federal Act of 22 December 1999 on the Participation of the Cantons in the Foreign Policy of the Confederation, in the negotiation of international treaties in the area of host state policy.

Art. 30 Information
The Department may provide information to anybody demonstrating a particular interest in:

a. the nature and extent of the privileges, immunities and facilities accorded, and the beneficiaries thereof;
b. the financial subsidies and other support measures accorded and the beneficiaries thereof.

Art. 31 Compliance with the terms of the privileges, immunities and facilities
1 The Federal Council shall monitor compliance with the terms of the privileges, immunities and facilities granted and shall take the measures necessary if it finds instances of abuse. It may, where appropriate, rescind the relevant agreements or revoke the privileges, immunities and facilities granted.
2 The Federal Council may delegate to the Department the power to revoke the privileges, immunities and facilities granted to an individual beneficiary.

Art. 32 Suspension, withdrawal and recovery of financial subsidies and other support measures
The Federal Council or, if within its remit, the Department, may suspend or withdraw financial subsidies and other support measures or demand the full or partial reimbursement of subsidies already provided, if the beneficiary, despite having been issued a notice to comply, fails to fulfil its tasks as foreseen or only partly fulfils its tasks.

Chapter 7: Final Provisions

Art. 33 Implementing provisions
1 The Federal Council shall enact the implementing provisions.
2 It may implement the present Act in association with the cantons or private legal entities.
3 It may delegate administrative responsibilities in the area of host state policy to private legal entities.

Art. 34 Repeal and amendment of current law
The repeal and amendment of the current law is regulated in the Annex.

Art. 35 Coordination with the Foreign Nationals Act of 16 December 2005 (FNA)
On the commencement of this Act or of the FNA, whichever is later, or on the simultaneous commencement of both, Chapter II number 2 of the Annex to this Act will become redundant and Article 98, paragraph 2, FNA is worded as follows:

Art. 98 para. 2

Art. 36 Referendum and commencement
1 This Act is subject to an optional referendum.
2 The Federal Council shall determine the commencement date.

Commencement date: 1 January 2008
Repeal and amendment of current law

I

The following Federal Acts and Federal Decrees are repealed:

1. Federal Decree of 30 September 1955 on Agreements with International Organisations on their Legal Status in Switzerland;
2. Federal Act of 5 October 2001 on Participation and Financial Aid in relation to the Foundation for the International Red Cross and Red Crescent Museum;

II

The following Federal Acts are amended as follows:

1. Federal Act of 21 March 1997 on Measures to Safeguard Internal Security

Art. 5 para. 1 let. b

... 

2. Federal Act of 26 March 1931 on the Residence and Permanent Settlement of Foreign Nationals

Art. 25 para. 1 let. f

... 

3. Federal Act of 16 December 1983 on the Acquisition of Real Estate in Switzerland by Non-Residents

Art. 7 let. h

...

Art. 7a

...

Art. 16 para. 2

Repealed

4. Subsidies Act of 5 October 1990

Art. 2 para. 4 let. a

...

5. Value Added Tax Act of 2 September 1999

Art. 90 para. 2 let. a

...


Art. 17 para. 1 let. g and h

...
7. Federal Act of 14 December 1990\textsuperscript{18} on Direct Federal Taxation

\textit{Art. 15 para. 1}

\ldots

\textit{Art. 56 let. i}

\ldots

8. Federal Act of 14 December 1990\textsuperscript{19} on the Harmonisation of Direct Taxation at Cantonal and Communal Levels

\textit{Art. 4a}

\ldots

\textit{Art. 23 para. 1 let. h}

\ldots

9. Federal Act of 13 October 1965\textsuperscript{20} on Withholding Tax

\textit{Art. 28 para. 2}

\ldots

10. Federal Act of 20 December 1946\textsuperscript{21} on the Old-Age and Survivors Insurance

\textit{Art. 1a para. 4 let. b}

\ldots

11. Federal Act of 18 March 1994\textsuperscript{22} on Health Insurance

\textit{Art. 3 para. 2}

\ldots

12. Federal Act of 20 March 1981\textsuperscript{23} on Accident Insurance

\textit{Art. 1a para. 2}

\ldots

13. Unemployment Insurance Act of 25 June 1982\textsuperscript{24}

\textit{Art. 2a}

\ldots

\textsuperscript{18} SR 642.11. These amendments are inserted in the said Federal Act.

\textsuperscript{19} SR 642.14. These amendments are inserted in the said Federal Act.

\textsuperscript{20} SR 642.21. This amendment is inserted in the said Federal Act.

\textsuperscript{21} SR 831.10. This amendment is inserted in the said Federal Act.

\textsuperscript{22} SR 832.10. This amendment is inserted in the said Federal Act.

\textsuperscript{23} SR 832.20. This amendment is inserted in the said Federal Act.

\textsuperscript{24} SR 837.0. This amendment is inserted in the said Federal Act.
International Court of Justice

Conditions to Admission of a State to Membership in the United Nations (Charter, Art. 4)
Advisory Opinion

I.C.J. Reports 1948
INTERNATIONAL COURT OF JUSTICE

YEAR 1948.

May 28th, 1948.

CONDITIONS OF ADMISSION OF A STATE TO MEMBERSHIP IN THE UNITED NATIONS
(ARTICLE 4 OF THE CHARTER)

Request for advisory opinion in virtue of Resolution of General Assembly of United Nations of November 17th, 1947.—Request does not refer to actual vote but to statements made by a Member concerning the vote.—Request limited to the question whether the conditions in Article 4, paragraph 1, of the Charter are exhaustive.—Legal or political character of the question.—Competence of the Court to deal with questions in abstract terms.—Competence of the Court to interpret Article 4 of the Charter.—Legal character of the rules in Article 4.—Interpretation based on the natural meaning of terms.—Considerations extraneous to the conditions of Article 4. Considerations capable of being connected with these conditions.—Procedural character of paragraph 2 of Article 4.—Subordination of political organs to treaty provisions which govern them. Article 24 of the Charter.—Demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.—Individual consideration of every application for admission on its own merits.

ADVISORY OPINION.

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

The Court, composed as above, gives the following advisory opinion:

On November 17th, 1947, the General Assembly of the United Nations adopted the following Resolution:

“The General Assembly,

Considering Article 4 of the Charter of the United Nations,

Considering the exchange of views which has taken place in the Security Council at its Two hundred and fourth, Two hundred and fifth and Two hundred and sixth Meetings, relating to the admission of certain States to membership in the United Nations,

Considering Article 96 of the Charter,

Requests the International Court of Justice to give an advisory opinion on the following question:

Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article 4? In particular, can such a Member, while it recognizes the conditions set forth in that paragraph to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

Instructs the Secretary-General to place at the disposal of the Court the records of the above-mentioned meetings of the Security Council.”

By a note dated November 24th, 1947, and filed in the Registry on November 29th, the Secretary-General of the United Nations transmitted to the Registrar a copy of the Resolution of the General Assembly. In a telegram sent on December 10th, the Secretary-General informed the Registrar that the note of November 24th was to be regarded as the official notification and that certified true copies of the Resolution had been despatched. These copies reached the Registry on December 12th, and the question was then entered in the General List under No. 3.

The same day, 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,
as the question put mentioned Article 4 of the Charter, the Registrar informed the Governments of Members of the United Nations, by means of a special and direct communication as provided in paragraph 2 of Article 65, that the Court was prepared to receive from them written statements on the question before February 9th, 1948, the date fixed by an Order made on December 12th, 1947, by the President, as the Court was not sitting.

By the date thus fixed, written statements were received from the following States: China, El Salvador, Guatemala, Honduras, India, Canada, United States of America, Greece, Yugoslavia, Belgium, Iraq, Ukraine, Union of Soviet Socialist Republics, and Australia. These statements were communicated to all Members of the United Nations, who were informed that the President had fixed April 15th, 1948, as the opening date of the oral proceedings. A statement from the Government of Siam, dated January 30th, 1948, which was received in the Registry on February 14th, i.e., after the expiration of the time-limit, was accepted by decision of the President and was also transmitted to the other Members of the United Nations.

By its Resolution the General Assembly instructed the Secretary-General to place at the disposal of the Court the records of certain meetings of the Security Council. In accordance with these instructions and with paragraph 2 of Article 65 of the Statute, where it is laid down that every question submitted for an opinion shall be accompanied by all documents likely to throw light upon it, the Secretary-General sent to the Registry the documents which are enumerated in Section I of the list annexed to the present opinion. A part of these documents reached the Registry on February 10th, 1948, and the remainder on March 20th. The Secretary-General also announced by a letter of February 12th, 1948, that he had designated a representative, authorized to present any written and oral statements which might facilitate the Court’s task.

Furthermore, the Governments of the French Republic, of the Federal People’s Republic of Yugoslavia, of the Kingdom of Belgium, of the Czechoslovak Republic, and of the Republic of Poland announced that they had designated representatives to present oral statements before the Court.

By decision of the Court, the opening of the oral proceedings was postponed from April 15th to April 22nd, 1948. In the course of public sittings held on April 22nd, 23rd and 24th, the Court heard the oral statements presented:

—on behalf of the Secretary-General of the United Nations, by its representative, Mr. Ivan Kerno, Assistant Secretary-General in charge of the Legal Department;

—on behalf of the Government of the French Republic, by its representative, M. Georges Scelle, Professor at the Faculty of Law of Paris;

—on behalf of the Government of the Federal People’s Republic of Yugoslavia, by its representative, M. Milan Bartoš, Minister Plenipotentiary;

—on behalf of the Government of the Kingdom of Belgium, by its representative, M. Georges Kaeckenbeek, D.C.L., Minister Plenipotentiary, 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 Republic of Czechoslovakia, by its representative, Mr. Vladimir Vochč, Professor of International Law in Charles University at Prague;

—on behalf of the Government of the Republic of Poland, by its representative, Mr. Manfred Lachs, Professeur agrégé of International Law at the University of Warsaw.

In the course of the hearings, new documents were filed by the representatives accredited to the Court. These documents are enumerated in Section II of the list annexed to the present opinion.

* * *

Before examining the request for an opinion, the Court considers it necessary to make the following preliminary remarks:

The question put to the Court is divided into two parts, of which the second begins with the words “In particular,” and is presented as an application of a more general idea implicit in the first.

The request for an opinion does not refer to the actual vote. Although the Members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court’s opinion as to the reasons which, in the mind of a Member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control. Nor does the request concern a Member’s freedom of expressing its opinion. Since it concerns a condition or conditions on which a Member “makes its consent dependent,” the question can only relate to the statements made by a Member concerning the vote it proposes to give.

It is clear from the General Assembly’s Resolution of November 17th, 1947, that the Court is not called upon either to define the meaning and scope of the conditions on which admission is made dependent, or to specify the elements which may serve in a concrete case to verify the existence of the requisite conditions.

1 See page 119.
The clause of the General Assembly's Resolution, referring to "the exchange of views which has taken place...," is not understood as an invitation to the Court to say whether the views thus referred to are well founded or otherwise. The abstract form in which the question is stated precludes such an interpretation.

The question put is in effect confined to the following point only: are the conditions stated in paragraph 1 of Article 4 exhaustive in character in the sense that an affirmative reply would lead to the conclusion that a Member is not legally entitled to make admission dependent on conditions not expressly provided for in that Article, while a negative reply would, on the contrary, authorize a Member to make admission dependent also on other conditions.

* * *

Understood in this light, the question, in its two parts, is and can only be a purely legal one. To determine the meaning of a treaty provision—to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein—is a problem of interpretation and consequently a legal question.

It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court 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. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances.

It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.

Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations," to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

Accordingly, the Court holds that it is competent, on the basis of Article 96 of the Charter and Article 65 of the Statute, and considers that there are no reasons why it should decline to answer the question put to it.

In framing this answer, it is necessary first to recall the "conditions" required, under paragraph 1 of Article 4, of an applicant for admission. This provision reads as follows:

"Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so. All these conditions are subject to the judgment of the Organization. The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members. The question put is concerned with the individual attitude of each Member called upon to pronounce itself on the question of admission.

Having been asked to determine the character, exhaustive or otherwise, of the conditions stated in Article 4, the Court must in the first place consider the text of that Article. The English and French texts of paragraph 1 of Article 4 have the same meaning, and it is impossible to find any conflict between them. The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused; for the text does not differentiate between these two cases and any attempt to restrict it to one of them would be purely arbitrary.

The terms "Membership in the United Nations is open to all other peace-loving States which..." and "Peuvent devenir Membres des Nations unies tous autres Etats pacifiques," indicate that States which fulfill the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.

Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfills them. Such an interpreta-
It has been sought to deduce either from the second paragraph of Article 4, or from the political character of the organ recommending or deciding upon admission, arguments in favour of an interpretation of paragraph 1 of Article 4, to the effect that the fulfilment of the conditions provided for in that Article is necessary before the admission of a State can be recommended or decided upon, but that it does not preclude the Members of the Organization from advancing considerations of political expediency, extraneous to the conditions of Article 4.

But paragraph 2 is concerned only with the procedure for admission, while the preceding paragraph lays down the substantive law. This procedural character is clearly indicated by the words "will be effected", which, by linking admission to the decision, point clearly to the fact that the paragraph is solely concerned with the manner in which admission is effected, and not with the subject of the judgment of the Organization, nor with the nature of the appreciation involved in that judgment, these two questions being dealt with in the preceding paragraph. Moreover, this paragraph, referring to the "recommendation" of the Security Council and the "decision" of the General Assembly, is designed only to determine the respective functions of these two organs which consist in pronouncing upon the question whether or not the applicant State shall be admitted to membership after having established whether or not the prescribed conditions are fulfilled.

The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation. There is therefore no conflict between the functions of the political organs, on the one hand, and the exhaustive character of the prescribed conditions, on the other.

It has been sought to base on the political responsibilities assumed by the Security Council, in virtue of Article 24 of the Charter, an argument justifying the necessity for according to the Security Council as well as to the General Assembly complete freedom of appreciation in connexion with the admission of new Members. But Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision, affect the special rules for admission which emerge from Article 4.

The foregoing considerations establish the exhaustive character of the conditions prescribed in Article 4.

* * *

The second part of the question concerns a demand on the part of a Member making its consent to the admission of an applicant dependent on the admission of other applicants.
ARTICLE 4 OF THE CHARTER OF THE UNITED NATIONS

Judged on the basis of the rule which the Court adopts in its interpretation of Article 4, such a demand clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4. It is also in an entirely different category from those conditions, since it makes admission dependent, not on the conditions required of applicants, qualifications which are supposed to be fulfilled, but on an extraneous consideration concerning States other than the applicant State.

The provisions of Article 4 necessarily imply that every application for admission should be examined and voted on separately and on its own merits; otherwise it would be impossible to determine whether a particular applicant fulfils the necessary conditions. To subject an affirmative vote for the admission of an applicant State to the condition that other States be admitted with that State would prevent Members from exercising their judgment in each case with complete liberty, within the scope of the prescribed conditions. Such a demand is incompatible with the letter and spirit of Article 4 of the Charter.

FOR THESE REASONS,

THE COURT,

by nine votes to six,

is of opinion that a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article;

and that, in particular, a Member of the Organization cannot, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State.

The present opinion has been drawn up in French and in English, the French text being authoritative.

ARTICLE 4 OF THE CHARTER OF THE UNITED NATIONS

Done at the Peace Palace, The Hague, this twenty-eighth day of May, one thousand nine hundred and forty-eight, in two copies, one of which shall be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) J. G. GUERRERO,
President.

(Signed) E. HAMBRO,
Registrar.

Judges ALVAREZ 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 a statement of their individual opinion.

Judges BASDEVANT, WINIARSKI, MCNAIR, READ, ZORIĆ 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 a statement of their dissenting opinion.

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

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

I.C.J. Reports 1949
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, Winiarski,
Zoricić, de Visscher, Sir Arnold McNair, Klaestad,
Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo.

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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 Article 65 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 Kaeckenbeek, 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 reparation 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 I (a) and I (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
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 useless 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 1, 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 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?"

The question is concerned solely with the reparation of damage caused 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 Members 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 Organization 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 Organization, 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 possess capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant 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 Organization 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 important 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
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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 an 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 question 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 has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed 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 should 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—
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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 Alvarez 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 Assembly for the Admission to the United Nations
Advisory Opinion

_I.C.J. Reports 1950_
INTERNATIONAL COURT OF JUSTICE

YEAR 1950

March 3rd, 1950

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


ADVISORY OPINION

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Hackworth, Winarski, Zoricic, De Visscher, Sir Arnold McNair, 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 communication, 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 Opinion. 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 65 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 65 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
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; it 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. II, 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 24 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 296 (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 nothing else. 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
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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 authori-
tative, 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 trans-
mitted to the Secretary-General of the United Nations.

(Signed) Basdevant,
President.

(Signed) E. Hambro,
Registrar.

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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.
Prosecutor v. Duško Tadić a/k/a "Dule"
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995

Case No. IT-94-1
Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa
Registrar:
Mrs. Dorothee de Sampaio Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR
v.
DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:
Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:
Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant' motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:
   a) illegal foundation of the International Tribunal;
   b) wrongful primacy of the International Tribunal over national courts;
   c) lack of jurisdiction ratione materiae.

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

"THE TRIAL CHAMBER [. . . ]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter Decision at Trial).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.

From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber


As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "Trials and Appeals" (Art. 15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5)) (hereinafter Rules of Procedure)).
5. However, Rule 73 had already provided for "Preliminary Motions by Accused", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

"The Trial Chamber shall dispose of preliminary motions in limine litis and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction." (Rules of Procedure, Rule 72 (B).)

This is easily understandable and the Prosecutor put it clearly in his argument:

"I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.

Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.

[...]

So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter Appeal Transcript).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter Prosecutor Trial Brief).)

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one amicus curiae, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with in limine litis, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It also has read the amicus curiae briefs submitted by Juristes sans Frontières and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116. The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

a) unlawful establishment of the International Tribunal;
b) unjustified primacy of the International Tribunal over competent domestic courts;
c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant.

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

9. The first ground of appeal attacks the validity of the establishment of the International Tribunal.

A. Meaning Of Jurisdiction

10. In discussing the Defence plea to the jurisdiction of the International Tribunal on grounds of invalidity of its establishment by the Security Council, the Trial Chamber declared:

"There are clearly enough matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather the lawfulness of its creation [. . .]" (Decision at Trial, at para. 4.)

There is a petitio principii underlying this affirmation and it fails to explain the criteria by which it the Trial Chamber disqualifies the plea of invalidity of the establishment of the International Tribunal as a plea to jurisdiction. What is more important, that proposition implies a narrow concept of jurisdiction reduced to pleas based on the limits of its scope in time and space and as to persons and subject-matter (ratione temporis, loci, personae and materiae). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word
itself, *jurisdiction* - a legal power, hence necessarily a legitimate power, "to state the law" (*dire le droit*) within this ambit, in an authoritative and final manner.

This is the meaning which it carries in all legal systems. Thus, historically, in common law, the *Termes de la ley* provide the following definition:

"jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

"[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633.).

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

C. The Issue Of Constitutionality

26. Many arguments have been put forward by Appellant in support of the contention that the establishment of the International Tribunal is invalid under the Charter of the United Nations or that it was not duly established by law. Many of these arguments were presented orally and in written submissions before the Trial Chamber. Appellant has asked this Chamber to incorporate into the argument before the Appeals Chamber all the points made at trial. (See Appeal Transcript, 7 September 1995, at 7.) Apart from the issues specifically dealt with below, the Appeals Chamber is content to allow the treatment of these issues by the Trial Chamber to stand.

27. The Trial Chamber summarized the claims of the Appellant as follows:

"It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types
The situations justifying resort to the powers provided for in Chapter VII are "a threat to the peace", a breach of the peace, or an act of aggression. While the determination of the Security Council that there is a breach of the peace or an act of aggression is more of a political character, this determination is subject to the limits of the Purposes and Principles of the Charter.

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subject to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (i.e., not subject to any legal limitations).

It is also clear from this text that the Security Council determines whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats . . . by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), para. 5.2 (emphasis added).

The Charter thus speaks the language of specific powers, not of absolute fiat. In choosing the course of action, the Security Council is not constrained by any particular constitutional limitations. This is evident from the text of Article 39, which provides that the Security Council may determine whether the situation in the former Yugoslavia constituted a "threat to the peace", and if it does, it may take measures to maintain or restore international peace and security.

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination as to whether the situation in the former Yugoslavia constitutes a threat to the peace, and it is the Security Council that takes the measures to maintain or restore international peace and security.

A question arises in this respect as to whether the choice of the Security Council is limited to the discharge of those duties which it is explicitly granted the power to discharge. The specific powers granted to the Security Council are those provided for in Article 39, and it is the Security Council that takes the measures to maintain or restore international peace and security. This is evident from the text of Article 39, which provides that the Security Council may determine whether the situation in the former Yugoslavia constitutes a threat to the peace, and if it does, it may take measures to maintain or restore international peace and security.
measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

These powers are coercive vis-à-vis the culprit State or entity. But they are also mandatory vis-à-vis the other Member States, who are under an obligation to cooperate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Articles 49), in the implementation of the action or measures decided by the Security Council.

3. The Establishment Of The International Tribunal As A Measure Under Chapter VII

As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measures chosen, as well as their potential contribution to the restoration or maintenance of peace. But here again, this discretion is not unfettered; moreover, it is limited to the measures provided for in Articles 41 and 42. Indeed, in the case at hand, this last point serves as a basis for the Appellant’s contention of invalidity of the establishment of the International Tribunal.

In its resolution 827, the Security Council considers that “in the particular circumstances of the former Yugoslavia”, the establishment of the International Tribunal “would contribute to the restoration and maintenance of peace” and indicates that, in establishing it, the Security Council was acting under Chapter VII (S.C. Res. 827, U.N. Doc. S/RES/827 (1993)). However, it did not specify a particular Article as a basis for this action.

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well as before this Chamber on at least three grounds:

a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;

b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;

c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatorily or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. Prima facie, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:

...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The First argument does not stand by its own language. Article 41 reads as follows:

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." (United Nations Charter, art. 41.)

It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.

That the examples do not suggest judicial measures goes some way towards the other argument that the Article does not contemplate institutional measures implemented directly by the United Nations through one of its organs but, as the given examples suggest, only action by Member States, such as economic sanctions (though possibly coordinated through an organ of the Organization). However, as mentioned above, nothing in the Article suggests the limitation of the measures to those implemented by States. The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures]" not "Those [measures]", refers to the species mentioned in the second phrase rather than to the "genus" referred to in.
36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can, by the same token, undertake measures which it can implement directly via its organs. If it happens to have the resources to do so. In the exercise of its functions, the United Nations has to act through its Members. But it is of the essence of “collective measures” that they are generally undertaken in common and not by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

37. The argument that the Security Council, not being endowed with judicial powers, cannot establish a criminal tribunal as an instrument for the exercise of its principal function of maintenance of peace and security, is in reality a platitude. It is only for want of such resources that the United Nations has to act through its Members. Action by Member States on behalf of the Organization is but a poor substitute for the exercise of the functions of an independent and impartial tribunal established by law. This is also the pattern of Article 42 on measures involving the use of armed force.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that every person has the right to a hearing, with due guarantees and within a reasonable time, by an independent and impartial tribunal established by law.

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by a tribunal, which has been established in Article 1(3), paragraph 1, of the Charter, in accordance with the procedures specifically provided for therein. It is of the essence of “collective measures” that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute for the exercise of the functions of an independent and impartial tribunal established by law.

42. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter. The establishment of the International Tribunal is but one of many measures adopted by the Security Council. It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures ex post facto, by a court, even in case of failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

43. The establishment of the International Tribunal, which is the subject of this appeal, is a measure taken by the Security Council in exercise of its powers under Chapter VII of the Charter, in order to address practically the same objection, to wit: the Federal Republic of Yugoslavia’s failure to establish the United Nations Emergency Force in the Middle East (UNEF) in 1956. Nor did the Appeals Chamber, in its advisory opinion in the UNEF (U.N. Emergency Force in the Middle East) case, find that the Security Council’s measures were not taken in accordance with the Charter.

44. The establishment of the International Tribunal is not a measure adopted by the Security Council under Chapter V of the Charter, but rather it is a measure adopted under Chapter VII of the Charter. The appeal of Appellant is dismissed.

45. The appearance of the theory of the exercise of the power of the Security Council under Chapter VII of the Charter as a model for the exercise of the power of the Security Council under Chapter V of the Charter is, however, misleading. The Security Council, in exercising its powers under Chapter VII of the Charter, is exercising an independent power, whereas its powers under Chapter V of the Charter are dependent on the United Nations, which is exercising an independent power.

46. The establishment of the International Tribunal is but one of many measures adopted by the Security Council. It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures ex post facto, by a court.
imposing an international obligation which only applies to the administration of criminal justice in a system of international criminal justice, in such a way as to ensure that all individuals are guaranteed the right to have, by a national authority found within its constitution, the United Nations Charter. As set out above (para. 28-40) we are
competent to determine whether the Security Council was endowed with the power to create this International Tribunal as a matter of law. The opinion of the International Court of Justice, by its Advisory Opinion on the Constitutionality of the Judgment of the Permanent Court of International Justice in the Kowa Cases (United States of America v. The Philippines), 3 U. N. International Law Reports 3 (1922), has been correctly invoked by Appellant in his argument. It is not in dispute that the Security Council in the exercise of its powers under Chapter VII of the United Nations Charter is empowered to take certain action which may have the effect of imposing international obligations on States.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

48. The first ground of Appeal: unlawful establishment of the International Tribunal, is accordingly dismissed.

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT DOMESTIC COURTS

49. The second ground of appeal attacks the primacy of the International Tribunal over national courts.

50. This primacy is established by Article 9 of the Statute of the International Tribunal, which provides:

"Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal." (Emphasis added.)

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a consequence of a request for deferral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of Procedure, Rule 10.)

In relevant part, Appellant's motion alleges: "[The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected..."
International Court of Justice

Legality of the Use by a State of Nuclear Weapons in Armed Conflict
Advisory Opinion

_I.C.J. Reports 1996_
LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT

Jurisdiction of the Court to give the advisory opinion requested — Article 65, paragraph 1, of the Statute and Article 96, paragraph 2, of the Charter — "Legal question" — Political aspects of the question posed — Motives said to have inspired the request and political implications that the opinion might have — Question arising "within the scope of [the] activities" of the requesting Organization — Interpretation of the constitution of the Organization — Article 2 of the World Health Organization Constitution — Absence of sufficient connection between the functions vested in the Organization and the question posed — "Principle of speciality" — Relationship between the United Nations and the specialized agencies — Issue of World Health Organization practice in the field of nuclear weapons — Resolution duly adopted from a procedural point of view and question whether that resolution has been adopted intra vires — Resolution of the United Nations General Assembly "welcoming" the request for an opinion submitted by the World Health Organization — Conclusion.

ADVISORY OPINION

Present: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddin, Weeramantry, Ranjeva, Hertzeghi, Shi, Fleischhauer, Koroma, Vereshchagin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

1. By a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization (hereinafter called "the WHO") officially communicated to the Registrar a decision taken by the World Health Assembly to submit a question to the Court for an advisory opinion. The question is set forth in resolution WHA46.40 adopted by the Assembly on 14 May 1993. That resolution, certified copies of the English and French texts of which were enclosed with the said letter, reads as follows:

"The Forty-sixth World Health Assembly,
Bearing in mind the principles laid down in the WHO Constitution;

Noting the report of the Director-General on health and environmental effects of nuclear weapons;¹

Recalling resolutions WHA34.38, WHA36.28 and WHA40.24 on the effects of nuclear war on health and health services;

Recognizing that it has been established that no health service in the world can alleviate in any significant way a situation resulting from the use of even one single nuclear weapon;²

Recalling resolutions WHA42.26 on WHO's contribution to the international efforts towards sustainable development and WHA45.31 which draws attention to the effects on health of environmental degradation and recognizing the short- and long-term environmental consequences of the use of nuclear weapons that would affect human health for generations;

Recalling that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons;³

Noting the concern of the world health community about the continued threat to health and the environment from nuclear weapons;

Mindful of the role of WHO as defined in its Constitution to act as the directing and coordinating authority on international health work (Article 2 (a)); to propose conventions, agreements and regulations (Article 2 (k)); to report on administrative and social techniques affecting public health from preventive and curative points of view (Article 2 (p)); and to take all necessary action to attain the objectives of the Organization (Article 2 (v));

Realizing that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use, and that over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons;


¹ Document A46/30.
request the International Court of Justice to give an advisory opinion on the following question:

'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?'

2. Request the Director-General to transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with Article 65 of the Statute of the Court.

2. Pursuant to Article 65, paragraph 2, of the Statute, the Director-General of the WHO communicated to the Court a dossier of documents likely to throw light upon the question; the dossier reached the Registry in several instalments.

3. By letters dated 14 and 20 September 1993, the Deputy-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.

4. By an Order dated 13 September 1993 the Court decided that the WHO and the member States of that Organization entitled to appear before the Court were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute; and, by the same Order, the Court fixed 10 June 1994 as the time-limit for the submission to it of written statements on the question. The special and direct communication provided for in Article 66, paragraph 2, of the Statute was included in the aforementioned letters of 14 and 20 September 1993 addressed to the States concerned. A similar communication was transmitted to the WHO by the Deputy-Registrar on 14 September 1993.

5. By an Order dated 20 June 1994, the President of the Court, upon the request of several States, extended to 20 September 1994 the time-limit for the submission of written statements. By the same Order, the President fixed 20 June 1995 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

6. Written statements were filed by the following States: Australia, Azerbaijan, Colombia, Costa Rica, Democratic People's Republic of Korea, Finland, France, Germany, India, Ireland, Islamic Republic of Iran, Italy, Japan, Kazakhstan, Lithuania, Malaysia, Mexico, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Republic of Moldova, Russian Federation, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, United Kingdom of Great Britain and Northern Ireland, and United States of America. In addition, written comments on those written statements were submitted by the following States: Costa Rica, France, India, Malaysia, Nauru, Russian Federation, Solomon Islands, United Kingdom of Great Britain and Northern Ireland, and United States of America. Upon receipt of those statements and comments, the Registrar communicated the text to all States having taken part in the written proceedings.

7. The Court decided to hold public sittings, opening on 30 October 1995, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court. By letters dated 23 June 1995, the Registrar requested the WHO and its member States entitled to appear before the Court to inform him whether they intended to take part in the oral proceedings; it was indicated, in those letters, that the Court had decided to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the WHO as well as oral statements concerning the request for an advisory opinion meanwhile laid before the Court by the General Assembly of the United Nations on the question of the Legality of the Threat or Use of Nuclear Weapons, on the understanding that the WHO would be entitled to speak only in regard to the request it had itself submitted; and it was further specified therein that the participants in the oral proceedings which had not taken part in the written proceedings would receive the text of the statements and comments produced in the course of the latter.

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 from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

for the WHO: Mr. Claude-Henri Vignes, Legal Counsel;

for the Commonwealth of Australia: Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,

The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

for the Arab Republic of Egypt: Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

for the French Republic: Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs,

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

for the Federal Republic of Germany: Mr. Hartmut Hillenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs,

H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

for Mexico: H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;

H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

for Indonesia: Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;
Questions were put by Members of the Court to particular participants in the oral proceedings, which replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

* * *

10. The Court has the authority to give advisory opinions by virtue of Article 65 of its Statute, paragraph 1 of which reads as follows:

“The 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.”

It is also stated, in Article 96, paragraph 2, of the Charter that the

specialized agencies, 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”.

Consequently, three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the
Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency (cf. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334).

11. Where the WHO is concerned, the above-mentioned texts are reflected in two other provisions, to which World Health Assembly resolution WHA46.40 expressly refers in paragraph 1 of its operative part. These are, on the one hand, Article 76 of that Organization’s Constitution, under which:

“Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.”

And on the other hand, paragraph 2 of Article X of the Agreement of 10 July 1948 between the United Nations and the WHO, under which:

“The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.”

This agreement was approved by the United Nations General Assembly on 15 November 1947 (resolution 124 (II)) and by the World Health Assembly on 10 July 1948 (resolution [WHA1.102]).

12. There is thus no doubt that the WHO has been duly authorized, in accordance with Article 96, paragraph 2, of the Charter, to request advisory opinions of the Court. The first condition which must be met in order to found the competence of the Court in this case is thus fulfilled. Moreover, this point has not been disputed; and the Court has in the past agreed to deal with a request for an advisory opinion submitted by the WHO (see Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 73 et seq.).

* * *

13. However, during both the written and oral proceedings, some States have disputed whether the other conditions necessary for the jurisdiction of the Court have been met in the present case. It has been contended that the question before the Court is an essentially political one, and also that it goes beyond the scope of the WHO’s proper activities, which would in limine have deprived the Organization itself of any competence to seize the Court of it.

14. Further, various arguments have been put forward for the purpose of persuading the Court to use the discretionary power it possesses under Article 65, paragraph 1, of the Statute, to decline to give the opinion sought. The Court can however only exercise this discretionary power if it has first established that it has jurisdiction in the case in question; if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise.

* * *

15. The Court must therefore first satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

“...framed in terms of law and raising problems of international law ... are by their very nature susceptible of a reply based on law ... [and] appear ... to be questions of a legal character” (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).

16. The question put to the Court by the World Health Assembly does in fact constitute a legal question, as the Court is requested to rule on whether,

“in view of the health and environmental effects, ... the use of nuclear weapons by a State in war or other armed conflict [would] be a breach of its obligations under international law including the WHO Constitution”.

To do this, the Court must identify the obligations of States under the rules of law invoked, and assess whether the behaviour in question conforms to those obligations, thus giving an answer to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them.

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt:

“Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may involve the interpretation of its constitution.” (I.C.J. Reports 1980, p. 87, para. 33.)

17. The Court also finds that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.

* * *

18. The Court will now seek to determine whether the advisory opinion requested by the WHO relates to a question which arises “within the scope of [the] activities” of that Organization, in accordance with Article 96, paragraph 2, of the Charter.

The Court notes that this third condition to which its advisory function is subject is expressed in slightly different terms in Article X, paragraph 2, of the Agreement of 10 July 1948 — which refers to questions arising within the scope of the WHO’s “competence” — and in Article 76 of the WHO Constitution — which refers to questions arising “within the competence” of the Organization. However, it considers that, for the purposes of this case, no point of significance turns on the different formulations.

19. In order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. As the Court has said with respect to the Charter:

“On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics.” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 157.)

But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted “in their context and in the light of its object and purpose” and there shall be

“taken into account, together with the context:

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

The Court has had occasion to apply this rule of interpretation several times (see Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, I.C.J. Reports 1991, pp. 69-70, para. 48; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, pp. 582-583, para. 373, and p. 586, para. 380; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995, p. 18, para. 33); it will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises “within the scope of [the] activities” of that Organization.

* * *

20. The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1984 and 1994.

The functions attributed to the Organization are listed in 22 subparagraphs (subparagraphs (a) to (v)) in Article 2 of its Constitution. None of these subparagraphs expressly refers to the legality of any activity
hazardous to health; and none of the functions of the WHO is dependent upon the legality of the situations upon which it must act. Moreover, it is stated in the introductory sentence of Article 2 that the Organization discharges its functions "in order to achieve its objective". The objective of the Organization is defined in Article 1 as being "the attainment by all peoples of the highest possible level of health". As for the Preamble to the Constitution, it sets out various principles which the States parties "declare, in conformity with the Charter of the United Nations, . . . [to be] basic to the happiness, harmonious relations and security of all peoples": hence, it is stated therein, inter alia, that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being" and that "[t]he health of all peoples is fundamental to the attainment of peace and security"; it is further indicated, at the end of the Preamble that,

"for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties . . . establish . . . the . . . Organization . . . as a specialized agency within the terms of Article 57 of the Charter of the United Nations".

21. Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.

The question put to the Court in the present case relates, however, not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. Whatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that.

22. World Health Assembly resolution WHA46.40, by which the Court has been seised of this request for an opinion, expressly refers, in its Preamble, to the functions indicated under subparagraphs (a), (k), (p) and (v) of Article 2 under consideration. These functions are defined as:

"(a) to act as the directing and co-ordinating authority on international health work;"
Realizing that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use, and that over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons;

The document entitled *Effects of Nuclear War on Health and Health Services*, to which the Preamble refers, is a report prepared in 1987 by the Management Group created by the Director-General of the WHO in pursuance of World Health Assembly resolution WHA36.28; this report updates another report on the same topic, which had been prepared in 1983 by an international committee of experts in medical sciences and public health, and whose conclusions had been approved by the Assembly in its above-mentioned resolution. As several States have observed during the present proceedings, the Management Group does indeed emphasize in its 1987 report that “the only approach to the treatment of health effects of nuclear warfare is primary prevention, that is, the prevention of nuclear war” (Summary, p. 5, para. 7). However, the Group states that “it is not for [it] to outline the political steps by which this threat can be removed or the preventive measures to be implemented” (*ibid.*, para. 8); and the Group concludes:

> “However, WHO can make important contributions to this process by systematically distributing information on the health consequences of nuclear warfare and by expanding and intensifying international cooperation in the field of health.” (*Ibid.*, para. 9.)

24. The WHO could only be competent to take those actions of “primary prevention” which fall within the functions of the Organization as defined in Article 2 of its Constitution. In consequence, the references to this type of prevention which are made in the Preamble to resolution WHA46.40 and the link there suggested with the question of the legality of the use of nuclear weapons do not affect the conclusions reached by the Court in paragraph 22 above.

25. The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. The Permanent Court of International Justice referred to this basic principle in the following terms:

> “As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.” (Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14, p. 64.)

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:

> “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.” (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 182-183; cf. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 57.)

In the opinion of the Court, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons — even in view of their health and environmental effects — would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

26. The World Health Organization is, moreover, an international organization of a particular kind. As indicated in the Preamble and confirmed by Article 69 of its Constitution, “the Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations”. Article 57 of the Charter defines “specialized agencies” as follows:

> “1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.”
2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as "specialized agencies."

Article 58 of the Charter reads:

"The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies."

Article 63 of the Charter then provides:

"1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations."

As these provisions demonstrate, the Charter of the United Nations laid the basis of a "system" designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the "United Nations system" is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies. In the case of the WHO, the agreement of 10 July 1948 between the United Nations and that Organization actually refers to the WHO Constitution in the following terms in Article I:

"The United Nations recognizes the World Health Organization as the specialized agency responsible for taking such action as may be appropriate under its Constitution for the accomplishment of the objectives set forth therein."

It follows from the various instruments mentioned above that the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter. If, according to the rules on which that system is based, the WHO has, by virtue of Article 57 of the Charter, "wide international responsibilities", those responsibilities are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency; it is difficult to imagine what other meaning that notion could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use. It is therefore difficult to maintain that, by authorizing various specialized agencies to request opinions from the Court under Article 96, paragraph 2, of the Charter, the General Assembly intended to allow them to seize the Court of questions belonging within the competence of the United Nations.

For all these reasons, the Court considers that the question raised in the request for an advisory opinion submitted to it by the WHO does not arise "within the scope of [the] activities" of that Organization as defined by its Constitution.

27. A consideration of the practice of the WHO bears out these conclusions. None of the reports and resolutions referred to in the Preamble to World Health Assembly resolution WHA46.40 is in the nature of a practice of the WHO in regard to the legality of the threat or use of nuclear weapons. The Report of the Director-General (doc. A46/30), referred to in the third paragraph of the Preamble, the aforementioned resolutions WHA34.38 and WHA36.28, as well as resolution WHA40.24, all of which are referred to in the fourth paragraph, as well as the above-mentioned report of the Management Group of 1987 to which reference is made in the fifth and seventh paragraphs, deal exclusively, in the case of the first, with the health and environmental effects of nuclear weapons, and in the case of the remainder, with the effects of nuclear weapons on health and health services. As regards resolutions WHA42.26 and WHA45.31, referred to in the sixth paragraph of the Preamble to resolution WHA46.40, the first concerns the WHO's contribution to international efforts towards sustainable development and the second deals with the effects on health of environmental degradation. None of these reports and resolutions deals with the legality of the use of nuclear weapons.

Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.

Nowhere else does the Court find any practice of this kind. In particular, such a practice cannot be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings, such as resolution WHA15.51 on the role of the physician in the preservation and development of peace, resolution WHA22.58 concerning co-operation between the WHO and the United Nations in regard to chemical and bacteriological weapons and the effects of their
possible use, and resolution WHA42.24 concerning the embargo placed on medical supplies for political reasons and restrictions on their movement. The Court has also noted that the WHO regularly takes account of various rules of international law in the exercise of its functions; that it participates in certain activities undertaken in the legal sphere at the international level — for example, for the purpose of drawing up an international code of practice on transboundary movements of radioactive waste; and that it participates in certain international conferences for the progressive development and codification of international law. That the WHO, as a subject of international law, should be led to apply the rules of international law or concern itself with their development is in no way surprising; but it does not follow that it has received a mandate, beyond the terms of its Constitution, itself to address the legality or illegality of the use of weaponry in hostilities.

* *

28. It remains to be considered whether the insertion of the words “including the WHO Constitution” in the question put to the Court (which essentially seeks an opinion on the legality of the use of nuclear weapons in general) could allow it to offer an opinion on the legality of the use of nuclear weapons by reference to the passage in the question concerning the WHO Constitution. The Court must answer in the negative. Indeed, the WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions.

* *

29. Other arguments have nevertheless been put forward in the proceedings to found the jurisdiction of the Court in the present case.

It has thus been argued that World Health Assembly resolution WHA46.40, having been adopted by the requisite majority, “must be presumed to have been validly adopted” (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 22, para. 20). The Court would observe in this respect that the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted intra vires are two separate issues. The mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting ultra vires, with which the resolution might be afflicted.

As the Court has stated, “each organ must, in the first place at least, determine its own jurisdiction” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 168). It was therefore certainly a matter for the World Health Assembly to decide on its competence — and, thereby, that of the WHO — to submit a request to the Court for an advisory opinion on the question under consideration, having regard to the terms of the Constitution of the Organization and those of the Agreement of 10 July 1948 bringing it into relationship with the United Nations. But likewise it is incumbent on the Court to satisfy itself that the conditions governing its own competence to give the opinion requested are met; through the reference made, respectively, by Article 96, paragraph 2, of the Charter to the “scope of [the] activities” of the Organization and by Article X, paragraph 2, of the Agreement of 10 July 1948 to its “competence”, the Court also finds itself obliged, in the present case, to interpret the Constitution of the WHO.

The exercise of the functions entrusted to the Court under Article 65, paragraph 1, of its Statute requires it to furnish such an interpretation, independently of any operation of the specific recourse mechanism which Article 75 of the WHO Constitution reserves for cases in which a question or dispute arises between States concerning the interpretation or application of that instrument; and in doing so the Court arrives at different conclusions from those reached by the World Health Assembly when it adopted resolution WHA46.40.

* *

30. Nor can the Court accept the argument that the General Assembly of the United Nations, as the source from which the WHO derives its power to request advisory opinions, has, in its resolution 49/75 K, confirmed the competence of that organization to request an opinion on the question submitted to the Court. In the last preambular paragraph of that resolution, the General Assembly

“[welcomed] resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization”.

In expressing this opinion, the General Assembly clearly reflected the wish of a majority of States that the Assembly should lend its political support to the action taken by the WHO, which it welcomed. However, the Court does not consider that, in doing so, the General Assembly meant to pass upon the competence of the WHO to request an opinion on the question raised. Moreover, the General Assembly could evidently
not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorize the specialized agencies to request opinions from the Court — limits which were reaffirmed in Article X of the relationship agreement of 10 July 1948.

* * *

31. Having arrived at the view that the request for an advisory opinion submitted by the WHO does not relate to a question which arises “within the scope of [the] activities” of that Organization in accordance with Article 96, paragraph 2, of the Charter, the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested. Consequently, the Court is not called upon to examine the arguments which were laid before it with regard to the exercise of its discretionary power to give an opinion.

* * *

32. For these reasons,

The Court,

By eleven votes to three,

finds that it is not able to give the advisory opinion which was requested of it under World Health Assembly resolution WHA46.40 dated 14 May 1993.

In favour: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

Against: Judges Shahabuddeen, Weeramantry, Koroma.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, 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 Director-General of the World Health Organization, respectively.

(Signed) Mohammed Bedjaoui,
President.

(Signed) Eduardo Valencia-Ospina,
Registrar.
General that Dato’ Param Cumaraswamy was entitled to immunity from legal process;

in favour: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetic, 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, Herczegh, Shi, Fleischhauer, Vereshchetic, 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, Herczegh, Shi, Fleischhauer, Vereshchetic, 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

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

I.C.J. Reports 1999
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 or 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:

“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 intention out of the Charter.” (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184.)

51. Article VI, Section 23, of the General Convention provides that “[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves”. In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

“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 . . .” (Ibid., p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from “every kind” of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: “it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work”.

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article “Malaysian Justice on Trial” in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy
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 had presumably 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 seized 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 aforementioned 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 litis. 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 litis 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 "[the 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, Sri, Fleischhauer, Vereshchegodskaya, 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, Sri, Fleischhauer, Vereshchegodskaya, 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-
IMMUNITY FROM LEGAL PROCESS (ADVISORY OPINION)

General that Dato' Param Cumaraswamy was entitled to immunity from legal process;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, 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, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, 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, Guillaune, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, 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.
European Court of Human Rights

Behrami and Behrami v. France and Saramati v. France, Germany and Norway
Decision of 2 May 2007, (dec.) [GC]

Application Nos. 71412/01 and 78166/01
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
I. RELEVANT BACKGROUND TO THE CASES

2. The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council ("NAC") of the North Atlantic Treaty Organisation ("NATO"), NATO announced air strikes on the territory of the Federal Republic of Yugoslavia ("FRY") should the FRY not comply with the demands of the international community and the Security Council ("UNSC") of the United Nations. The FRY, led by President Slobodan Milosevic, began to withdraw from Kosovo on 24 March 1999. The resulting proposal for an international security force following an appropriate UN Security Council Resolution was approved on 11 April 1999.

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence ("KFOR") by "Member States and relevant international organisations". The Council also requested the Secretary General ("SG") to establish an interim administration for Kosovo ("UNMIK") and requested the SG, with the assistance of other international organisations, to establish it and to appoint a Special Representative to the SG ("SRSG") to control its implementation. KFOR was to control and pace the implementation of the Security Council Resolution 1244. The SG appointed the Secretary General, with the assistance of relevant international organisations, to establish the KFOR, the SG appointed the Secretary General, with the assistance of relevant international organisations, to establish the UNMIK and the SRSG, and the SG appointed the Secretary General, with the assistance of relevant international organisations, to establish the KFOR and UNMIK.

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. The children threw a CBU in the air, it detonated, and blew up Gadaf Behrami, who was killed. The children then left and were not reported to be injured. The UNMIK police investigated. They took witness statements from, inter alia, the boys involved in the incident and completed an initial report. Further investigation reports dated 11, 12 and 13 March 2000 indicated, inter alia, that UNMIK police could not access the site without KFOR agreement; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that the detonation site had been marked out by KFOR the day after the detonation. The autopsy report confirmed Gadaf Behrami's death from multiple injuries resulting from the CBU explosion. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".

6. By letter dated 22 May 2000, the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued, and that the District Public Prosecutor requested KFOR to investigate the incident. KFOR forwarded the complaint to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop Command ("FTC") and requested an investigation by the French military authorities. The FTC forwarded the complaint to the French military authorities, which launched an investigation.

7. By letter dated 22 May 2000, the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued, and that the District Public Prosecutor requested KFOR to investigate the incident. KFOR forwarded the complaint to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop Command ("FTC") and requested an investigation by the French military authorities. The FTC forwarded the complaint to the French military authorities, which launched an investigation.
III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before a military judge on suspicion of attempted murder and illegal possession of a weapon. On 13 July 2001 the District Court extended his detention for 30 days.

9. On 14 July 2001 the UNMIK police informed him that his detention was under the control of the UNMIK police's Legal Adviser. Mr Saramati's representative sought his release on 13 July 2001. On 4 June 2001 the commander of KFOR ordered Mr Saramati's detention to be extended.

10. On 14 July 2001 the UNMIK police informed him that his detention was under the control of the UNMIK police's Legal Adviser. Mr Saramati's representative sought his release on 13 July 2001. On 4 June 2001 the commander of KFOR ordered Mr Saramati's detention to be extended.

11. On 14 July 2001 the District Court extended Mr Saramati's detention for 30 days.

12. 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 peace and security in Kosovo.

13. On 11 August 2000 Mr Saramati's detention was again extended by the District Court for 30 days.

14. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati's representatives requested his release and the trial court responded that Mr Saramati was in detention under the responsibility of KFOR.
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.
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:
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:

(a) Is attributable to the international organization under international law; and

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

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 ...”

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

43. 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,

44. 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,

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

46. 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,

47. 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;

48. 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;

49. 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;

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

51. (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;

52. 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) Transferring, 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 SRSG 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) or [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/FRAO997 (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
underlined that, since the UN did not intend to implement the mine action programme in Kosovo itself, it would rely on a variety of operators including UN agencies, KFOR contingents, NGOs and commercial companies. These operators had to be accredited, supported and coordinated to ensure that they worked in a coherent and integrated manner. Accordingly, a key factor in the success of the mine clearance activities in Kosovo was the establishment of an appropriately structured, integrated and coordinated mechanism for all de-mining activities. The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

60. In 2001 UNMAS commissioned an external evaluation of its mine action programme in Kosovo for the period mid-1999–2001. The report, entitled “An Evaluation of the United Nations Mine Action Programme in Kosovo 1999–2001,” commented as follows: “The concept plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance. At the beginning of August 1999, the MACC had assumed full control of the mine action programme, although formally it still fell under KFOR’s responsibility. This was followed, on 24 August, by UNMACC (24 August) and UNMAS (24 August) which took the initiative by marking CBU sites as a matter of urgency and providing any further information they had. The latter’s attention to recent CBU explosions involving deaths and asked for the latter’s personal support to ensure that the mine clearance project was carried out with all necessary measures. The UNMAS report of August 1999 confirmed that the MACC worked closely with UNMACC and UNMIK regional offices. UNMAS letter of 10 August 1999 explained that KFOR worked closely with UNMAS and with UNMACC which had been “set up jointly” by KFOR and the UN. KFOR had submitted a report to the UNSC on its mine action in Kosovo. The report confirmed that the UNMACC had been “set up jointly” by KFOR and the UN. KFOR had submitted a report to the UNSC on its mine action in Kosovo.

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 the mine-clearance project by marking CBU sites as a matter of urgency and providing any further information they had. The latter’s attention to recent CBU explosions involving deaths and asked for the latter’s personal support to ensure that the mine clearance project was carried out with all necessary measures. The UNMAS report of August 1999 confirmed that the MACC worked closely with UNMACC and UNMIK regional offices. UNMAS letter of 10 August 1999 explained that KFOR worked closely with UNMAS and with UNMACC which had been “set up jointly” by KFOR and the UN. KFOR had submitted a report to the UNSC on its mine action in Kosovo. The report confirmed that the UNMACC had been “set up jointly” by KFOR and the UN. KFOR had submitted a report to the UNSC on its mine action in Kosovo.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He also complained about the breach of the respondent States’ positive obligation to guarantee the Convention rights of those residing in Kosovo.
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 UNMACC 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; Ilıççu 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
The MTA and UNSC Resolution 1244 provided that KFOR, on which UNMIK relied to exist as a control), was already in Kosovo in 1999, prior to the deployment of KFOR on 10 June 1999, which is when the Court considers the UNSC Resolution 1244 to be effective. It is also clear from the above that the Court considered the UNSC Resolution 1244 to be effective from the date of its adoption. Therefore, the Court's reference to the MTA and the UNSC Resolution 1244 in the context of the present cases must be understood as referring to the MTA and the UNSC Resolution 1244 as they are effective from the date of their adoption, not from the date of their signing.

The Court therefore considers the question raised by the present cases to be as follows: whether the respondent States exercised extra-territorial jurisdiction in Kosovo, and, if so, whether that jurisdiction was based on the MTA and the UNSC Resolution 1244.

In the present case, the Court considers, and 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 35 above). Since KFOR had been aware of the unexploded ordinance and controlled the site, it should have excluded the public. Moreover, NATO had submitted that it was not a security matter for KFOR to control the site.

70. The following day, 10 June 1999, UNSC Resolution 1244 was adopted. The Court considered that, in the context of the present cases, it is not necessary to consider the implications of the adoption of the resolution for the purposes of the present case. It is sufficient to consider that the resolution was adopted on 10 June 1999, and that it provided for the deployment of an international military force to Kosovo, on which UNMIK was to rely to exist, and to exercise its functions.

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, than whether, on the basis of the facts established by the Court, the jurisdiction was based on the MTA and the UNSC Resolution 1244.

72. Accordingly, the first issue to be examined by this Court is the compatibility of the applicants' submissions with the provisions of the MTA and the UNSC Resolution 1244. The Court has summarised and examined the relevant provisions of the MTA and the UNSC Resolution 1244 in detail in paragraphs 51 above, and below.

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

B. The applicants' submissions

74. The applicants maintained that KFOR was the responsible organisation in each case.

75. In the first place, France had voted in the NAC in favour of deploying an international force to Kosovo. In the second place, the French contingent's control of MNB Northeast was a relevant jurisdictional link in the Behrami case. In the third place, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO, and KFOR was a NATO-led multinational force made up of NATO and non-NATO troops. In the fourth place, the UNMIK Regulation 2001/9 of 10-14 States foresees a progressive transfer to the local authorities of UNMIK's responsibilities, which meant that the UNMIK and KFOR presences in Kosovo were not in fact exercising the same functions as those of the Government of the FRY, since there was no unified command link between the UNSC and NATO, and the TCNs retained such significant power that the UNMIK and KFOR were not exercising the same functions as those of the Government of the FRY.

76. Secondly, the French contingent's control of MNB Southeast was a relevant jurisdictional link in the Behrami case. While KFOR was the relevant international force in Kosovo, the French contingent was under the control of the UNMIK, and the UNMIK was under the control of the UNSC. In the Saramati case, the French contingent was under the control of KFOR. In the Behrami case, the French contingent was under the control of the UNMIK and the UNMIK was under the control of the UNSC. In the Saramati case, the French contingent was under the control of KFOR and KFOR was under the control of the UNSC. Moreover, KFOR had been aware of the unexploded ordinance and controlled the site, and it should have excluded the public. Moreover, NATO had submitted that it was not a security matter for KFOR to control the site.

77. Thirdly, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO, and KFOR was a NATO-led multinational force made up of NATO and non-NATO troops. In the fourth place, the UNMIK Regulation 2001/9 of 10-14 States foresees a progressive transfer to the local authorities of UNMIK's responsibilities, which meant that the UNMIK and KFOR presences in Kosovo were not in fact exercising the same functions as those of the Government of the FRY, since there was no unified command link between the UNSC and NATO, and the TCNs retained such significant power that the UNMIK and KFOR were not exercising the same functions as those of the Government of the FRY.

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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 that 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 TCN: the rules of engagement were national; troops were disciplined by national command; deployment decisions were national; the troops were financed by the States; individual TCNCOs had been set up; etc. The French Government argued that the term “jurisdiction” in Article 1 was closely linked to the notion of a State’s competence "ratione personae." In addition, and according to the ILC, the criterion by which the responsibility of an international organisation was engaged was exclusive, control of the agent by the organisation (paragraphs 50-53 above). As to the Security Council’s role, the Court noted that the UNSC was an international organ exercising limited control, as could be seen from the Security Council’s resolution of 13 February 2000, where the Security Council had again demanded the withdrawal of KFOR and the immediate establishment of a UNMIK mission, which had not been done. Finally, as to the respondent States’ arguments, their submissions on the "Monetary Gold" principle were fundamentally misconceived. In addition, it would be inconsistent with the object and purpose of the Convention to accept that States should be deterred from participating in peacekeeping missions by the recognition of this Court’s jurisdiction in the present cases.

C. The submissions of the respondent States

1. The French Government

82. The Government argued that the term “jurisdiction” in Article 1 was closely linked to the notion of a State’s competence "ratione personae." In addition, and according to the ILC, the criterion by which the responsibility of an international organisation was engaged was exclusive, control of the agent by the organisation (paragraphs 50-53 above). As to the Security Council’s role, the Court noted that the UNSC was an international organ exercising limited control, as could be seen from the Security Council’s resolution of 13 February 2000, where the Security Council had again demanded the withdrawal of KFOR and the immediate establishment of a UNMIK mission, which had not been done. Finally, as to the respondent States’ arguments, their submissions on the "Monetary Gold" principle were fundamentally misconceived. In addition, it would be inconsistent with the object and purpose of the Convention to accept that States should be deterred from participating in peacekeeping missions by the recognition of this Court’s jurisdiction in the present cases.

83. The French contingent was placed at the disposal of KFOR which, from a security point of view, exercised effective control in Kosovo. KFOR was an international force under unified command, operational control of the forces being that of COMKFOR, strategic control that of Supreme Allied Commander Europe of NATO ("SACEUR") and political control that of the NAC of NATO and, finally, by the UNSC. Decisions and acts were therefore taken in the name of KFOR and the French contingent operated at all times in accordance with the UNMIK’s OPLAN devised and controlled by NATO. KFOR was therefore an application of the peacekeeping operations authorised at all times by the UNSC whose resolutions formed the legal basis for the UNMIK’s OPLAN and command and control. The French contingent, in such circumstances, the acts and omissions of its personnel (including those of its TCN’S) could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.

84. The lack of jurisdiction "ratione personae" of France was confirmed by the following. In the first place, reference was made to the immunities of KFOR and UNMIK and to the special remedies put in place by the UNMIK’s OPLAN devised and controlled by NATO, KFOR was therefore an application of the peacekeeping operations authorised at all times by the UNSC whose resolutions formed the legal basis for the UNMIK’s OPLAN and command and control. The French contingent, in such circumstances, the acts and omissions of its personnel (including those of its TCN’S) could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.

85. Fifthly, and alternatively, KFOR did not have a separate legal personality and could not be a subject of international law or bear international responsibility for the acts or omissions of its personnel, nor could a State be held responsible for damages caused by KFOR or UNMIK. The Court was of the view that KFOR and UNMIK were not in any way "international organisations" as defined in the Convention: neither NATO nor the UN were organisations within the meaning of the Convention. Secondly, the Court regarded KFOR and UNMIK as "international organisations" as defined in the Convention. Finally, the Court held that the peacekeeping operations were carried out in accordance with the OPLAN devised and controlled by NATO. Finally, the Court held that the peacekeeping operations were carried out in accordance with the OPLAN devised and controlled by NATO.
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/C/81/SEM0) 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 placed the commanders of UNMIK and KFOR under unified command and control within the UN context. Seeking to address those deficiencies through this Court risks detracting from the coherence and effectiveness of such missions.

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 c. 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 by Chapter VII of the UN Charter. The cases were therefore inadmissible. The UN Charter and the relevant United Nations Security Council (UNSC) resolutions mandated the maintenance of international peace and security by the UN, which exercised its function in accordance with the principles of the UN Charter. The UNSC was responsible for the exercise of that function and could lay down rules for the implementation of its decisions. The UNSC had the authority to make binding decisions (Article 25) which prevailed over other international obligations (Article 103). The UNSC retained overall responsibility for the implementation of its resolutions and the exercise of its functions.

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 was exercised by the UN and was answerable, via the SG, to the UNSC. The TCNs could not have exercised such control and was answerable, via the SG, to the UN.

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes of the UN Charter, which included the maintenance of international peace and security. The applications were therefore inadmissible as incompatible ratione personae.

2. 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 for the implementation of its resolutions and the exercise of its functions, and it could lay down rules for the implementation of those functions. The UNMIK and KFOR structures were international, coherent and comprehensive structures admitting of no national instruction. 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 by Chapter VII of the UN Charter. The cases were therefore inadmissible. The UN Charter and the relevant United Nations Security Council (UNSC) resolutions mandated the maintenance of international peace and security by the UN, which exercised its function in accordance with the principles of the UN Charter. The UNSC was responsible for the exercise of that function and could lay down rules for the implementation of its decisions. The UNSC had the authority to make binding decisions (Article 25) which prevailed over other international obligations (Article 103). The UNSC retained overall responsibility for the implementation of its resolutions and the exercise of its functions.

105. These submissions, as to the unity of the UN operation, were confirmed by secondary legislation in Kosovo: if UNMIK took care to exercise its functions and was answerable, via the SG, to the UNSC, 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 by Chapter VII of the UN Charter. The cases were therefore inadmissible.
enshrined in its Regulations, fundamental rights. Protection and promoting, that implied the Convention's human rights, to mechanisms did not the inhabitants of Kosovo as outlined in the jurisdiction of UNMIK. The UN could not exert control over the (with a legal personality distinct from member states). TCNs were not exercising governmental authority in Kosovo. The complaint was therefore inadmissible (para. 71).

11. Finding that States were seriously liable for participating in peacekeeping and demining missions would have a devastating effect on such missions as well as counter to the values of the States, willingness to participate in such missions, which results would run counter to the values of the above-cited judgments of Ila/g250cu and Others, §§ 312-332 and Assanidze v. Georgia [GC], no. 71503/01, §§ 19-142, ECHR 2004-II).

12. While the applicants did not fail within the jurisdiction of the respondent States so the question of the attribution of acts to those States must be settled. The above-cited judgment of the Ila/g250cu and Others, decision, at § 75).

13. The main issue was whether the respondent States were responsible for the acts of UNMIK and/or KFOR so that the question of the attribution of acts to those States, in the absence of a clear indication of such responsibility, could not be adequately addressed. The above-cited cases of Bankovi/g252 and Others, at § 62, Ila/g250cu and Others, at §§ 332 and Bosphorus, at § 150).

14. The legal basis for the civilian and military presence in Kosovo was UNSC Resolution 1244, as amended by Resolution 1244, which was a United Nations mechanism for the implementation of international agreements and the protection of human rights in Kosovo. Resolution 1244, which was adopted under Chapter VI of the UN Charter, granted the UN Security Council the authority to establish a military presence in Kosovo and to take such steps as it deemed necessary for the maintenance of international peace and security. Resolution 1244 also established a number of other mechanisms, including the UN Special Representative of the Secretary-General (SRSG) and the UN Protection Force (UNPROFOR), which were responsible for the implementation of the resolution. The SRSG was responsible for the political and administrative aspects of the presence in Kosovo, while UNPROFOR was responsible for the military aspects.

15. In addition to the UN Security Council, the United Nations and its member states, including NATO, exercised effective control in Kosovo. The MNBs, consisting of contingents from States parties to the Convention (including substantial contingents from States not parties to the Convention), and from Kosovo itself, effectively controlled the MNB in Kosovo. The MNBs did not take the decision to establish the MNB in Kosovo, but they were responsible for its operation and for the proper functioning of international organisations (the above-cited cases of Bosphorus, at § 150).

16. The legal basis for the civilian and military presence in Kosovo was UNSC Resolution 1244, as amended by Resolution 1244, which was a United Nations mechanism for the implementation of international agreements and the protection of human rights in Kosovo. Resolution 1244, which was adopted under Chapter VI of the UN Charter, granted the UN Security Council the authority to establish a military presence in Kosovo and to take such steps as it deemed necessary for the maintenance of international peace and security. Resolution 1244 also established a number of other mechanisms, including the UN Special Representative of the Secretary-General (SRSG) and the UN Protection Force (UNPROFOR), which were responsible for the implementation of the resolution. The SRSG was responsible for the political and administrative aspects of the presence in Kosovo, while UNPROFOR was responsible for the military aspects.

17. In addition to the UN Security Council, the United Nations and its member states, including NATO, exercised effective control in Kosovo. The MNBs, consisting of contingents from States parties to the Convention (including substantial contingents from States not parties to the Convention), and from Kosovo itself, effectively controlled the MNB in Kosovo. The MNBs did not take the decision to establish the MNB in Kosovo, but they were responsible for its operation and for the proper functioning of international organisations (the above-cited cases of Bosphorus, at § 150).
The UN, as set forth in UNSC Resolution 1244, was an expression of the will of the member states to adopt a UN structure: as opposed to the mandate, the UN operation retained, unless otherwise specified, discretion to determine implementation and security measures. In exercising the relevant provisions of the Security Council resolutions, the Security Council exercises control over any part of Kosovo. The UN Mission in Kosovo (UNMIK) was tasked with civil administration and with human rights matters, while KFOR did not control that administration. The Security Council, including the Turkish forces identified by the Court as regards Northern Cyprus (see cases cited at paragraph 68 above), decided 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 a position of power or responsibility to secure those rights and freedoms through the exercise of legal authority, since all required of the international community was a form of technical and operational support for the exercise of that function by the international authority.

The present case could be distinguished from the situation in R (Al-Skeini) v. Secretary of State for Defence ([2007] EWCA Civ 1609) where a contingent in an international operation had exclusive control of a place of detention. In addition, while the duty under Article 1 was indivisible (Bankovic and Others, at § 75), the respondent States had neither the power nor the responsibility to secure the rights and freedoms defined in Article 1 since their authority was exclusively vested in UNMIK.

The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate was the following: the UN Mission in Kosovo (UNMIK) was a subsidiary organ of the UN, endowed with all-inclusive legislative, executive, judicial and security powers. The Security Council was, for the most part, left to be concretised and agreed upon in the realities of their daily operations. In addition, the UNMIK and KFOR relationship was based on the recognition that both were required to co-ordinate and operate in a mutually supportive manner towards the same goals.

As to de-mining in particular, paragraph 9(e) of UNSC Resolution 1244 (according responsibility for de-mining to KFOR but expressly leaving for determination by the two presences how that task would be done) ensured the safe and unimpeded return of persons to their homes. The UNMIK reactor and KFOR, as well as the responsibility for de-mining established in Kosovo (the concept plan, paragraph 54 above), to fulfil these functions depended largely on close co-operation with all de-mining partners and, notably, KFOR. Responsibility for de-mining was, however, ensured by the fact that KFOR had provided an opportunity to de-mining partners, including UNMACC, a safe and secure environment and, through the rapid deployment of UNMACC to Kosovo, it was possible for UNMACC to establish a de-mining base in Kosovo.

The present case was therefore an example of the way in which the international community co-operated to bring about the resolution of a difficult situation.


8. The UN.
CBU site marking. Accordingly, UNMIK's responsibility for de-mining was dependant 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, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in Saramati) and inaction of UNMIK (failure to de-mine in Behrami) 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 then examined whether it is competent ratione personae to review any such action or omission found to be attributable to the UN.

122. In so doing, 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 in such instruments for the matters impugned before it (mutatis mutandis, Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A no. 258-B, § 72).

It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; Al-Adsani v. the United Kingdom [GC], no. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of Banković and Others, at § 57).

1. 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) since both were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124. Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders.

125. As regards de-mining, the Court notes that Article 9(e) of UNSC Resolution 1244 provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by, as pointed out by the UN to the Court, Article 11(k) of the Resolution. The report of the SG to the UNSC of 12 June 1999 (paragraph 53 above) confirmed that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC pending which KFOR continued to act as the de facto coordination centre. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRSG of Pillar I. The UN submissions to this Court, the above-cited Evaluation Report, the Concept Plan, FRAGO 300 and the letters of the Deputy SRSG of August and October 1999 to KFOR (paragraphs 55 and 57 above) confirm, in the first place, that the mandate for supervising de-mining was de facto and de jure taken over by UNMACC, created by UNMIK, at the very latest, by October 1999 and therefore prior to the detonation date in the Behrami case and, secondly, that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

126. The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, NATO had dropped the CBUs or KFOR had failed to secure the site and provide information thereon to UNMIK, this would not alter the mandate of UNMIK. The reports of the SG to the UNSC (53 above) cited by the applicants may have referred to UNMACC as having been set up jointly by KFOR and the UN, but this described the provision of assistance to UNMIK by the previous de facto co-ordination centre (KFOR): it was therefore transitional assistance which accorded with KFOR's general obligation to support UNMIK (paragraphs 6 and 9(f) of UNSC Resolution 1244) and such assistance in the field did not change UNMIK's mandate. The report of the International Committee of the Red Cross relied upon by the applicants, indicated (at p. 23) that mine clearance in Kosovo was coordinated by UNMACC which in turn fell under the aegis of UNMIK. Finally, even if KFOR support was, as a matter of fact, essential to the continued presence of UNMIK (the applicants' submission), this did not alter the fact that the Resolution created separate and distinct presences, with different mandates and responsibilities and, importantly, without any hierarchical relationship or accountability between them (UN submissions, paragraph 118 above).
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 members 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 to set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. Finally, the Resolution put sufficiently defined limits as to allow the UNSC to exercise its overall authority and control over the military presence required to ensure the execution of the mandate.

135. 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 find, and any suggestion in the present cases of any actual TCN involvement, highlighted by the Court in its Section III (ICG Report cited at paragraph 32 above).

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’ argument at paragraph 77 above, direct operational command from the cases where the level of TCN control in the present cases was such that it detached troops from the international mandate and undermined the unity of NATO’s operational command. The Court notes that, in those cases, the TCNs retained 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).

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 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 find, and any suggestion in the present cases of any actual TCN involvement, highlighted by the Court in its Section III (ICG Report cited at paragraph 32 above).

140. 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 find, and any suggestion in the present cases of any actual TCN involvement, highlighted by the Court in its Section III (ICG Report cited at paragraph 32 above).

141. 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 find, and any suggestion in the present cases of any actual TCN involvement, highlighted by the Court in its Section III (ICG Report cited at paragraph 32 above).

142. 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 find, and any suggestion in the present cases of any actual TCN involvement, highlighted by the Court in its Section III (ICG Report cited at paragraph 32 above).
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 relevant operational orders and exercising such authority in a manner which could be considered at least functionally, if not jurisdictionally, from the point of view of the UN and the UNSC, that it acted at all times as a KFOR officer answerable to NATO through the informal officer command-and-control structure since COMKFOR acted at all times as a KFOR officer answerable to NATO through the above-described chain of command, precludes the applicants’ contention that there is room for progress in cooperation and command structures between the UNSC, TCNs, KFOR, and other international organisations that contributed to the mission. Accordingly, if the UN itself would accept that there is room for progress in cooperation and command structures between the UNSC, TCNs, KFOR, and other international organisations that contributed to the mission, the question arises in the present case whether the Court is competent ratione personae to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

3. Is the Court competent ratione personae?

144. It is therefore the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (The Reparations case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention. Consequently, it is the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (The Reparations case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention.
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 fulfil 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 there 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
- SRSG: 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
European Court of Justice

European Commission and Others v. Yassin Abdullah Kadi
Judgement of 18 July 2013

Joined cases C-584/10 P, C-593/10 P and C-595/10 P
JUDGMENT OF THE COURT (Grand Chamber)
18 July 2013 (*)


In Joined Cases C-584/10 P, C-593/10 P and C-595/10 P,
THREE APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 December 2010,

European Commission, represented initially by P. Hetsch, S. Boelaert, E. Paasivirta and M. Konstantinidis, and subsequently by L. Gussetti, S. Boelaert, E. Paasivirta and M. Konstantinidis, acting as Agents, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented initially by E. Jenkinson and subsequently by S. Behzadi-Spencer, acting as Agents, and by J. Wallace QC, D. Beard QC, and M. Wood, Barrister,

appellants,
supported by:

Republic of Bulgaria, represented by B. Zaimov, T. Ivanov and E. Petranova, acting as Agents,

Italian Republic, represented by G. Palmieri, acting as Agent, and by M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

Grand Duchy of Luxembourg, represented by C. Schiltz, acting as Agent,

Hungary, represented by M. Fehér, K. Szűzjártó and K. Molnár, acting as Agents,

Republic of Austria, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

Slovak Republic, represented by B. Ricziová, acting as Agent,

Republic of Finland, represented by H. Leppo, acting as Agent, interveners in the appeal in Case C-593/10 P,

the other parties to the proceedings being:

Yassin Abdullah Kadi, represented by D. Vaughan QC, V. Lowe QC, J. Crawford SC, M. Lester and P. Eeckhout, Barristers, G. Martin, Solicitor, and by C. Murphy, applicant at first instance,

French Republic, represented by E. Belliard, G. de Bergues, D. Colas, A. Adam and E. Ranaivoson, acting as Agents, intervener at first instance,

THE COURT (Grand Chamber),
composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, M. Ilieș, L. Bay Larsen, T. von Danwitz and M. Berger, Presidents of Chambers, U. Löhmus, E. Levits, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby, Judges,
Advocate General: Y. Bot,
Registrar: A. Impellizzeri, Administrator,
having regard to the written procedure and further to the hearing on 16 October 2012, after hearing the Opinion of the Advocate General at the sitting on 19 March 2013,
Since the late 1990s, and even more since the attacks of 11 September 2001 in the United States, the Security Council has adopted a number of resolutions under Chapter VII of the United Nations Charter to combat terrorism. These resolutions have been progressively extended to include new threats, with the freezing of assets and even the designation of individuals and entities associated with terrorism. The resolutions provide for the establishment of a ‘focal point’ within the Security Council, responsible for the implementation of those actions. That focal point was established in March 2007.

In order to deal with delisting requests made by organisations, entities, or persons named for that purpose in the Consolidated List, they must provide a statement of case; the statement of case must include as much detail as possible, whether such detail is provided in the form of information or documents. The Security Council may decide, when it adds a name to the Consolidated List, to make accessible on its website a narrative summary of reasons for listing. The Security Council may also decide, when it adds a name to the Consolidated List, to provide a narrative summary of reasons for listing, including for use by the [Sanctions] Committee for development of the summary described in (paragraphs 12 and 13) below, or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States.

The Charter of the United Nations provides, first, that the Sanctions Committee, when it adds a name to its Consolidated List, is to make accessible on its website ‘a narrative summary of reasons for listing’ names on that list before the adoption of Resolution 1822/2008. That resolution provides, secondly, that that committee is to make accessible on the same site, ‘narrative summaries of reasons for listing names on that list before the adoption of Resolution 1822/2008.’

Judgment

Since the late 1990s, and even more since the attacks of 11 September 2001 in the United States, the Security Council has adopted a number of resolutions under Chapter VII of the United Nations Charter to combat international terrorism and the implementation of those actions by the European Union.

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Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names to the Consolidated List, they must provide a statement of case. The statement of case must provide as much detail as possible, whether such detail is provided in the form of information or documents. The Security Council may decide, when it adds a name to the Consolidated List, to make accessible on its website ‘a narrative summary of reasons for listing’ names on that list before the adoption of Resolution 1822/2008. As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an ‘Office of the Ombudsperson’ whose task, under paragraph 20 thereof, is to assist the Sanctions Committee in the consideration of such requests. Under that same paragraph, the person appointed to be the Ombudsperson must be an individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, including law, human rights, counter-terrorism, and sanctions. The mandate of the Ombudsperson, as described in Annex II to that resolution, covers a stage of gathering information from the State concerned, the focal point, and the Security Council, and of advising the Sanctions Committee on the matter; it also includes, in the case of States that do not have an Ombudsperson, the provision of information by the focal point. The Office of the Ombudsperson may be engaged in a comprehensive report on its activities, and the report to the Sanctions Committee, and after deciding whether to approve that request.

Since the Charter of the United Nations states that in the event of a conflict between its obligations and those of the Members of the United Nations, the obligations of the United Nations are to prevail. The obligations of the Members of the United Nations under that Charter are to be determined under international law, the obligations of the United Nations under that Charter are to prevail.

Legal context

Chapter VII of the United Nations Charter provides for the maintenance of international peace and security, through the action of the Security Council. The Charter defines the action to be taken in such cases as follows: (a) in determining the existence of any such threat, any such breach, or any such act, and is to order the Security Council to determine the existence of any such threat, any such breach, or any such act, and (b) in acting in accordance with that determination. The Security Council may decide, when it adds a name to the Consolidated List, to make accessible on its website a narrative summary of reasons for listing names on that list before the adoption of Resolution 1822/2008.
Common Foreign and Security Policy, that European Union action was required in order to implement the Security Council Resolutions on combating international terrorism, the Council adopted a series of regulations providing for, inter alia, the freezing of the assets of organisations, entities and individuals identified by the Sanctions Committee.

In parallel with the regime described above, which is aimed solely at organisations, entities and individuals designated by name by the Sanctions Committee as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban, there exists a wider regime of sanctions provided for by Security Council Resolution 1373 (2001) of 28 September 2001, which was likewise adopted in response to the terrorist attacks of 11 September 2001. That resolution, which also provides for asset-freezing measures, differs from the resolutions mentioned above in that the identification of the organisations, entities or persons which it is intended to cover is left entirely to the discretion of the States.

At European Union level, Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and by Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70, and corrigendum, OJ 2010 L 52, p. 58). Those measures contain a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

Background to the proceedings

The case which gave rise to the Kadi judgment

On 17 October 2001 Mr Kadi, identified as being an individual associated with Usama bin Laden and the Al-Qaeda network, was listed on the Sanctions Committee Consolidated List.


On 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review.

By judgment of 21 September 2005 in Case T-315/01 Kadi v Council and Commission [2005] ECR I-3469, the General Court dismissed that action. In essence, the General Court held that it followed from the principles governing the relationship between the international legal order under the United Nations and the European Union legal order that Regulation No 881/2002, being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review of its internal lawfulness and thus enjoyed immunity from jurisdiction, except as regards its compatibility with rules falling within the ambit of *jus cogens*, understood as a body of rules of public international law having the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when implementing Security Council resolutions, it does not follow from the principles governing the international legal order under the United Nations that an act adopted by the European Union such as Regulation No 881/2002 thereby enjoys immunity from jurisdiction. The Court added that there is no basis for such immunity in the EC Treaty.

In those circumstances the Court held, in paragraphs 326 and 327 of the Kadi judgment, that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court’s reasoning was consequently vitiated by an error of law.

Ruling on the action brought by Mr Kadi before the General Court, the Court held, in paragraphs 336 to 341 of the Kadi judgment, that the effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard. The Court stated that, as regards a decision that a person’s name should be listed for the first time, for reasons connected with the effectiveness of the restrictive measures at issue and with the objective of the regulation concerned, it was necessary that that disclosure and that hearing should occur not prior to the adoption of that decision but when that decision was adopted or as swiftly as possible thereafter.

In paragraphs 345 to 349 of the Kadi judgment, the Court added that, since the Council had neither communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not been in a position effectively to make known his point of view in that regard, with the consequence that the rights of defence and the right to effective judicial review had been infringed. The Court also stated, in paragraph 350 of that judgment, that that infringement had not been remedied before the Courts of the European Union, given that the Council had not adduced before them any such evidence. In paragraphs 369 to 371 of that judgment, the Court concluded, on the same grounds, that Mr...
Kadi’s fundamental right to respect for property had been infringed.

The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the infringements found.

The response of the European Union institutions to the Kadi judgment and the contested regulation

On 21 October 2008 the Chairman of the Sanctions Committee communicated the narrative summary of reasons for Mr Kadi’s listing on that committee’s Consolidated List to France’s Permanent Representative to the UN, and authorised its transmission to Mr Kadi.

That summary of reasons was worded as follows:

‘The individual Yasin Abdullah Ezzedine Qadi … satisfies the standard for listing by the [Sanctions Committee] because of his actions in (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; (b) supplying, selling, or transferring arms and related material to; (c) recruiting for; or (d) otherwise supporting acts or activities of; Al-Qaeda, Usama bin Laden or the Taliban, any cell, affiliate, splinter group or derivative thereof (see United Nations Security Council Resolution 1822 (2008), paragraph 2).

Mr Qadi has acknowledged that he is a founding trustee and directed the actions of the Muwafaq Foundation. The Muwafaq Foundation historically operated under the umbrella of Makhtab Al-Khidamat/Al Kifah (QE.M.12.01), an organisation founded by Mr Abdullah Azzam and Mr Usama Muhammed Awad bin Laden (QE.B.8.01), and the predecessor to Al-Qaeda (QE.A.4.01). Following the dissolution of Makhtab Al-Khidamat/Al Kifah in early June 2001 and its absorption into Al-Qaeda, a number of NGOs formerly associated with Makhtab Al-Khidamat/Al Kifah, including the Muwafaq Foundation, also joined with Al-Qaeda.

In 1992, Mr Qadi hired Mr Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (QL.A.25.01) to head the European offices of the Muwafaq Foundation. During the mid-1990s, Mr Al-Ayadi also headed the Muwafaq Foundation branch in Bosnia and Herzegovina. Mr Qadi hired Mr Al-Ayadi on the recommendation of known Al-Qaeda financier Mr Wa’el Hamza Abd Al-Fatah Julaidan (QLJ.79.02), who fought with Mr bin Laden in Afghanistan in the 1980s. At the time of his appointment by Mr Qadi as the Muwafaq Foundation’s European director, Mr Al-Ayadi was operating under agreements with Mr bin Laden. Mr Al-Ayadi was one of the principal leaders of the Tunisian Islamic Front, went to Afghanistan in the early 1990s to receive paramilitary training, and then went to Sudan with others to meet Mr bin Laden, with whom they concluded a formal agreement regarding the reception and training of Tunisians. They later met with Mr bin Laden a second time, securing an agreement for bin Laden collaborators in Bosnia and Herzegovina to receive Tunisian mujahidin from Italy.

In 1995, the leader of Al-Gama’a at Al-Islamiya, Mr Talad Fuad Kassem, said that the Muwafaq Foundation had provided logistical and financial support for a mujahidin battalion in Bosnia and Herzegovina. In the mid-1990s, the Muwafaq Foundation was involved in providing financial support for terrorist activities of the mujahidin, as well as arms trafficking from Albania to Bosnia and Herzegovina. Some involvement in the financing of these activities was provided by Mr bin Laden.

Mr Qadi was also a major shareholder in the now closed Sarajevo-based Depositna Banka, in which Mr Al-Ayadi also held a position and acted as nominee for Mr Qadi’s shares. Planning sessions for an attack against a United States facility in Saudi Arabia may have taken place at this bank.

Mr Qadi further owned several firms in Albania which funnelled money to extremists or employed extremists in positions where they controlled the firm’s funds. Mr Bin Laden provided the working capital for four or five of Mr Qadi’s companies in Albania.’

That summary of reasons was also published on the website of the Sanctions Committee.

On 22 October 2008 France’s Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No 881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

On 10 November 2008 Mr Kadi sent his comments to the Commission. He argued, on the basis of documents certifying that the Swiss, Turkish and Albanian authorities had decided not to pursue criminal investigations against him concerning his alleged support of terrorist organisations or involvement in financial crime, that, whenever he had been given the opportunity to express his point of view on the evidence said to incriminate him, he had been able to demonstrate that the allegations made against him were unfounded, and he requested the production of the evidence in support of the claims and assertions made in the summary of reasons relating to his being listed on the Sanctions Committee Consolidated List and the relevant documents in the Commission’s file, and asked that he be allowed to submit comments on that evidence. While drawing attention to the vagueness and generality of a number of the allegations contained in that summary of reasons, he disputed, with supporting evidence, that any of the reasons relied on against him were well founded.

On 28 November 2008 the Commission adopted the contested regulation.

According to recitals 3 to 6, 8 and 9 of the preamble to that regulation:

‘(3) In order to comply with [the Kadi judgment], the Commission has communicated the … [summary] of reasons provided by the … Sanctions Committee, to Mr Kadi … and given [him] the opportunity to comment on these grounds in order to make [his] point of view known.

(4) The Commission has received comments by Mr Kadi … and examined these comments.

(5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by the … Sanctions Committee, includes Mr Kadi …

(6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network.

(8) In view of this, Mr Kadi … should be added to Annex I.

(9) This Regulation should apply from 30 May 2002, given the preventive nature and objectives of the freezing of funds and economic resources under Regulation … No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the Kadi judgment].’

In accordance with Article 1 of the contested regulation and the annex thereto, Annex I to
Mr Kadi’s rights of the restrictive measures to which he had been subject for almost ten years was marked and, in paragraphs 171 to 180 of the judgment under appeal, the need to protect the confidentiality of the information challenged was at issue in this instance.

In paragraph 128 of the judgment under appeal, the General Court observed that, ‘the principle of a full and rigorous judicial review of freezing measures such as those at issue in this instance’.

Exercising the second and fifth pleas in law in support of annulment, the General Court found, in paragraphs 171 to 180 of the judgment under appeal, that there was a breach of Mr Kadi’s rights of the restrictive measures to which he had been subject for almost ten years was marked and, in paragraphs 171 to 180 of the judgment under appeal, the need to protect the confidentiality of the information challenged was at issue in this instance.

The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008 and is applicable from 30 May 2002.

Mr Kadi was refused access by the Commission to the evidence against him despite his express request, whilst no balance was struck between his interests and the need to protect the confidentiality of the information challenged.

The procedure before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 26 February 2009, Mr Kadi brought an action for annulment of the contested regulation in so far as it concerns him. In support of his claims, he put forward five pleas in law. The second plea alleged a disproportionate restriction on the right to property.

The General Court further found, in paragraphs 181 to 184 of the judgment under appeal, that the Commission considered itself strictly bound by the findings of the Sanctions Committee and made no effort to refute the exculpatory evidence adduced by Mr Kadi.

The General Court also found, in paragraphs 181 to 184 of the judgment under appeal, that the Commission considered itself strictly bound by the findings of the Sanctions Committee and made no effort to refute the exculpatory evidence adduced by Mr Kadi.

The General Court therefore annulled the contested regulation in so far as it concerns Mr Kadi.
The Commission, the Council and the United Kingdom put forward various grounds in support of their respective appeals. There are, in essence, three. The first ground, raised by the Council, alleges an error of law in that the contested regulation was not recognised as having immunity from jurisdiction. The second ground, raised by the Commission, the Council and the United Kingdom, alleges errors of law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third ground, again raised by those three appellants, alleges that the General Court erred in its examination of Mr Kadi’s pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality.

The first ground of appeal: error of law in that the contested regulation was not recognised as having immunity from jurisdiction

Arguments of the parties

In relation to the first ground of appeal, the Council, supported by Ireland, the Kingdom of Spain and the Italian Republic, complains that the General Court erred in law, in particular in paragraph 126 of the judgment under appeal, by refusing, pursuant to the Kadi judgment, to recognise that the contested regulation had immunity from jurisdiction. The Council, supported by Ireland, formally requests the Court to reconsider the principles set out in that regard in the Kadi judgment.

The request to reopen the oral procedure

By letter of 9 April 2013, Mr Kadi requested that the Court reopen the oral procedure, claiming, in essence, that statements made in point 117 of the Opinion of the Advocate General in relation to the issue of respect for the rights of the defence are contradicted by the findings of fact made by the General Court, in paragraphs 171 and 172 of the judgment under appeal, which have not been debated by the parties in the course of these appeals.

In that regard, it must be recalled that, first, the Court may, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure, in accordance with Article 83 of the Rules of Procedure, if it considers that it lacks sufficient information or that the case should be decided on the basis of an argument which has not been debated between the parties (see judgment of 11 April 2013 in Case C-535/11 Novartis Pharma, paragraph 30 and case-law cited).

Secondly, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General’s involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (see judgment of 22 November 2012 in Case C-89/11 P E.ON Energie v Commission, paragraph 62 and case-law cited).

In the present case, the Court, having heard the Advocate General, considers that it has sufficient information to adjudicate and that the cases need not be decided on the basis of arguments which have not been debated between the parties. There is therefore no need to accede to the request to reopen the oral procedure.
It follows that the judgment under appeal, in particular paragraph 126 thereof, is not vitiated by any error of law. In accordance with the Kadi judgment, the contested regulation could not be afforded immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the United Nations Charter. That refusal wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security. That refusal, therefore, wholly ignores the measures of the United Nations Security Council, to which the United Nations Security Council should pay due regard, in the context of the Kadi judgment, to the determination of the Security Council of the measures of the United Nations Security Council.

The refusal to grant the contested regulation immunity from jurisdiction is also contrary to the principle of necessity. Mr. Kadi contends that any challenge to the position that a European Union measure such as the contested regulation does not have immunity from jurisdiction is contrary to the principle of necessity, as stated in paragraphs 326 and 327 of the judgment under appeal, to those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law, by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

The refusal to grant the contested regulation immunity from jurisdiction is contrary to the principle of necessity, as stated in paragraphs 326 and 327 of the judgment under appeal, to those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law, by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

The second ground of appeal must therefore be rejected. The second and third grounds of appeal: respectively, errors of law relating to the level of intensity of judicial review defined in the judgment under appeal and errors committed by the General Court in the judgment under appeal.

In relation to the second and third grounds of appeal, the Commission, the Council and the United Kingdom, supported by all the Member States intervening in the appeals, claim that the facts on which the appeal is based, as described in paragraphs 326 and 327 of the judgment under appeal, is, in essence, a criticism of errors of law vitiating the interpretation of the rights of the defence and the right to effective judicial protection adopted by the General Court in the judgment under appeal. The argument adopted by the General Court is, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law, by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

In the second place, it is claimed that the General Court wrongly held, in paragraph 138 of the judgment under appeal, that the regime referred to in paragraphs 14 and 15 of that judgment is one of Court jurisdiction, whereas the regime referred to in paragraphs 14 and 15 of that judgment is a regime of preliminary rulings and no regime of jurisdiction.

Second, the Commission, the Council and the United Kingdom, supported by all the Member States intervening in the appeals, claim that the facts on which the appeal is based, as described in paragraphs 326 and 327 of the judgment under appeal, is, in essence, a criticism of errors of law vitiating the interpretation of the rights of the defence and the right to effective judicial protection adopted by the General Court in the judgment under appeal. The argument adopted by the General Court is, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law, by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

The refusal to grant the contested regulation immunity from jurisdiction is contrary to the principle of necessity, as stated in paragraphs 326 and 327 of the judgment under appeal, to those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law, by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.
Supported by all the Member States intervening in the appeals, claim that the Court gave a perfectly clear indication, in the Kadi judgment, of the scope and intensity of the review of lawfulness applicable in this case. The Court explicitly stated, subject only to confidentiality requirements relating to public security, that the right of a party concerned to the disclosure of evidence relied on against him might be restricted in... to Mr Kadi thereasons for the listing of his name in Annex I to Regulation No 881/2002, and not to the failure to disclose information and evidence held by the Sanctions Committee.

Fifth, the Commission contends that the General Court erred by failing, except as regards the parallel proceedings brought before the Security Council, to take into account the United Nations Security Council Resolution 1822 (2008) of 20 August 2008, which is not the subject of the present appeal. The express text of that Resolution states that the listing of a person in Annex I to the United Nations Resolution 1390 (2002) of 20 December 2002 on the Al-Qaeda network and Usama bin Laden has the purpose of strengthening the capacity of the United Nations to combat international terrorism. The Resolution contains specific conditions for delisting from the Consolidated List, including that any measures under the UN Resolution 1390 (2002) be lifted. The General Court ignored that the listing of Mr Kadi was in the context of the UN Resolution 1390 (2002). The Court's judgment is defective.

Mr Kadi responds, first, that the General Court correctly held, in the judgment under appeal, that the Court gave a perfectly clear indication, in the Kadi judgment, of the scope and intensity of the review of lawfulness applicable in this case. The Court explicitly stated, subject only to confidentiality requirements relating to public security, that the right of a party concerned to the disclosure of evidence relied on against him might be restricted in...
The extent of the rights of the defence and of the right to effective judicial protection

In the second place, the General Court’s approach is consistent with European Union law, which requires respect for fundamental rights and the guarantee of independent and impartial judicial review, including review of European Union measures based on international law. The extent of the rights of the defence and of the right to effective judicial protection must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of acts of the institutions (see, to that effect, judgment of 8 December 2011 in Case C-300/11 ZZ, paragraph 53 and case-law cited).

Third, after noting that the considerations of the General Court on the nature of the restrictive measures can no longer be described as presumptive and have become persuasive, by reason of the extent of the rights of the defence and of the right to effective judicial protection, Mr Kadi none the less argues that, in his particular case, the review of the contested regulation that the General Court has conducted reveals a number of general and unsubstantiated allegations, which Mr Kadi has not been in a position to effectively rebut.

Fourth, Mr Kadi contends that the legal proceedings in the United States are of no relevance to this case, given that the purpose of those proceedings is the annulment of his listing on the list of the Office of the Ombudsperson, whereas, in the present case, the contested regulation is relevant, not only to the person concerned, but also to other persons in the same situation, and not only to the persons who have been subject to them for a very long time, a factor which justifies full and rigorous review of the contested regulation.

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The extent of the rights of the defence and of the right to effective judicial protection must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of acts of the institutions (see, to that effect, judgment of 8 December 2011 in Case C-300/11 ZZ, paragraph 53 and case-law cited).

Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of the case, in particular the nature of the act at issue, the context of its adoption and the legal rules governing the examination procedure (see, to that effect, judgment of 4 April 2013 in Case C-300/11 ZZ, paragraph 53 and case-law cited).

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Mr Kadi contends that the legal proceedings in the United States are of no relevance to this case, given that the purpose of those proceedings is the annulment of his listing on the list of the Office of the Ombudsperson, whereas, in the present case, the contested regulation is relevant, not only to the person concerned, but also to other persons in the same situation, and not only to the persons who have been subject to them for a very long time, a factor which justifies full and rigorous review of the contested regulation.

Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of the case, in particular the nature of the act at issue, the context of its adoption and the legal rules governing the examination procedure (see, to that effect, judgment of 4 April 2013 in Case C-300/11 ZZ, paragraph 53 and case-law cited).
In this case, it is necessary to determine whether, in the light of the requirements stated in particular in Article 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international peace and security while respecting international law, and specifically the principles of the Charter of the United Nations and of the European Union, the fact that Mr Kadi and the others concerned to whom the decision of the Sanctions Committee relates are not placed in a position in which they are able to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an appeal, constitutes an infringement of the rights of the defence and the right to effective judicial protection.

In the context of the adoption of a Common Position or a joint action adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action maintained under the relevant Security Council resolutions, the competent Union authority must ensure that it is in a position to re-examine the summary of reasons submitted by the Sanctions Committee, in the light of comments and any exculpatory evidence provided therewith, in order to determine whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing, in order to obtain, in that spirit of effective judicial protection, the material on which the individual concerned can rely, in the context of the decision to list or maintain the listing of the individual concerned on the Consolidated List, in order to give effect to that decision, in the light of the relevant principles of the Charter of the United Nations, or of the EU Treaty relating to the common foreign and security policy.

As regards the question whether, as in this case, the summary of reasons referred to in paragraphs 10 and 11 of the judgment was made public, and the right of those concerned to make known their views on the grounds advanced against them, the Court notes that it is for the individual concerned, in the light of the relevant principles of the Charter of the United Nations, or of the EU Treaty relating to the common foreign and security policy, to ensure that it is in a position to defend their rights, in the light of the relevant principles of the Charter of the United Nations, or of the EU Treaty relating to the common foreign and security policy, whether there is any point in bringing an appeal, and to seek the assistance of the competent Union authority, in the light of comments and any exculpatory evidence provided therewith, in order to determine whether it is necessary to re-examine the summary of reasons submitted by the Sanctions Committee, in the light of comments and any exculpatory evidence provided therewith, in order to determine whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing, in order to obtain, in that spirit of effective judicial protection, the material on which the individual concerned can rely, in the context of the decision to list or maintain the listing of the individual concerned on the Consolidated List, in order to give effect to that decision.
117 The Courts of the European Union must, further, determine whether the competent European
ingen authorities have complied with the procedural safeguards set out in paragraphs 111 to 114 of
this judgment and the obligation to state reasons laid down in Article 296 of the treaty, as mentioned
in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are
reasonably related to the evidence and to the matters of fact or law relied on in the
decisions. If, on the other hand, the competent European Union authority relies on
information or evidence produced before the European Union courts, it is necessary to strike
an appropriate balance between the requirements attached to the right to effective judicial
protection, in particular the right of an adversarial procedure, and those flowing from the
security of the Union or its Member States or the conduct of its international relations.

118 The Courts of the European Union conclude that the reasons do not preclude disclosure
at the very least on the basis of the information or evidence which has been disclosed,
irrespective of whether such possibilities are taken into account or whether such evidence
or information is relevant. In such circumstances, it is none the less the task of the
Courts of the European Union, before whom the secrecy or confidentiality of the
information or evidence is no valid objection, to apply, in the course of
the review by the European Union courts, techniques which accommodate, on the one hand,
the requirement for the disclosure of information or evidence which has been disclosed,
which may be relevant to such an examination (see, by analogy, paragraph 59).

119 To that end, it is for the European Union courts, when examining the information or
evidence relating to the decision, to ensure that the reasons relied on are sufficiently
described in substance to support that decision, that the reasons relied on are satisfactorily
related to the evidence and to the matters of fact or law relied on in the decision
and, in particular, whether the reasons relied on are reasonably related to the evidence
and to the matters of fact or law relied on in the decision.

120 To that end, it is for the European Union courts, when examining the information or
evidence relating to the decision, to ensure that the reasons relied on are sufficiently
described in substance to support that decision, that the reasons relied on are satisfactorily
related to the evidence and to the matters of fact or law relied on in the decision
and, in particular, whether the reasons relied on are reasonably related to the evidence
and to the matters of fact or law relied on in the decision.

121 That is because it is the task of the competent European Union authority to establish, in
the event of a challenge, that the reasons relied on by the person concerned are well founded,
and it is for the European Union courts, in the examination of the information or
evidence, to determine whether the reasons relied on by the person concerned are well founded,
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and it is for the European Union courts, in the examination of the information or
evidence, to determine whether the reasons relied on by the person concerned are well founded,
On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union the information or evidence which is in the sole possession of the Sanctions Committee, and, endorsing the slender, that the refusal occasioned by the Sanctions Committee to provide the information or evidence, which amounts to a refusal of a person whose name is listed on the Sanctions Committee Consolidated List, and, subsequently, in the European Court of Human Rights, endorsing the decision of the Sanctions Committee, is sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, as defined in paragraphs 117 to 129 of the judgment, the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is not well founded, the person concerned will have the right to appeal to the Courts of the European Union. In the absence of one such reason, the Courts of the European Union will annul the contested decision.

Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned (see, to that effect, the judgment, paragraphs 358, Kadi v. Council and Commission, No 10593/08, not yet published in the Reports of Judgments and Decisions).

Further, and bearing in mind that the assessment, by the General Court, of whether the statement of reasons is or is not sufficient is subject to review by the Court on an appeal (see, to that effect, paragraph 64, v. Bamba, paragraph 41 and case-law cited), the General Court erred in law by basing, as is apparent from paragraphs 174, 177, 188 and 192 to 194 of the judgment under appeal, its finding that the statement of reasons is or is not sufficient in the light of the observations presented by that person and any exculpatory evidence that may be produced by him. The errors of law affecting the judgment under appeal

139 Contrary to what is stated in paragraphs 181, 183 and 184 of the judgment under appeal, the passages in the Kadi judgment from which the General Court referred in those paragraphs do not indicate that the fact, that the concerned and the Courts of the European Union do not have access to information or evidence which is not accessible to the person concerned and, subsequently, to the Courts of the European Union, constitutes, as such, an infringement of the rights of the defence or the right to effective judicial protection.

140 On the other hand, the same cannot be said of the other reasons stated in the summary provided in the judgment under appeal, the argument of Mr Kadi set out in the fourth indent of paragraph 157 of that judgment, the last of which is or is not sufficient in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

141 Admittedly, as the General Court correctly ruled by endorsing, in paragraph 177 of the judgment under appeal, the argument of Mr Kadi set out in the fourth indent of paragraph 157 of the judgment under appeal, the statement of reasons is or is not sufficient if the assertions contained in the reasons set out in paragraphs 81 to 84 of the judgment under appeal are not sufficiently detailed, even though such a general conclusion cannot be drawn if each of those reasons is examined separately.

142 The errors of law affecting the judgment under appeal

143 The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is held to be null and void, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (see, to that effect, Council v. Abdulrahim C. 239/12 v. Council and Commission, paragraphs 67 to 86).

138 Hence, in paragraphs 173, 181, 183 and 184 of the judgment under appeal, the Court of Justice erred in law by basing its finding on the principle of proportionality, and had the right to review whether the reasons contained in the summary provided by the Sanctions Committee and expressed in the paragraphs in question are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

137 On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union the information or evidence which is in the sole possession of the Sanctions Committee, and, endorsing the slender, that the refusal occasioned by the Sanctions Committee to provide the information or evidence, which amounts to a refusal of a person whose name is listed on the Sanctions Committee Consolidated List, and, subsequently, in the European Court of Human Rights, endorsing the decision of the Sanctions Committee, is sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

136 If follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in the European Court of Human Rights, endorsing the decision of the Sanctions Committee, information and evidence in its possession concerning the person concerned and, subsequently, to the Courts of the European Union, if and as they are necessary for the exercise of those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of the person's measures, provide (see, on the other hand, the public availability and suspension of the Kadi judgment, paragraphs 64, Haddad v. Council and Netherlands v. Haddad Organization of Islam, paragraphs 120, and judgment of 28 May 2013 in Case C-259/12 P Pejcinovic v. Federal Supreme Court of Switzerland, paragraphs 70 and case-law cited).

135 It follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in the European Court of Human Rights, endorsing the decision of the Sanctions Committee, information and evidence in its possession concerning the person concerned and, subsequently, to the Courts of the European Union, if and as they are necessary for the exercise of those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of the person's measures, provide (see, on the other hand, the public availability and suspension of the Kadi judgment, paragraphs 64, Haddad v. Council and Netherlands v. Haddad Organization of Islam, paragraphs 120, and judgment of 28 May 2013 in Case C-259/12 P Pejcinovic v. Federal Supreme Court of Switzerland, paragraphs 70 and case-law cited).

134 The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is held to be null and void, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (see, to that effect, Council v. Abdulrahim C. 239/12 v. Council and Commission, paragraphs 67 to 86).
The unlawfulness of the contested regulation

143 The first reason, based on Mr Kadi’s acknowledgement that, in his comments of 10 November 2008 submitted in support of his action before the General Court, he had declared that he was involved in international strategic decisions of the activities of the entity concerned, had ceased to operate by 1998 at the latest and in any event by June 2001, in particular, and disputed that the Muwafaq Foundation in the periods identified by the Commission had engaged in any activities in support of any terrorist organisation, including Al-Qaeda.

144 The second reason is based on the fact that, in accordance with the Convention of 1980 and the Declaration of Trust, Mr Kadi claimed that the objects and purpose of that foundation were exclusively charitable and that he was involved in international strategic decisions of the activities of the entity concerned, had ceased to operate by 1998 at the latest and in any event by June 2001, in particular, and disputed that the Muwafaq Foundation in the periods identified by the Commission had engaged in any activities in support of any terrorist organisation, including Al-Qaeda.

In its reply of 8 December 2008 to the comments of Mr Kadi, the Commission contended that the fact that some or all of the activities of the entity concerned had ceased did not rule out the possibility that that entity, having continuous legal personality, had joined Al-Qaeda.

152 In its reply of 8 December 2008 to the comments of Mr Kadi, also submitted to the General Court, the Commission contended that the fact that some or all of the activities of the entity concerned had ceased did not rule out the possibility that that entity, having continuous legal personality, had joined Al-Qaeda.

153 It is however clear that no information or evidence has been produced to substantiate the allegations concerning the role and duties of Mr Kadi in relation to that foundation are not such as to justify the adoption, at European Union level, of restrictive measures against him.

145 That second reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and the context of the appointment in question and information on the individuals involved.

147 That third reason is based on the fact that Mr Kadi was one of the major shareholders in the Maghreb Al-Athar company and that, in 1992, Mr Talal Fouda, a Tunisian national, is said to have agreed to transfer to Mr Kadi, on the recommendation of Mr Julaidan, 20% of the shares of the said company.

146 That third reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and the context of the appointment in question and information on the individuals involved.

155 The third reason, which is based on a statement allegedly made in 1995 by Mr Talal Fouda, the leader of the Al-Gama’at al Islamiyya, to the effect that the Muwafaq Foundation provided logistical and financial support to mujahidin activities of those mujahidin and to the reception and training of Tunisians and, later, an agreement regarding the reception of Tunisian mujahidin from Italy by Usama bin Laden’s collaborators in Bosnia and Herzegovina.

154 It is possible that the material cited by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-Ayadi, combined with the fact that Mr Al-Ayadi and Mr Julaidan were supporting Mr Matar, who at that time was working with him on a project supporting vocational training for refugees from the former Yugoslavia, including Bosnian and Serbian refugees, from Mr Matar and Mr Al-Ayadi, who were working in Bosnia and Herzegovina, the former Yugoslav republics, with mention of an alleged link between that entity, on the one hand, and Usama bin Laden and Al-Qaeda, on the other.

148 That fourth reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and the context of the appointment in question and information on the individuals involved.

156 In that regard, while it is conceivable that the material relied on in the summary of reasons provided by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-Ayadi and the alleged links between Mr Al-Ayadi and Al-Qaeda, the material relied on in the summary of reasons provided by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-Ayadi and the alleged links between Mr Al-Ayadi and Al-Qaeda, is not sufficient to justify the adoption, at European Union level, of restrictive measures against him.

149 Contrary to what is stated in paragraph 15 of the judgment under appeal, fourth reason is sufficiently detailed and specific, in that it identifies the financial institution through which Mr Kadi and Mr Julaidan were involved in international strategic decisions of the activities of the entity concerned, had ceased to operate by 1998 at the latest and in any event by June 2001, in particular, and disputed that the Muwafaq Foundation in the periods identified by the Commission had engaged in any activities in support of any terrorist organisation, including Al-Qaeda.

150 Although it emerges from paragraphs 138 to 140 and 142 to 149 of this judgment that errors of law were made by the General Court, it is necessary to determine whether, notwithstanding those errors, the opening part of the judgment under appeal can stand or should be set aside as being without legal prejudice to the determination of whether suspicions of involvement in terrorist activities, on the one hand, and on the other, are justified.
Ayadi on the recommendation of Mr. Julaidan and the alleged involvement of Mr. Al Antar and Mr. Julaidan in terrorist activities in association with Usama bin Laden might have been deemed sufficient to justify the initial inclusion, in 2002, of Mr. Kadi's name in the list of persons subject to restrictive measures against him. However, since no information or evidence has been produced to support the claim that Ayadi, Julaidan, and Al Antar are active in terrorist activities, and since there is no indication that these individuals have engaged in any terrorist activities, the inclusion of Mr. Kadi's name in the list of persons subject to restrictive measures against him is not justified.

157 As regards the third reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 146 of this judgment, in his comments of 10 November 2008, Mr. Kadi asserted that he had never provided financial or any other support to the Muwafaq Foundation, nor to any other entity subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

158 In its reply of 8 December 2008 to Mr. Kadi's comments, the Commission asserted that the statement of Mr. Talad Fuad Kassem served as partial corroboration of the fact that Mr. Kadi had used his position for purposes other than ordinary business purposes. The Commission added that, in such circumstances, it was irrelevant whether or not Mr. Kadi knew Mr. Talad Fuad Kassem.

159 However, as regards the fourth reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 148 of this judgment, in his comments of 10 November 2008, Mr. Kadi denied ever providing material or any other support to Depositna Banka, nor to any other entity subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

160 In its reply of 8 December 2008 to Mr. Kadi's comments, the Commission asserted that the indications that Depositna Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration of the fact that Mr. Kadi had used his position for purposes other than ordinary business purposes. The Commission added that, in such circumstances, it was irrelevant whether or not Mr. Kadi knew Mr. Talad Fuad Kassem.

161 It follows, from the analysis set out in paragraphs 141 and 142 of this judgment, that the reasons, other than the two reasons that the Sanctions Committee relied on in its decision of 8 December 2008, are not such as to affect the validity of the decision to include Mr. Kadi's name in the list of persons and entities subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

162 As regards the reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 147 of this judgment, in his comments of 10 November 2008, Mr. Kadi denied ever providing material or any other support to the Arab International Foundation, nor to any other entity subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

163 In its reply of 8 December 2008 to Mr. Kadi's comments, the Commission asserted that the information provided by Mr. Talad Fuad Kassem is not such as to affect the validity of the decision to include Mr. Kadi's name in the list of persons and entities subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

164 As regards the fifth reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 148 of this judgment, in his comments of 10 November 2008, Mr. Kadi denied ever providing material or any other support to the Arab International Foundation, nor to any other entity subject to restrictive measures at the European Union level, the name of Mr. Kadi in the list of persons and entities subject to the restrictive measures at issue.

165 Consequently, the appeals must be dismissed.

166 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which apply to the procedure on appeal, the costs are to be apportioned between the parties according to their fault, unless the Court considers that the case is exceptional in that respect. According to Article 139(1) of those Rules, the Member States which have intervened in the proceedings are to bear their own costs.

167 Since the Commission, the Council and the United Kingdom have been unsuccessful, they must be ordered, in accordance with Mr. Kadi's pleadings, to pay the costs.

168 The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, as interveners, are to bear their own costs.

On those grounds, the Court (Grand Chamber):

1. Dismisses the appeals;

2. Orders the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland to pay the costs;

3. Orders the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, as interveners, to bear their own costs.
Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland to bear their own costs.

[Signatures]

Language of the case: English.
United States District Court, Southern District of New York
Opinion and Order of 9 January 2015

No. 13-CV-7146 JPO (2nd Cir. Jan 9, 2015)
I. Background

Plaintiffs Delama Georges, Alius Joseph, Lisette Paul, Felicia Paule, and Jean Rony Silfou are citizens of the United States or Haiti who claim that they or their relatives were killed or made ill by the cholera epidemic that erupted in Haiti in 2010. (Compl. ¶¶ 14-18.) The UN is an international organization founded in 1945 with the goals of “maintain[ing] international peace and security” and “promot[ing] and encourage[ing] respect for human rights.” (Id. ¶ 19.) The UN’s principal place of business is in New York. (Id.) MINUSTAH is a subsidiary body of the UN established in 2004 and based in Haiti. (Id. ¶¶ 20, 48.) Ban Ki-moon is and was, during the relevant time period, the Secretary-General of the UN. (Id. ¶ 21.) Mulet was the Special Representative of the Secretary-General and Head of MINUSTAH from March 31, 2010, to May 17, 2011 (id. ¶ 22), and is now the Assistant Secretary-General for UN Peacekeeping Operations (Dkt. No. 21).

Plaintiffs allege that in October 2010, Defendants deployed over 1,000 UN personnel from Nepal to Haiti without screening them for cholera, a disease that is endemic to Nepal and with which some of the personnel were infected. (Compl. ¶¶ 5, 59.) Plaintiffs further allege that Defendants stationed these personnel on a base at the banks of the Meille Tributary, which flows into Haiti’s primary source of drinking water, the Artibonite River. It was at this base, Plaintiffs contend, that these recently transferred personnel discharged raw untreated sewage into the tributary, causing an outbreak of cholera in Haiti. (Id. ¶¶ 6-9.)

Plaintiffs allege that Defendants have failed to establish any claims commission or other dispute resolution mechanism to resolve the claims of those who have been injured or who have lost family members to the cholera outbreak. This refusal, Plaintiffs contend, is in direct

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1 The following facts are taken from the Complaint. They are assumed true for the purposes of the motion.

Because Plaintiffs could not personally serve the Complaint, they moved this Court to affirm that service had been made or to permit service by alternative means. (Dkt. No. 4.) The UN did not respond to Plaintiffs’ motion; instead, the United States filed a “Statement of Interest” contending that Defendants are immune from Plaintiffs’ suit and requesting that the Court dismiss the Complaint for lack of subject matter jurisdiction. (Dkt. No. 21 (“Statement of Interest”).)

II. Discussion

A. Legal Standard

A case must be dismissed pursuant to Federal Rule of Civil Procedure 12(h)(3) if the court “determines at any time that it lacks subject-matter jurisdiction.” See also Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 250 (2d Cir. 2008) (“If a court perceives at any stage of the proceedings that it lacks subject matter jurisdiction, then it must take proper notice of the defect by dismissing the action.”). A defendant’s immunity from suit divests the Court of subject matter jurisdiction. See, e.g., Brzak v. United Nations, 597 F.3d 107, 111-12 (2d Cir. 2010) (affirming dismissal of suit against the UN for lack of subject matter jurisdiction on ground of immunity under the CPIUN); De Luca v. United Nations Org., 841 F. Supp. 531, 533 (S.D.N.Y. 1994) (dismissing claim against the UN for lack of subject matter jurisdiction on the ground of immunity from suit). The court, in determining whether it has subject matter jurisdiction, may refer to evidence outside the pleadings. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1011 (2d Cir. 1986)). In doing so, however, the court must accept as true all factual allegations in the complaint and “[c]onstrue[e] all ambiguities and draw[ ] all inferences” in favor of the plaintiff. Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005) (quoting Makarova, 201 F.3d at 113) (first alteration in original). The party asserting subject matter jurisdiction bears the burden of proving by a preponderance of the evidence that it exists. Makarova, 201 F.3d at 113 (citing Malik v. Meissner, 82 F.3d 560, 562 (2d Cir. 1996)).

B. Immunity from Suit of the United Nations and MINUSTAH

The Charter of the United Nations (“UN Charter”) states that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.” U.N. Charter art. 105, para. 1. The CPIUN, which was adopted less than a year after the UN Charter, defines the UN’s privileges and immunities in more detail. See Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, entered into force with respect to the United States Apr. 29, 1970, 21 U.S.T. 1418. The CPIUN provides that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, § 2. Because the CPIUN is self-executing, this Court must enforce it despite the lack of implementing legislation from Congress. Brzak, 597 F.3d at 111-12.

The Second Circuit’s decision in Brzak v. United Nations requires that Plaintiffs’ suit against the UN be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3). In Brzak, the Second Circuit unequivocally held that “[a]s the CPIUN makes clear, the United Nations enjoys absolute immunity from suit unless ‘it has expressly waived its immunity.’” 597 F.3d at 112 (quoting CPIUN art. II, § 2). Here, no party contends that the UN has expressly
waived its immunity. (Statement of Interest at 6 (“In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity.”)); (Dkt. No. 43, at 1 (“Waiver is not at issue here.”)). Accordingly, under the clear holding of Brzak, the UN is immune from Plaintiffs’ suit. In addition, MINUSTAH, as a subsidiary body of the UN, is also immune from suit. See Sadikoglu v. United Nations Dev. Programme, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011).

Plaintiffs argue that the UN has materially breached the CPIUN such that it is not entitled to the “benefit of the bargain.” Specifically, Plaintiffs insist that the UN has breached section 29(a), which provides that “[t]he United Nations shall make provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.” CPIUN art. VIII, § 29(a). Because the UN has failed to provide any mode of settlement for the claims at issue here, Plaintiffs argue, it is not entitled to benefit from the CPIUN’s grant of absolute immunity.

This argument is foreclosed by Brzak. In Brzak, the plaintiffs argued that the UN’s dispute resolution mechanism was inadequate to resolve their case, and that this inadequacy stripped the UN of its immunity. The Second Circuit rejected this argument on the ground that it ignores the “express waiver” requirement of the CPIUN. Brzak, 597 F.3d at 112. Here too, construing the UN’s failure to provide “appropriate modes of settlement” for Plaintiffs’ claims as subjecting the UN to Plaintiffs’ suit would read the strict express waiver requirement out of the CPIUN.

Moreover, nothing in the text of the CPIUN suggests that the absolute immunity of section 2 is conditioned on the UN’s providing the alternative modes of settlement contemplated by section 29. See Tachiona v. United States, 386 F.3d 205, 216 (2d Cir. 2004) (“When interpreting a treaty, we begin with the text of the treaty and the context in which the written words are used.”) (internal quotation marks omitted) (interpreting the CPIUN)). As the Second Circuit held in Brzak, the language of section 2 of the CPIUN is clear, absolute, and does not refer to section 29: the UN is immune from suit unless it expressly waives its immunity. Brzak, 597 F.3d at 112; see also Sadikoglu, 2011 WL 4953994, at *5 (“Nor does the contested status of the parties’ efforts to arbitrate or settle the current dispute strip [the United Nations Development Programme] of its immunity. The CPIUN merely requires the UN to ‘make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.’ However, nothing in this section or any other portion of the CPIUN refers to or limits the UN’s absolute grant of immunity as defined in article II—expressly or otherwise.” (citation omitted)). Further, the CPIUN’s drafting history indicates at most the commitment that, pursuant to section 29, the UN will provide a dispute resolution mechanism for private claims; it does not, as Plaintiffs argue, indicate the intent that such a mechanism is required in order for the UN to claim immunity in any particular case. See Tachiona, 386 F.3d at 216 (“Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”) (brackets and internal quotation marks omitted)).

It is true that section 29 uses mandatory language, providing that the UN “shall make provisions for appropriate modes of settlement of . . . disputes . . . ” This language may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word “shall” in section 29 cannot fairly be read to override the clear and specific grant of “immunity from every form of legal process”—absent an express waiver—in section 2, as construed by the Second Circuit.
Finally, “in construing treaty language, ‘[r]espect is ordinarily due the reasonable views of the Executive Branch.’” *Id.* (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)) (alteration in original); see also *Swarna v. Al-Awadi*, 622 F.3d 123, 133 (2d Cir. 2010) (“[W]hile the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the ‘Executive Branch’s interpretation of a treaty is entitled to great weight.’” (quoting *Abbott v. Abbott*, 560 U.S. 1, 15 (2010))). For the reasons given above, the United States’ interpretation that the CPIUN’s grant of immunity is vitiates only by an express waiver of that immunity by the UN is reasonable. Here, where such an express waiver is absent, the UN and its subsidiary body MINUSTAH are immune from suit.

C. Immunity from Suit of Ban Ki-moon and Edmond Mulet

The UN Charter provides that “officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.” U.N. Charter art. 105, para. 2. The CPIUN further provides that “[t]he Secretary-General and all Assistant Secretaries-General shall be accorded . . . the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19. The Vienna Convention on Diplomatic Relations is the relevant international law here; that convention states that current diplomatic agents “enjoy immunity from [the] civil and administrative jurisdiction” of the United States, except in three situations, none of which is relevant here. See Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, entered into force with respect to the United States Dec. 13, 1972, 23 U.S.T. 3227, (the “Vienna Convention”); *Braz*, 597 F.3d at 113 (stating that, under the Vienna Convention, “current diplomatic envoys enjoy absolute immunity from civil and criminal process”). Thus, Ban Ki-moon and Edmond Mulet, both of whom currently hold diplomatic positions, are immune from Plaintiffs’ suit. Accordingly, Plaintiffs’ suit against them must be dismissed. See 22 U.S.C. § 254d (requiring a district court to dismiss “[a]ny action or proceeding against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention”).

III. Conclusion

For the foregoing reasons, the United Nations, MINUSTAH, Ban Ki-moon, and Edmond Mulet are absolutely immune from suit in this Court. Plaintiffs’ claims against these defendants are therefore DISMISSED under Rule 12(h)(3) for lack of subject matter jurisdiction. Plaintiffs’ motion for affirmation that service has been made, or, in the alternative, for service of process by alternative means is DENIED as moot.

The Clerk of Clerk is directed to close the motion at Docket Number 4 and to close the case.

SO ORDERED.

Dated: January 9, 2015
New York, New York

J. PAUL OETKEN
United States District Judge