INTERNATIONAL ORGANIZATIONS
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Codification Division of the United Nations Office of Legal Affairs

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REQUIRED READINGS (printed format)

Legal instruments and documents

1. Articles of Agreement of the International Bank for Reconstruction and Development, 1944
2. Charter of the United Nations, 1945
   For text, see Charter of the United Nations and Statute of the International Court of Justice
   For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 228
7. 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
8. Agreement Establishing the World Trade Organization, 1994
10. Articles on the Responsibility of International Organizations, 2011
    For text, see The Work of the International Law Commission, 8th ed., vol. II, p. 494
11. Chart of the United Nations System

Case law


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

19. *European Commission and Others v. Yassin Abdullah Kadi (Joined cases C-584/10 P, C-593/10 P and C-595/10 P), Judgment, ECJ, 18 July 2013*


**RECOMMENDED READINGS (electronic format)**

**Legal instruments and documents**

2. Articles of Agreement of the International Monetary Fund, 1944
3. Convention on International Civil Aviation, 1944
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
Case law


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

Legal writings (not reproduced)


Articles of Agreement of the International Bank for Reconstruction and Development, 1944

UNTS, vol. 2, p. 134
Table of Contents

INTRODUCTORY ARTICLE
The International Bank for Reconstruction and Development is established and shall operate in accordance with the following provisions:

ARTICLE I: Purposes

ARTICLE II: Membership in and Capital of the Bank

ARTICLE III: General Provisions Relating to Loans and Guarantees

ARTICLE IV: Operations

ARTICLE V: Organization and Management

ARTICLE VI: Withdrawal and Suspension of Membership: Suspension of Operations

ARTICLE VII: Status, Immunities and Privileges

ARTICLE VIII: Amendments

ARTICLE IX: Interpretation

ARTICLE X: Approval Deemed Given

ARTICLE XI: Final Provisions

SCHEDULE A: Subscriptions
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 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 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 territory, 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) 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 territory, 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.

(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.

2. Section added by amendment effective December 17, 1965.

(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 reloaned 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 1 (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 at least 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) All loan contracts shall stipulate the currency or currencies in which payments under the contract shall be made to the Bank. At the option of the borrowers however, such payments may be made in gold, or subject to the agreement of the Bank, in the currency of a member other than that prescribed in the contract.

(i) In the case of loans made under Section 1 (a) (i) of this Article, the loan contracts shall provide that payments to the Bank of interest, other charges and amortization shall be made in the currency loaned, unless the member whose currency is loaned agrees that such payments shall be made in some other specified currency or currencies. These payments, subject to the provisions of Article II, Section 9 (c), shall be equivalent to the value of such contractual payments at the time the loans were made, in terms of a currency specified for the purpose by the Bank by a three-fourths majority of the total voting power.

(ii) In the case of loans made under Section 1 (a) (ii) of this Article, the total amount outstanding and payable to the Bank in any one currency shall at no time exceed the total amount of the outstanding borrowings made by the Bank under Section 1 (a) (ii) and payable in the same currency.

(c) If a member suffers from an acute exchange stringency, so that the service of any loan contracted by that member or guaranteed by it or by one of its agencies cannot be provided in the stipulated manner, the member concerned may apply to the Bank for a relaxation of the conditions of payment. If the Bank is satisfied that some relaxation is in the interests of the particular member and of the operations of the Bank and of its members as a whole, it may take action under either, or both, of the following paragraphs with respect to the whole, or part, of the annual service:

(i) The Bank may, in its discretion, make arrangements with the member concerned to accept service payments on the loan in the member's currency for periods not to exceed three years upon appropriate terms respecting the use of such currency and the maintenance of its foreign exchange value; and for the repurchase of such currency on appropriate terms.

(ii) The Bank may modify the terms of amortization or extend the life of the loan, or both.

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 Governor-s 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 five members having the largest number of shares;

(ii) seven shall be elected according to Schedule B by all the Governors other than those appointed by the Governor-s as chairman.

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.
(e) 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.

(f) 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.

(g) 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.

(h) 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.

(i) 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

(a) 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.

(b) 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.

(c) 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.

(d) 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

(a) 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.

(b) Councilors 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 where 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.
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 L, 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 all liabilities to creditors have been discharged or provided for, and
(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.

(f) Any member receiving assets distributed by the Bank in accordance with (h) above, shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

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
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 all 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.

(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 any 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>Subscriptions (millions of dollars)</th>
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</thead>
<tbody>
<tr>
<td>Australia 200.0</td>
</tr>
<tr>
<td>Belgium 225.0</td>
</tr>
<tr>
<td>Bolivia 7.0</td>
</tr>
<tr>
<td>Brazil 105.0</td>
</tr>
<tr>
<td>Canada 325.0</td>
</tr>
<tr>
<td>Chile 35.0</td>
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<tr>
<td>China 600.0</td>
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<tr>
<td>Colombia 35.0</td>
</tr>
<tr>
<td>Costa Rica 2.0</td>
</tr>
<tr>
<td>Cuba 35.0</td>
</tr>
<tr>
<td>Czechoslovakia 125.0</td>
</tr>
<tr>
<td>Denmark (a) 17.5</td>
</tr>
<tr>
<td>Dominican Republic 2.0</td>
</tr>
<tr>
<td>Ecuador 3.2</td>
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<tr>
<td>Egypt 40.0</td>
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<tr>
<td>El Salvador 1.0</td>
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<tr>
<td>Ethiopia 3.0</td>
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<tr>
<td>France 450.0</td>
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<tr>
<td>Greece 25.0</td>
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<tr>
<td>Guatemala 2.0</td>
</tr>
<tr>
<td>Haiti 2.0</td>
</tr>
<tr>
<td>Honduras 1.0</td>
</tr>
<tr>
<td>Iceland 1.0</td>
</tr>
<tr>
<td>India 400.0</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.

UNTS, vol. 1, p. 16
No. 4. CONVENTION 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 whomever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity 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 whomever 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 in so far 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;
(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, television and other communications; and 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, shall, 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;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions;

(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, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

SECTION 12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

SECTION 13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a state for the discharge of their duties shall not be considered as periods of residence.

SECTION 14. Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.
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 15. 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.

**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 69 of the Charter so provide.

**Final Article**

**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 62 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

**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 convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.
Constitution of the World Health Organization, 1946

UNTS, vol. 14, p. 186
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.

ACCEPTING 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 provided that such signature or acceptance shall be completed before the first session of the Health Assembly.

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 labelling of biological, pharmaceutical and similar products moving in international commerce.

Article 22

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 rejection or reservations within the period stated in the notice.

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, shall elect 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

These 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 adopt its own rules of procedure.

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 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 non-governmental. 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 manner 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 Organization1 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.

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.

1 Renamed “Pan American Health Organization” by decision of the XV Pan American Sanitary Conference, September-October 1958.
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.
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 Review of the Red Cross, no. 293 (1993)
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

Privileges and immunities 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

Privileges and immunities 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;

c) 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 waived 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 be 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.).
Marrakesh Agreement Establishing the World Trade Organization, 1994

UNTS, vol. 1867, p. 154
AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

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 allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

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,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

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 trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

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 Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. 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. 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 administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

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 carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.
Article V

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 VI

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 adopt regulations therein 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;

(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.
A rticle V

III.

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

1. The WTO shall have legal personality, and shall be accorded by each of its Members such privileges and immunities as are 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 independent exercise of their functions in connection with the WTO.

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

4. The WTO may conclude a headquarters agreement.

5. Decisions under a Plurilateral Trade Agreement including any decisions on interpretations and waivers, shall be governed by the provisions of the Agreement.

Article VI

Sta tus of the WTO

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 voting. At meetings of the Ministerial Conference and the General Council, each Member shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO.

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements in the case of an interpretation of a Multilateral Trade Agreement not covered by a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

4. A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

5. The WTO shall have legal personality, and shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.
Article 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.

Article 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.

Article 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 VI of this Agreement, shall serve as Director-General of the WTO.

2. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

3. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

4. No reservations may be made in respect of any provision of any of the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement.

5. The Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.
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

Switzerland Legislative Act 192.12, 22 June 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
declares:

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;
Art. 3

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

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. it 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:

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:

a. it works closely with one or more intergovernmental organisations or international institutions based in Switzerland or with States in carrying out tasks which are normally the responsibility of those intergovernmental organisations, international institutions or States;

b. it plays a key role in an important area of international relations;

c. it has wide recognition at the international level; and

d. the granting of privileges, immunities and facilities contributes substantially to the fulfilment of its mandate.

**Art. 15** Eminent persons carrying out an international mandate

An eminent person carrying out an international mandate may by way of exception be accorded privileges, immunities and facilities if he or she:

a. executes a mandate that is limited in time and conferred by an intergovernmental organisation, an international institution or a group of States;

b. is a foreign national;

c. is resident in Switzerland for the duration of the mandate and was not habitually resident in Switzerland prior to its commencement;

d. does not engage in any gainful activity; and

e. needs to be in Switzerland for the purposes of the mandate.

**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 play 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.

3 SR 120
4 SR 642.11
Art. 25  Definition
An INGO, for the purposes of this Act, is an organisation:

a. with the legal form of an association or a foundation formed in accordance with Swiss law;
b. whose members are natural persons of different nationalities or legal persons formed in accordance with the national laws of different States;
c. which is genuinely active in several States;
d. 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;
e. which operates in conjunction with an intergovernmental organisation or international institution, for example by having observer status at such organisation or institution; and
f. 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:
   a. grant the privileges, immunities and facilities;
   b. 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:
   a. the granting of privileges, immunities and facilities;
   b. the tax treatment of beneficiaries within the meaning of Article 2;
   c. the status of Swiss employees of institutional beneficiaries within the meaning of Article 2 paragraph 1, for the purposes of Swiss social insurance;
   d. the granting of financial subsidies and other support measures, subject to the budgetary prerogative of the Federal Assembly;
   e. cooperation with neighbouring States in the area of host state policy.

3 The Federal Council may delegate to the Department the power:
   a. to grant privileges, immunities and facilities of limited duration;
   b. 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;
   c. 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:
   a. disputes arising out of contracts to which the institutional beneficiary may be a party and of other private-law disputes;
   b. 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.
3 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:
- the nature and extent of the privileges, immunities and facilities accorded, and the beneficiaries thereof;
- 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

SR 138.1

7 SR 142.20. This amendment is inserted in the said Federal Act
8 BRB of 7 December 2007 (AS 2007 6649)
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
   ...

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9 [AS 1956 1137]
10 [AS 2002 1902]
11 [AS 2000 2979]
12 SR 120. This amendment is inserted in the said Federal Act.
14 SR 211.412.41. These amendments are inserted in the said Federal Act.
15 SR 616.1. This amendment is inserted in the said Federal Act.
16 SR 641.20. This amendment is inserted in the said Federal Act.
17 SR 641.61. This amendment is inserted in the said Federal Act.
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, p. 57
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, Winiarski, Zoróidé, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo.

ARTICLE 4 OF THE CHARTER OF THE UNITED NATIONS

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 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?

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 26th, 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 66, 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 Governments of the French Republic, by its representative, M. Georges Seelle, Professor at the Faculty of Law of Paris;

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

—on behalf of the Government of the Kingdom of Belgium, by its representative, M. Georges Kaeckebieck, 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 Vochoč, 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 27th, 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. Nor is there 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 "Membres des Nations unies tous autres États 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 fulfils them. Such an interpreta-
tion would be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of "tout État remplissant ces conditions"—"any such State". It would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions. Such a power would be inconsistent with the very character of paragraph I of Article 4 which, by reason of the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter, clearly constitutes a legal regulation of the question of the admission of new States. To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established.

Moreover, the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them. If the authors of the Charter had meant to leave Members free to import into the application of this provision considerations extraneous to the conditions laid down therein, they would undoubtedly have adopted a different wording.

The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.

The Court furthermore observes that Rule 60 of the Provisional Rules of Procedure of the Security Council is based on this interpretation. The first paragraph of this Rule reads as follows:

"The Security Council shall decide whether in its judgment the applicant is a peace-loving State and is able and willing to carry out the obligations contained in the Charter, and accordingly whether to recommend the applicant State for membership."

It does not, however, follow from the exhaustive character of paragraph 1 of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified.

Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of admission—is excluded.

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, in 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.
the French text being authoritative.

The present Opinion has been drawn up in French and in English.


The Court,

For these reasons,

THE COURT

ARTICLE 4 OF THE CHARTER OF THE UNITED NATIONS
International Court of Justice

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

I.C.J. Reports 1949, p. 174
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.

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 risen 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 develop-
ment 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 inter-
national 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 inter-
national claim described in the Request for this Opinion. That
is a claim against a State to obtain reparation in respect of the
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 possesses capacity to bring an international claim. It cannot be supposed that in such an event all the Members of the Organization, save the defendant 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
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 in 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 questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.

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

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

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and 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—
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 fulfill 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 1 (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 1 (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 the General Assembly for the Admission of a State to the United Nations
Advisory Opinion

*I.C.J. Reports 1950*, p. 4
INTERNATIONAL COURT OF JUSTICE

YEAR 1950
March 3rd, 1950

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


ADVISORY OPINION

Present: President Basdevant; Vice-President Guerrero; Judges Alvarez, Hackworth, Winarski, Zorić, de Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Krylov, Read, Hsu Mo, Azevedo; Registrar Mr. Hambro.

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 66 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 that only. An unfavourable recommendation would not correspond to the provisions of Article 4, paragraph 2.

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

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

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

For these reasons,

THE COURT,

by twelve votes to two,

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

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this third day of March, one thousand nine hundred and fifty, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Basdevant,
President.

(Signed) E. Hambro,
Registrar.

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

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.

(Initialed) J. B.

(Initialed) E. H.
ANNEX

LIST OF DOCUMENTS SUBMITTED TO THE COURT
BY THE SECRETARY-GENERAL OF THE UNITED NATIONS
IN APPLICATION OF ARTICLE 65 OF THE STATUTE

I.

6. Records of the Security Council Committee of Experts Meetings concerning the Rules on the admission of new Members:

1946. S/Procedure 91.

   "  92.
   "  93.
   "  93, Corr. 1.
   "  94.
   "  99.


   "  101.
   "  102.
   "  103.
   "  104.

7. Records of the meetings of the Joint Committees appointed by the General Assembly and the Security Council on Rules governing the admission of new Members:

A/AC.II/SR.1.

   "  SR.1, Corr. 1.
   "  SR.2.
   "  SR.2, Rev. 1.
   "  SR.3.
   "  SR.3, Rev. 1.
   "  SR.4.
   "  SR.5.
   "  SR.6.
   "  SR.7.
   "  SR.8.
   "  SR.8, Corr.
   "  SR.9.
   "  SR.10.
   "  SR.II.


   Security Council Official Records, First Year, Second Series:

   No. 1.
   "  2.
   "  3.
   "  4.
   "  5.
   "  18.
   "  23.
   "  24.
   "  25.

   Security Council Journal, First Year, No. 35.

II. Records of the First Committee Meetings of the Second Part of the First Session of the General Assembly concerning the admission of new Members, 1946:

   36


Security Council Official Records, Second Year, No. 38:


16. Records of the First Committee Meetings of the Second Regular Session of the General Assembly concerning the admission of new Members, 1947:


17. Records of the meetings of the Second Regular Session of the General Assembly concerning the admission of new Members, 1947:

A/P.V.83. A/P.V.89.

II

I. Records of General Assembly, second special session

inclusion of item in agenda.

Records of proceedings.

Records of the General Committee, 42nd meeting.

Records of the General Assembly, 131st plenary meeting.

inclusion of item in agenda.

Documents.

Application of the Union of Burma for membership in the United Nations—Letter dated 10 April, 1948, from the President of the Security Council to the Secretary-General of the United Nations A/533

Supplementary list of items for the agenda of the second special session: item proposed by China—Note by the Secretary-General A/535
Supplementary list of items for the agenda of the second special session: item proposed by India—Note by the Secretary-General A/536

Agenda for the second special session: Report of the General Committee A/537

Resolution.

Resolutions adopted without reference to a committee—188 (S-2). Admission of the Union of Burma to membership in the United Nations.

II. RECORDS OF GENERAL ASSEMBLY, FIRST PART OF THIRD SESSION

Inclusion of items in agenda.

Records of proceedings.


Inclusion of items in agenda.

Documents.

Provisional agenda for the third session of the General Assembly A/585

Letter dated 21 July from the Argentine representative to the Secretary-General requesting the inclusion of items in the provisional agenda of the third session of the General Assembly A/586

Adoption of the agenda for the third session and allocation of agenda items to committees—Report of the General Committee A/653

Establishment of an Ad hoc Political Committee—Report of the General Committee A/715

Provisional agenda for the third regular session of the General Assembly—Note by the Secretary-General A/BUR/97

Allocation of items on the agenda of the third session—Letter dated 15 November, 1948, from the President of the General Assembly to the Chairman of the Ad hoc Political Committee A/AC.24/1

Note by the Secretary-General A/597

Reconsideration of the applications of Albania, Austria, Bulgaria, Finland, Hungary, Ireland, Italy, Mongolia, People's Republic, Portugal, Romania and Transjordan—Special report of the Security Council to the General Assembly A/617

Special report of the Security Council to the General Assembly A/618

Ad hoc Political Committee.

Records of proceedings.

6th meeting.
7th meeting.
8th meeting.
9th meeting.
10th meeting.
11th meeting.
12th meeting.
13th meeting.
14th meeting.
15th meeting.
16th meeting.
22nd meeting.
23rd meeting.

Ad hoc Political Committee.

Documents.

Australia: draft resolution A/AC.24/6
(= A/761, resolution A under paragraph 19)

Australia: draft resolution A/AC.24/7
Australia: draft resolution A/AC.24/8
Australia: draft resolution
A/AC.24/9
Australia: draft resolution
A/AC.24/10
Australia: draft resolution
A/AC.24/11
Belgium: draft resolution
A/AC.24/12
United States of America: draft resolution
A/AC.23/13
Argentina: draft resolution
A/AC.24/14
Switzerland: draft resolution
A/AC.24/15
Bolivia: amendments to the draft resolution proposed by Sweden
A/AC.24/17
India: amendment to the draft resolution proposed by Sweden (A/AC.24/17)
A/AC.24/18
Burma: amendment to the draft resolution proposed by Belgium
A/AC.24/19
Burma: amendment to the Australian draft resolution concerning Ceylon
A/AC.24/20
Draft resolution submitted by the Sub-Committee appointed at the 22nd meeting of the Ad hoc Political Committee
A/AC.24/21
Report of the Ad hoc Political Committee
A/761

Plenary meetings of the General Assembly.

Records of proceedings.

175th meeting.
176th meeting.
177th meeting.

Plenary meetings of the General Assembly.

Documents.

Australia, Burma, India, Pakistan, Philippines: amendments to draft resolution proposed by the Ad hoc Political Committee (A/761)
A/771

Resolution.

Resolutions adopted on the reports of the Ad hoc Political Committee—197 (III). Admission of new Members.

III. Records of General Assembly, second part of third session

Inclusion of items in agenda.

Records of proceedings.

Records of the General Committee, 60th, 61st, 62nd and 63rd meetings.

Records of the General Assembly, 191st, 192nd, 204th and 205th plenary meetings.

Inclusion of items in agenda.

Documents.

Agenda of the third regular session of the General Assembly—Report of the General Committee A/829
Report of the General Committee concerning the completion of the work of the General Assembly A/845
Completion of the work of the General Assembly, including the date for final adjournment—Note by the President A/BUR/116
Allocation of items on the agenda of the second part of the third session: Letter dated 13 April, 1949, from the President of the General Assembly to the Chairman of the First Committee A/C.1/437
Allocation of items on the agenda of the second part of the third session: Letter dated 2 May, 1949, from the President of the General Assembly to the Chairman of the First Committee A/C.1/444 and Corr. I
Allocation of items on the agenda of the second part of the third session: Letter dated 2 May, 1949, from the President of the General Assembly to the
Chairman of the Ad hoc Political Committee

A/AC.24/59 and Corr. 1

Letter dated 7 March, 1949, from the President of the Security Council to the President of the General Assembly concerning the application of Israel for membership in the United Nations

A/818

Letter dated 17 March, 1949, from the President of the Security Council to the President of the General Assembly concerning the application of Ceylon for admission to membership in the United Nations

A/823

Ad hoc Political Committee.

Records of meetings.

42nd meeting.
43rd meeting.
44th meeting.
45th meeting.
46th meeting.
47th meeting.
50th meeting.
51st meeting.

Ad hoc Political Committee.

Documents.

El Salvador: draft resolution
A/AC.24/60
El Salvador: revised draft resolution
A/AC.24/60/Rev. 1
Argentina: draft resolution
A/AC.24/61
Lebanon: draft resolution
A/AC.24/62
Lebanon: revised draft resolution
A/AC.24/62/Rev. 1
Lebanon: revised draft resolution
A/AC.24/62/Rev. 2
Greece: amendment to the Argentine draft resolution (A/AC.24/61)
A/AC.24/63
Iraq: draft resolution
A/AC.24/64

Application of Israel for admission to membership in the United Nations—

Australia: amendment to El Salvador draft resolution (A/AC.24/60)
A/AC.24/65

Application of Israel for admission to membership in the United Nations—

Denmark: amendment to El Salvador draft resolution (A/AC.24/60)
A/AC.24/66

Application of Israel for admission to membership in the United Nations—

Saudi Arabia: amendment to the Greek amendment (A/AC.24/63) to the Argentine draft resolution (A/AC.24/61)
A/AC.24/67

Application of Israel for admission to membership in the United Nations—

Saudi Arabia: revised amendment to the Greek amendment (A/AC.24/63) to the Argentine draft resolution (A/AC.24/61)
A/AC.24/67/Rev. 1

Australia, Canada, Guatemala, Haiti, Panama, United States of America and Uruguay: draft resolution
A/AC.24/68

Application of Israel for admission to membership in the United Nations—

Chile: amendment to the joint draft resolution of Australia, Canada, Guatemala, Haiti, Panama, United States of America and Uruguay
(A/AC.24/68)
A/AC.24/69

Application of Israel for admission to membership in the United Nations—

Peru: amendment to the Chilian amendment (A/AC.24/69) to the joint draft resolution of Australia, Canada, Guatemala, Haiti, Panama, United States of America and Uruguay
(A/AC.24/68)
A/AC.24/72

Report of the Ad hoc Political Committee
A/855
Plenary meetings of the General Assembly.

207th meeting.

Plenary meetings of the General Assembly.

Resolution.

273 (III). Admission of Israel to membership in the United Nations.

IV. RECORDS OF GENERAL ASSEMBLY, FOURTH SESSION

Inclusion of item in agenda.

Records of proceedings.

Records of the General Committee, 65th meeting.

Records of the General Assembly, 224th plenary meeting.

Inclusion of item in agenda.

Documents.

Adoption of the agenda of the fourth regular session and allocation of items to Committees—Records of the General Committee

A/989

Adoption of the agenda and allocation of items to Committees—Memorandum by the Secretary-General

A/BUR/118

Admission of new Members—Application of the Republic of Korea for membership in the United Nations—Special report of the Security Council

A/968

Application of Nepal for membership in the United Nations—Special report of the Security Council

A/974

Reconsideration of the applications of Albania, Austria, Bulgaria, Ceylon, Finland, Hungary, Ireland, Italy, Mongolian People's Republic, Portugal, Romania and Transjordan for membership in the United Nations—Special report of the Security Council

A/982

Ad hoc Political Committee.

Documents.

Australia: draft resolution concerning the application of Austria for admission to membership in the United Nations

A/AC.31/L.9

(= A/1066, resolution A)

Australia: draft resolution concerning the application of Ceylon for admission to membership in the United Nations

A/AC.31/L.10

(= A/1066, resolution B)

Australia: draft resolution concerning the application of Finland for admission to membership in the United Nations

A/AC.31/L.11

(= A/1066, resolution C)

Australia: draft resolution concerning the application of Ireland for admission to membership in the United Nations

A/AC.31/L.12

(= A/1066, resolution D)

Australia: draft resolution concerning the application of Italy for admission to membership in the United Nations

A/AC.31/L.13

(= A/1066, resolution E)
Australia: draft resolution concerning the application of Jordan for admission to membership in the United Nations

A/AC.31/L.14
(= A/1066, resolution F)

Australia: draft resolution concerning the application of the Republic of Korea for admission to membership in the United Nations

A/AC.31/L.15
(= A/1066, resolution G)

Australia: draft resolution concerning the application of Portugal for admission to membership in the United Nations

A/AC.31/L.16
(= A/1066, resolution H)

Australia: draft resolution concerning the application of Nepal for admission to membership in the United Nations

A/AC.31/L.17
(= A/1066, resolution I)

Argentina: draft resolution

Union of Soviet Socialist Republics: draft resolution

Note by the Rapporteur (revised draft resolution by Argentina)

A/AC.31/L.19

Iraq: draft resolution

Netherlands: amendment to the draft resolution proposed by Argentina (A/AC.31/L.20)

A/AC.31/L.22

United States of America, Saudi Arabia and Iraq: amendment to the draft resolution proposed by Iraq (A/AC.31/L.21)

A/AC.31/L.23

Admission of new Members—Report of the Ad hoc Political Committee A/1066

Plenary meetings of the General Assembly.

Records of proceedings.

251st meeting.
252nd meeting.
Documents.

Letter dated 27 February, 1948, from the Ambassador of Burma addressed to the Secretary-General concerning the application of Burma for membership in the United Nations S/687

Report of the Committee on the admission of new Members concerning the membership application of the Union of Burma S/706

Letter dated 3 April, 1948, from the representatives of France, the United Kingdom and the United States to the President of the Security Council concerning the membership applications of Italy and Transjordan S/709

Letter dated 5 April, 1948, from the deputy representative of the Ukrainian Soviet Socialist Republic to the Secretary-General concerning the membership applications of Albania, Bulgaria, Finland, Hungary, Italy, the Mongolian People’s Republic and Romania S/712

Letter dated 7 April, 1948, from the representatives of France, the United Kingdom and the United States to the President of the Security Council concerning membership applications of Austria, Ireland and Portugal S/715

China: draft resolution submitted at the 279th meeting of the Security Council, 10 April, 1948, concerning the application of the Union of Burma for admission to membership in the United Nations (adopted at the same meeting) S/717

Cablegram dated 17 May, 1948, from the Foreign Secretary of the Provisonal Government of Israel to the Secretary-General S/747 and Corr. 1

Letter dated 25 May, 1948, from the Prime Minister and Minister for External Affairs of Ceylon to the Secretary-General transmitting the application from the Government of Ceylon for admission to the United Nations under Article 4 of the Charter S/820

Report of the Committee on the admission of new Members to the Security Council concerning the application of Ceylon for membership in the United Nations S/859

Letter dated 2 August, 1948, from the Ceylon Government representative to the President of the Security Council transmitting information concerning Ceylon S/951

Union of Soviet Socialist Republics: draft resolution submitted at the 351st meeting of the Security Council, 18 August, 1948, concerning the application of Ceylon for admission to membership in the United Nations S/974

Telegram dated 22 September, 1948, from the Minister of Foreign Affairs of the People’s Republic of Bulgaria to the Secretary-General regarding Bulgaria’s request for admission to membership in the United Nations S/1012

Declaration of acceptance of the obligations contained in the Charter, submitted by the Government of the People’s Republic of Bulgaria on 9 October, 1948, in connexion with its application for membership in the United Nations S/1012/Add. 1

Letter dated 27 September, 1948, from the Hungarian Minister to the Secretary-General concerning Hungary’s application for membership in the United Nations S/1017
Declaration of acceptance of the obligations contained in the Charter, submitted by the Government of Hungary on 8 October, 1948, in connexion with its application for membership in the United Nations

Telegram dated 13 October, 1948, from the Government of the People's Republic of Albania to the Secretary-General concerning Albania's application for membership in the United Nations

S/1017/Add. 1

Cablegram dated 12 October, 1948, from the Government of the Mongolian People's Republic to the Secretary-General concerning the application of the Mongolian People's Republic for membership in the United Nations

S/1033

Declaration of acceptance of the obligations contained in the Charter, submitted to the Secretary-General on 25 October, 1948, by the Government of the Mongolian People's Republic in connexion with its application for membership in the United Nations

S/1035/Add. 1

Letter dated 12 October, 1948, from the Government of the People's Republic of Romania to the Secretary-General concerning Romania's application for membership in the United Nations

S/1051

Declaration of acceptance of the obligations contained in the Charter, submitted to the Secretary-General on 9 November, 1948, by the People's Republic of Romania in connexion with its application for membership in the United Nations

S/1051/Add. 1

Letter dated 29 November, 1948, from the Israeli Minister for Foreign Affairs to the Secretary-General concerning

S/1093

Israel's application for membership in the United Nations and declaration accepting the obligations contained in the Charter

Declaration of acceptance of the obligations contained in the Charter, submitted on 2 December, 1948, by the Government of the People's Republic of Albania in connexion with its application for membership in the United Nations

S/1105

Letter dated 7 December, 1948, from the Chairman of the Committee on the admission of new Members to the President of the Security Council concerning Israel's application for membership in the United Nations

S/1110 and Corr. 1

Letter dated 9 December, 1948, from the President of the General Assembly to the President of the Security Council concerning the application of Ceylon for membership in the United Nations

S/1113

United Kingdom: draft resolution submitted at the 384th meeting of the Security Council, 15 December, 1948, concerning the application of Israel for admission to membership in the United Nations

S/1121

Syria: draft resolution submitted at the 385th meeting of the Security Council, 17 December, 1948, concerning the application of Israel for admission to membership in the United Nations

S/1125

France: draft resolution submitted at the 385th meeting of the Security Council, 17 December, 1948, concerning the application of Israel for admission to membership in the United Nations

S/1127

Letter dated 11 December, 1948, from the Secretary-General to the President of the Security Council transmitting the text of the resolutions concerning the admission of new Members adopted
by the General Assembly at its 177th meeting, 8 December, 1948  

Text of resolution 197 (III) A concerning the admission of new Members, adopted by the General Assembly at its 177th plenary meeting, 8 December, 1948  

Letter dated 19 January, 1949, from the Acting Foreign Minister of the Republic of Korea to the Secretary-General concerning the application of the Republic of Korea for admission to membership in the United Nations, and a declaration accepting obligations under the Charter  

Telegram dated 9 February, 1949, from the Minister of Foreign Affairs of the Democratic People’s Republic of Korea to the Secretary-General concerning the application of the Democratic People’s Republic of Korea for admission to membership in the United Nations and note by the Secretary-General  

Letter dated 11 February, 1949, from the representative of the Union of Soviet Socialist Republics to the President of the Security Council concerning the application of the Democratic People’s Republic of Korea for admission to membership in the United Nations  

Union of Soviet Socialist Republics: draft resolution submitted at the 410th meeting of the Security Council, 16 February, 1949, concerning the application of the Democratic People’s Republic of Korea for admission to membership in the United Nations  

Letter dated 13 February, 1949, addressed to the Secretary-General from the Director-General of the Ministry of Foreign Affairs of the Government of Nepal concerning Nepal’s application for admission to membership in the United Nations  

Declaration submitted on 10 March, 1949, by the Government of Nepal relating to the acceptance of the obligations contained in the Charter in connexion with its application for membership in the United Nations  

Letter dated 24 February, 1949, from the representative of Israel to the Secretary-General concerning the application of Israel for membership in the United Nations.  

United States of America: draft resolution submitted at the 414th meeting of the Security Council, 4 March, 1949, concerning the application of Israel for admission to membership in the United Nations (adopted at the same meeting)  

Report to the Security Council by the Committee on the admission of new Members concerning the application of the Republic of Korea for membership in the United Nations  

China: draft resolution submitted at the 423rd meeting of the Security Council, 8 April, 1949, concerning the application of the Republic of Korea for admission to membership in the United Nations  

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Portugal to membership in the United Nations  

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Jordan to membership in the United Nations
Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Italy to membership in the United Nations. S/1333

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Finland to membership in the United Nations. S/1334

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Ireland to membership in the United Nations. S/1335

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Austria to membership in the United Nations. S/1336


Union of Soviet Socialist Republics: draft resolution submitted at the 427th meeting of the Security Council, 17 June, 1949, concerning the applications of Albania, the Mongolian People's Republic, Bulgaria, Romania, Hungary, Finland, Italy, Portugal, Ireland, Transjordan (Jordan), Austria, and Ceylon for admission to membership in the United Nations. S/1340

People's Republic, Transjordan (Jordan), Portugal, Ireland, Hungary, Italy, Austria, Romania, Bulgaria, Finland, Ceylon and Nepal for admission to membership in the United Nations. S/1340/Rev. 1

Union of Soviet Socialist Republics: draft resolution submitted at the 442nd meeting of the Security Council, 13 September, 1949, concerning the applications of Albania, the Mongolian People's Republic, Bulgaria, Romania, Hungary, Finland, Italy, Portugal, Ireland, Transjordan (Jordan), Austria, Ceylon and Nepal for admission to membership in the United Nations. S/1340/Rev. 2

Letter dated 16 August, 1949, from the Chairman of the Committee on the admission of new Members to the President of the Security Council. S/1378

Report to the Security Council by the Committee on the admission of new Members concerning the application of Nepal for membership in the United Nations. S/1382

China: draft resolution submitted at the 439th meeting of the Security Council, 7 September, 1949, concerning the application of Nepal for admission to membership in the United Nations. S/1385

Committee on the admission of new Members.

Records of proceedings.

24th meeting.
25th meeting.
26th meeting.
27th meeting.
28th meeting.
29th meeting.
30th meeting.
31st meeting.
32nd meeting.
33rd meeting.
34th meeting.

Committee on the admission of new Members.

Document.

Letter dated 22 July, 1949, from the
Director-General, Foreign Affairs,
Kathmandu, Nepal, to the Chairman
of the Committee on the admission
of new Members

S/C.2/16
International Criminal Tribunal for the former Yugoslavia

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

Case No. IT-94-1-A, paras. 1-12, 26-48
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's 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 blocks 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 has also 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 tempore, 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 Charter thus speaks the language of specific powers, not of absolute fiat.

The Charter does not grant the Security Council, in paragraphs 3 and 4, the right to address to such threats by appropriate measures. Article 19(1) of the Security Council’s Powers and Procedures (Provisional Measure) of 1945 establishes that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and that the Security Council shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42.

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 the charter to which it is under such a constitution, the powers of the Security Council are subject to the various constitutional limitations, however broadly or narrowly they may be interpreted.

In particular, Article 24, after declaring, in paragraph 1, that the Charter vests in the Security Council primary responsibility for the maintenance of international peace and security, imposes on it, in paragraph 2, the obligation to report annually (or more frequently, if the Charter so provides) to the General Assembly and provides, more importantly, in paragraph 2, that:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 in order to maintain or restore international peace and security, by the use of armed forces if necessary, or any other measures by international organizations or States, or by the Security Council itself, as it deems appropriate, including those provided for in the United Nations Charter, of a decision of the United Nations Security Council, or the United Nations General Assembly, or the United Nations General Assembly."

The Charter thus speaks the language of specific powers, not of absolute fiat.

The Charter does not grant the Security Council, in paragraphs 3 and 4, the right to address to such threats by appropriate measures. Article 19(1) of the Security Council’s Powers and Procedures (Provisional Measure) of 1945 establishes that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and that the Security Council shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42.
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

32. 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?

33. 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 mandatory 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-T), at para. 3.2.1 (hereinafter Defence Trial Brief.)

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
It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures or procedures on the basis of their success or failure to achieve their ends. In the present case, the establishment of the International Tribunal is but one of many measures adopted by the Security Council.

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen means and its effectiveness in achieving its objective in the restoration and maintenance of peace. Whether or not such a power could have been lawfully exercised in this case, the fact remains that it was exercised.

40. 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. In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.

41. Appellant argues that the right to have a criminal charge determined by a tribunal established by law is a general principle of law, as established in the International Court of Justice, the International Tribunal for the Law of the Sea, and in Article 6(1) of the American Convention on Human Rights and in Article 6(1) of the European Convention on Human Rights. This principle, however, is one that is not susceptible of infallible application in all circumstances. The question before the Appeals Chamber is whether the Security Council was exercising a power which it had under the Charter to regulate staff and relations. It was exercising such a power which it had under the Charter to regulate both the domestic affairs of the former Yugoslavia and the international relations of the United Nations. In its advisory opinion in the Effect of Awards case, the International Court of Justice declared that the “Charter does not confer judicial functions on the General Assembly, in the exercise of its principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.”

46. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter.

47. The argument that the Security Council, not being endowed with judicial powers, cannot establish a subsidiary organ possessed of such powers is untenable: it results from a fundamental misunderstanding of the constitutional set-up of the Charter. The principal function of the Security Council is the maintenance of international peace and security, in which the Security Council exercises both decision-making and executive powers. The general principles that a tribunal must be established by law, as established in the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights, are minimum requirements in international law for the administration of criminal justice.

48. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to the powers and functions of the United Nations as a whole. Appellant argues that the right to have a criminal charge determined by a tribunal established by law is a general principle of law, as established in the International Court of Justice, the International Tribunal for the Law of the Sea, and the European Court of Human Rights. This principle, however, is one that is not susceptible of infallible application in all circumstances. The question before the Appeals Chamber is whether the Security Council was exercising a power which it had under the Charter to regulate both the domestic affairs of the former Yugoslavia and the international relations of the United Nations. In its advisory opinion in the Effect of Awards case, the International Court of Justice declared that the “Charter does not confer judicial functions on the General Assembly, in the exercise of its principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.”

49. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen means and its effectiveness in achieving its objective in the restoration and maintenance of peace. Whether or not such a power could have been lawfully exercised in this case, the fact remains that it was exercised.
imposing an international obligation, which only applies to the administration of criminal justice in a
municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be “established by law.”

43. Indeed, there are three possible interpretations of the term “established by law.” First, as Appellant argues, “established by law” could mean established by a legislature. Appellant claims that the International Tribunal has not been “established by law.” (Defence Appeal Brief, at para. 5.4.)

44. A second possible interpretation of “established by law” is that its establishment must be in accordance with the rule of law. This appears to be the most likely meaning of the term in the context of international law. For a tribunal such as the International Tribunal to be established according to the rule of law, it must be established in accordance with the relevant legal framework. For example, the International Tribunal is established within the framework of the United Nations Charter, which sets out the powers and functions of the Security Council, the principal organ of the United Nations. The Security Council is the body authorized to establish international tribunals. Therefore, the International Tribunal is established by the Security Council, as provided for in the United Nations Charter.

45. The third possible interpretation of the requirement that the International Tribunal be “established by law” is that the Tribunal must be established on the basis of a decision made by a competent authority that has the power to create international tribunals. This interpretation is consistent with the view that the Security Council was endowed with the power to create this International Tribunal as a measure to protect the peace and security of the United Nations. As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the establishment of international criminal tribunals, such as the International Criminal Court, is subject to the approval of the United Nations Security Council. The Security Council has the power to establish international tribunals pursuant to its powers under Chapter VII of the United Nations Charter. The Security Council has the power to adopt resolutions that establish international tribunals to promote international peace and security.

According to Appellant, however, the Security Council has not established the International Tribunal. Appellant takes the position that the International Tribunal is not established by law. This is a question of fact that requires an examination of the governing documents of the United Nations. As noted by the Trial Chamber in its Decision, the International Tribunal is established by the United Nations Security Council, as provided for in the United Nations Charter. Therefore, the International Tribunal is established by law.

46. The International Tribunal is “established by law” in the sense that its establishment is in accordance with the rule of law. This interpretation is consistent with the view that the Security Council has the power to establish international tribunals pursuant to its powers under Chapter VII of the United Nations Charter. The Security Council has the power to adopt resolutions that establish international tribunals to promote international peace and security. As noted by the Trial Chamber in its Decision, the International Tribunal is established by the United Nations Security Council, as provided for in the United Nations Charter. Therefore, the International Tribunal is established by law.

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48. The International Tribunal is established by law in the sense that its establishment is in accordance with the rule of law. This interpretation is consistent with the view that the Security Council has the power to establish international tribunals pursuant to its powers under Chapter VII of the United Nations Charter. The Security Council has the power to adopt resolutions that establish international tribunals to promote international peace and security. As noted by the Trial Chamber in its Decision, the International Tribunal is established by the United Nations Security Council, as provided for in the United Nations Charter. Therefore, the International Tribunal is established by law.

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." ([Defence] Motion on
International Court of Justice

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

I.C.J. Reports 1996, p. 66
INTERNATIONAL COURT OF JUSTICE

YEAR 1996

1996
8 July
General List
No. 93

8 July 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 — Specialized agency authorized to request opinions under 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, Herczegh, Shi, Fleischhauer, Koroma, Veresichetin, 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;
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;
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;

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. Requests 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 part taken 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;

for Indonesia:
H.E. Mr. Johannes Berchmans Soedarmano Kadarisman, Ambassador of Indonesia to the Netherlands;

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

for the Islamic Republic of Iran:
H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

for Italy:
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;
for Japan: H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs, Mr. Takashi Hiraoka, Mayor of Hiroshima, Mr. Ichio Itoh, Mayor of Nagasaki;

for Malaysia: H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations, Dato' Mohd. Abdullah, Attorney-General;

for New Zealand: The Honourable Paul East, Q.C., Attorney-General of New Zealand, Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry of Foreign Affairs and Trade;

for the Philippines: H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands, Professor Merlin M. Magallona, Dean, College of Law, University of the Philippines;

for the Russian Federation: Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

for Samoa: H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations, Miss Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva, Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

for the Marshall Islands: The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America, Mrs. Lijon Ekniang, Council Member, Rongelap Atoll Local Government;

for Solomon Islands: The Honourable Victor Ngele, Minister of Police and National Security, Mr. Ieau Salmon, Professor of Law, Université libre de Bruxelles, Mr. Ene David, Professor of Law, Université libre de Bruxelles, Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development,

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

for Costa Rica: Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;


for the United States of America: Mr. Conrad K. Harper, Legal Adviser, United States Department of State, Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State, Mr. John H. McNell, Senior Deputy General Counsel, United States Department of Defense;


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 occasion to indicate that questions “framed in terms of law and rais[ing] 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 include 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 Bahraim (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 (y)) 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 ... to 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;

.................................................................

(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;

.................................................................

(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;

.................................................................

[and]

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

In the view of the Court, none of these functions has a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of [the] activities" of the WHO. The causes of the deterioration of human health are numerous and varied; and the legal or illegal character of these causes is essentially immaterial to the measures which the WHO must in any case take in an attempt to remedy their effects. In particular, the legality or illegality of the use of nuclear weapons in no way determines the specific measures, regarding health or otherwise (studies, plans, procedures, etc.), which could be necessary in order to seek to prevent or cure some of their effects. Whether nuclear weapons are used legally or illegally, their effects on health would be the same. Similarly, while it is probable that the use of nuclear weapons might seriously prejudice the WHO's material capability to deliver all the necessary services in such an eventuality, for example, by making the affected areas inaccessible, this does not raise an issue falling within the scope of the Organization's activities within the meaning of Article 96, paragraph 2, of the Charter. The reference in the question put to the Court to the health and environmental effects, which according to the WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within the WHO's functions.

23. However, in its Preamble, resolution WHA46.40 refers to "primary prevention" in the following terms:

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

.................................................................

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 by which they 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 67 of the Charter of the United Nations.” Article 67 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. A consideration of the effects and implications of the WHO's role in nuclear weapon issues and the development of recommended guidelines and strategies for the control and reduction of these issues.

3. The United Nations Conference on Disarmament process and the role of the WHO in promoting international cooperation on health and safety issues related to nuclear weapons.

4. The impact of nuclear weapons on health and safety, and the need for international cooperation to address these issues.

5. The implications of nuclear weapons for international law and the role of the WHO in promoting compliance with international law.

6. The role of the WHO in promoting the development and implementation of international guidelines and protocols for the control and reduction of nuclear weapons.

7. The challenges and opportunities for the WHO in promoting international cooperation on nuclear weapon issues.

8. The role of the WHO in promoting education and awareness on nuclear weapon issues.


10. The role of the WHO in promoting international cooperation on the prevention of nuclear terrorism.

11. The impact of nuclear weapons on international security and the role of the WHO in promoting security and stability.

12. The role of the WHO in promoting international cooperation on the prevention of nuclear war.

13. The role of the WHO in promoting international cooperation on the promotion of peace and security.

The United Nations Conference on Disarmament process and the role of the WHO in promoting international cooperation on health and safety issues related to nuclear weapons.

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The role of the WHO in promoting the development and implementation of international guidelines and protocols for the control and reduction of nuclear weapons.

The challenges and opportunities for the WHO in promoting international cooperation on nuclear weapon issues.

The impact of nuclear weapons on the global economy and the role of the WHO in promoting economic stability.

The role of the WHO in promoting international cooperation on the prevention of nuclear terrorism.

The impact of nuclear weapons on international security and the role of the WHO in promoting security and stability.

The role of the WHO in promoting international cooperation on the prevention of nuclear war.

The role of the WHO in promoting international cooperation on the promotion of peace and security.
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 the 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, Herzegh, Shi, Fleischhauer, Vereshchegin, 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.
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*, pp. 84-89, paras. 47-67
city the provisions of this Section were applicable to him at the time of his statements at issue, and that they continue to be applicable.

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

* *

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

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

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

and added:

“Malaysia observes that the word used was ‘applicability’ not ‘application’. ‘Applicability’ means ‘whether the provision is applicable to someone’ not ‘how it is to be applied’.”

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

50. In the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 (b), the Secretary-General of the United Nations has a pivotal role to play. The Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required. This authority has been recognized by the Court when it stated:


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 presumably would not have so acted if it had been of the opinion that Mr. Cumarswamy 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. Cumarswamy, 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. Cumarswamy 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. Cumarswamy’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. Cumarswamy 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 above-mentioned obligation.

63. Section 22 (b) of the General Convention explicitly states that experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. By necessary implication, questions of immunity are therefore preliminary issues which must be expeditiously decided in limine 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. Cumbaraswamy 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 Cumbaraswamy entitled entails holding Mr Cumbaraswamy 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. Cumbaraswamy 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. Cumbaraswamy’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 “[i]f 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 Cumbaraswamy as Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers;

IN FAVOUR: President Schwobel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Sji, Fleischhauer, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: Judge Koroma;

(b) By fourteen votes to one,

That Dato’ Param Cumbaraswamy 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 Schwobel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herzegh, Sji, Fleischhauer, Vereshchetin, 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-
European Court of Human Rights

Behrami and Behrami v. France and Saramati v. France, Germany and Norway
Decision on Admissibility of 2 May 2007 [Grand Chamber]

Application No. 71412/01 and Application No. 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

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

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") of the international community and the United Nations, the then Federal Republic of Yugoslavia ("FRY") should the FRY not comply with the demands of the international community... 

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by "Member States and relevant international institutions" under UN auspices; with "substantial" NATO participation and "under UN auspices", NATO allowed deployment of significant forces to Kosovo by 12 June 1999 (in accordance with OPLAN 10413, "Operation Joint Guardian"). By 20 June, KFOR withdrew to four relevant international organisations, to control its implementation. Four pillars corresponding to the SG ("SRSG") concerned, namely: (i) Humanitarian assistance, (ii) Internally displaced persons and refugees, (iii) Security and economic development, and (iv) an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution"). 

4. UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General ("SG"). The SG, with the assistance of relevant international organisations, established an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution"). 

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. At around midday, the group had been playing during the bombardment by NATO in 1999 and which had been agreed upon by the NAC. Believing it was safe, one of the children threw a CBU in the air, it detonated and killed Gadaf Behrami. Bekim, who had later also been seriously injured and taken to hospital in Pristina (where he later had surgery and was released), further investigation reports dated 11 and 12 March 2000 indicated that KFOR police could not access the site without KFOR agreement. The report stated that the boys were aware of the unexploded CBUs... 

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 filed, and that the incident was an accident that the evidence was that the CBU detonation was an accident, that criminal charges would not be filed, and that the incident amounted to "unintentional homicide committed by imprudence". 

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 filed, and that the incident amounted to "unintentional homicide committed by imprudence".
III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001, after he had been kept in prison in Prizren without being given access to a lawyer, COMKFOR ordered his detention for 30 days. On 13 July 2001 the Supreme Court lifted the detention order on a habeas corpus application. On 19 July 2001 Mr Saramati was rearrested by UNMIK police officers by order of the Commander of KFOR (COMKFOR), who was also the lead nation in Kosovo at the time. On 20 July 2001 Mr Saramati's case was transferred to the District Court for Pristina, the indictment retaining charges of, inter alia, attempted murder and the illegal possession of weapons and explosives. Mr Saramati appealed against the detention order, but his request was rejected.

9. On 11 August 2001 Mr Saramati was transferred to the UNMIK detention facilities in Prishtina and was refused visitors.

10. On 13 August 2001 Mr Saramati was transferred to the UNMIK detention facilities in Prishtina and was refused visitors.

11. On 14 July 2001 Mr Saramati was transferred to the UNMIK detention facilities in Prishtina and was refused visitors.

12. On 26 July 2001 Mr Saramati was transferred to the UNMIK detention facilities in Prishtina and was refused visitors.

13. On 6 September 2001 Mr Saramati was transferred to the UNMIK detention facilities in Prishtina and was refused visitors.

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, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

IV. RELEVANT LAW AND PRACTICE

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

18. The prohibition on the unilateral use of force by States, together with its counterpart principle of collective security, mark the dividing line between the classic concept of international law, characterised by the right to have recourse to war (ius ad bellum) as an indivisible part of State sovereignty, and modern international law which recognises the prohibition on the use of force as a fundamental legal norm (ius contra bellum). More particularly, the end of the First World War and the Kellogg-Briand Pact signed in 1928” with the aim of maintaining peace through an obligation not to resort to war (First recital of the Covenant of the League of Nations) as through universal systems of peace (Articles 15 of the Covenant). It is argued by commentators that, in that stage, customs international law prohibited unilateral recourse to war (for example, R. Korb, “Le Droit international relatif au maintien de la paix”, Hebling and Lichtenhahn, Bruylant, 2003, pp. 60-68).

19. The UN succeeded the League of Nations in 1946. The primary objective of the Charter was to maintain international peace and security through two complimentary actions (Articles 1 and Article 11 of the Covenant). It was argued by commentators that, at that stage, the UN succeeded the League of Nations as the permanent forum for the maintenance of international peace and security.
The second type of action, “negative peace”, was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to the prohibition of the unilateral use of force (Article 2 § 4) in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. Two matters were essential to this peace and security mechanism: its “collective” nature (States had to act together against an aggressor identified by the UNSC) as well as its “universality” (competing alliances were considered to undermine the mechanism so that coercive action by regional organisations was subjected to the universal system by Article 53 of the Charter).

B. The Charter of the UN, 1945

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

"WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,
AND FOR THESE ENDS
- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and
- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,
HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

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

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

Article 2
...

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

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

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

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

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

Article 25 provides:

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

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

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

The notion of a “threat to the peace” within the meaning of Article 39 has evolved to include internal conflicts which threaten to “spill over” or
Articles 41 and 42 read as follows:

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

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

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

25. Chapter VII continues:

“Article 48

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

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

Article 49

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

C. Article 103 of the Charter

26. This Article reads as follows:

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

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

D. The International Law Commission (“ILC”)

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

1. Draft Articles on the Responsibility of International Organisations

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

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

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

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

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

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

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

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

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

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

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

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

“...
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 ...

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

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

... Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also

the acceptance by the [FRY] of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the [FRY’s] agreement to that paper,

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

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

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

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

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

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

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

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

(g) Conducting border monitoring duties as required;

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

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

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

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

(d) 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. The SOP described how KFOR authorised detention. Each case was reviewed by KFOR staff, the MNB commander and by a review panel at KFOR HQ (superseded by the KFOR Detention Directive A-2 in October 2001).

48. TCNs were responsible for adjudicating claims that arose from their own activities in accordance with their own rules and procedures. While KFOR was the overall administrator of military operations in Kosovo, it was also responsible for adjudicating TCN claims. TCN claims, therefore, were claims that arose out of KFOR operations in Kosovo, in which case the claims would be handled by the KCO. The KCO would adjudicate claims relating to the overall administration of the UN operation in Kosovo, which included the monitoring of de-mining developments in general.

49. Annex C provided guidelines for the structure and procedures of the Kosovo Appeals Commission, which was set up to provide a mechanism for the review of claims that had been decided by the KCO or the TCNs. The commission was intended to provide a mechanism for the review of claims that had been decided by the KCO or the TCNs. The commission was intended to provide a mechanism for the review of claims that had been decided by the KCO or the TCNs.

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

"KFOR contingents, which are grouped into four multinational brigades, KFOR troops come from 29 NATO and non-NATO countries. Although brigades are responsible for a specific area of operations, they all fall under the unified command and control of KFOR. KFOR's unified command and control is a military term for which there is no NATO equivalent. KFOR's unified command and control is responsible for all aspects of KFOR's operations in Kosovo, including the provision of military forces, the coordination of civilian and military operations, and the provision of security. KFOR's unified command and control is responsible for all aspects of KFOR's operations in Kosovo, including the provision of military forces, the coordination of civilian and military operations, and the provision of security."
undertaken that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators, including UN agencies, KFOR contingents, NGOs and commercial companies. These activities would be co-ordinated through an appropriate structure, UNMIK MACC which would, inter alia, act as the “focal point and coordination mechanism for all de-mining activities in Kosovo.” The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

55. Accordingly, on 24 August 1999 a memorandum was sent by the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should also be implemented. The memorandum went on to explain that this request was followed up with a letter dated 5 October 1999 from Deputy SRSG [Deputy SRSG] to General Jackson, [COMKFOR], which stated that “the formal handing over from the military sector to the civilian sector of the mine action programme for Kosovo took place, as mandated in [UNSC Resolution] 1244; although, in reality, this had already taken place towards the end of August.”

60. By letter dated 6 April 2000 to COMKFOR, the Deputy SRSG drew the latter’s attention to recent CBU explosions involving deaths and asked for the latter’s personal support to ensure the continuation of the mine clearance project by marking CBU sites as a matter of urgency and providing any further information they had. The request was followed up with a letter dated 7 May 2000, in which the Deputy SRSG reiterated the need for the formalisation of the mine action programme in Kosovo (1999-2000), entitled “A Review of the United Nations Mine Action Programme in Kosovo (1999-2000),” commented as follows:

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

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 incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs which those troops knew to be present on that site.

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 UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s report for August 1999 confirmed that KFOR worked closely with UNMACC which had been set up jointly by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN. KFOR’s letter of 13 September 1999 submitted to the UNSC by the SG’s of KFOR and UNMACC which had been “set up jointly” by KFOR and the UN.
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 the de-mining of the area in which he had been injured. The Grand Chamber, however, found that the German observant’s involvement did not, unambiguously, demonstrate that Mr Saramati was within the jurisdiction of Germany because the available evidence did not establish that the officer had been able to demonstrate a personal link with the impugned acts. The Court failed to accept that the Grand Chamber’s request for evidence and Mr Saramati’s failure to produce any evidence in support of his claim amounted to an admission of the lack of jurisdiction. In any event, Mr Saramati’s submissions had not been admissible under Article 35 § 1 of the Convention. The third party States submitted in essence that the respondent States had not exhausted the remedies available under Article 35 § 1 of the Convention. They further maintained that the remedies available under Article 35 § 1 of the Convention were insufficient to ensure the effective redress of complaints if the Court were to find that Mr Saramati was within the meaning of Article 1 of the Convention. They argued that the Court should not decide the merits of the case in accordance with the “Monetary Gold” principle (Monetary Gold, ICJ Reports 1954), as the cases were inadmissible under Article 35 § 1 of the Convention, and that the remedies available under Article 35 § 1 of the Convention were insufficient to ensure the effective redress of complaints if the Court were to find that Mr Saramati was within the meaning of Article 1 of the Convention.

II. THE CASES AGAINST FRANCE AND NORWAY

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. The Court has accepted that the applicants were compatible parties to the Convention, and that their complaints were compatible with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States.
In the present case, the Court considers, and indeed it was not disputed, that the FRY did not “control” Kosovo (within the meaning of the word in the above-cited jurisprudence of the Court concerning northern Cyprus) since prior to the relevant events it had agreed in the MTA, as it was entitled to do as the sovereign power (Banković and Others, cited above, at §§ 60 and 71 and further references therein; Shaw, *International Law*, 1997, 4th Edition, p. 462, Nguyen Quoc Dinh, *Droit International Public*, 1999, 6th Edition, pp. 475-478; and Dixon, *International Law*, 2000, 4th Edition, pp. 133-135), to withdraw its own forces in favour of the deployment of international civil (UNMIK) and security (KFOR) presences to be further elaborated in a UNSC Resolution, which Resolution had already been introduced under Chapter VII of the UN Charter (see Article 1 of the MTA, paragraph 36 above).

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

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

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

**B. The applicants’ submissions**

73. The applicants maintained that KFOR (as opposed to the UN or UNMIK) was the relevant responsible organisation in both cases.
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; ... competent to examine a case about the actions of British KFOR in Kosovo, individual State accountability was feasible (Bici & Anor v Ministry of Defence [2004] EWHC 786); and it was national commanders who decided on the waiver of the immunity of KFOR troops whereas the SG so did only in his capacity as an officer of the UNSC which, from a legal point of view, was a separate authority (paragraph 50.3 above). From this perspective, control of KFOR’s military activities was exercised by the UNSC, according to an international force under unified command, as could be seen from numerous constituent and appurtenant instruments, over which the French did not exercise any authority. Therefore, the CN were directly controlled by COMKFOR, by KFOR, whose rules were controlling, and by the SG, whose decisions were then working in turn commands. The French were also subject to the national jurisdiction of the UN. In such circumstances, the acts of the UN could not be imputed to a State but rather to the UN, which exercised overall effective control over the mission.

Finally, and 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 States was imputed was the overall effective control of the agent by the authority in question (paragraph 30.3 above). The CN were under a joint command, with the necessities of the mission determining the rules of engagement, the deployment decisions, and the overall control of the mission. 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, as could be seen from numerous constituent and appurtenant instruments, over which the French did not exercise any authority. Therefore, the CN were directly controlled by COMKFOR, by KFOR, whose rules were controlling, and by the SG, whose decisions were then working in turn command. The decisions concerning KFOR were taken by the SG, the other decision concerning KFOR’s military activities was exercised by the UNSC, according to an international force under unified command, as could be seen from numerous constituent and appurtenant instruments, over which the French did not exercise any authority. Therefore, the CN were directly controlled by COMKFOR, by KFOR, whose rules were controlling, and by the SG, whose decisions were then working in turn command. The French were also subject to the national jurisdiction of the UN. In such circumstances, the acts of the UN could not be imputed to a State but rather to the UN, which exercised overall effective control over the territory.

78. Fourthly, as regards Mr Saramati’s case, final decisions on detention lay with COMKFOR, who decided on the basis of the UN rules and the national rules of engagement. The decision to detain Mr Saramati was taken within the framework of the SOFA between Kosovo and UNMIK, and not under the Convention (paragraph 46.3 above). Second, the Committee for the Protection of Detained Prisoners, which considered the case of Mr Saramati, concluded that the UNMIK had no jurisdiction in the case. Therefore, the UNMIK, as the agent of the UN, was not subject to the jurisdiction of the States. Therefore, the Convention was not applicable. Finally, the Committee for the Protection of Detained Prisoners, which considered the case of Mr Saramati, concluded that the UNMIK had no jurisdiction in the case. Therefore, the UNMIK, as the agent of the UN, was not subject to the jurisdiction of the States. Therefore, the Convention was not applicable.

79. 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. The Court was therefore not competent to hear the case.

80. Even if this Court were to consider that the relevant legal framework applied, it would not absolve the States from their Convention responsibility for the acts of KFOR or its personnel. The Court was therefore not competent to hear the case. The Court was therefore not competent to hear the case.
Prevention of Torture, Inhuman and Degrading Treatment ("the CPT") concluded agreements with KFOR and UNMIK in May 2006 as it considered that Kosovo did not fall under the several national or regional standards. The Court, therefore, concluded that the French contingent's acts and omissions (carried out under the authority of NATO and control) 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. The case was incompatible ratione materiae as the contracting States did not exercise any control over the relevant events and no national police or military authority was involved. The Court's jurisdiction would indirectly involve judging the actions of non-Contracting States, contrary to the Monist Draft Article on State Responsibility (paragraph 34 above) or the ILC draft Articles on State Responsibility (paragraph 34 above). The case was therefore also incompatible ratione forum as the Monist Draft Article on State Responsibility (paragraph 34 above) or the ILC draft Articles on State Responsibility (paragraph 34 above) would require the Court to judge the actions of non-Contracting States, contrary to the principle (judgment cited above).

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. 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 a common goal. 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 a common goal. 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 a common goal. 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 a common goal. 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88. 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 a common goal.

89. 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 a common goal.

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 workable due to overlapping and perhaps conflicting national or regional standards. The Court, therefore, concluded that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France.

91. In these submissions, the States also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to growing demand. The Court adopted an organization in the present cases based on the need for effective monitoring and control, with UNMIK and KFOR having independent command and control structures as laid down in the CPT's report on the monitoring of the UN mission in the former Yugoslavia ("the BH report"). The Court, therefore, concluded that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France.

92. As to the de-mining and detention mandates, the Court noted that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France. The States also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to growing demand. The Court adopted an organization in the present cases based on the need for effective monitoring and control, with UNMIK and KFOR having independent command and control structures as laid down in the CPT's report on the monitoring of the UN mission in the former Yugoslavia ("the BH report"). The Court, therefore, concluded that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France.

93. Referring to the above-cited Bosphorus judgment, the States noted that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France.

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 authorized by an international organization. In this context, the Court noted that the French contingent's acts and omissions (carried out under the authority of NATO and control) were not imputable to France.

95. Finally, the applicants' suggestion, that the impugned action and inaction constituted a sufficient jurisdictional link between the States and the applicants, was misconceived. The applicants had also confused the
legal personality of international structures (such as NATO and the UN) and that of their member states. Even if KFOR did not have separate legal personality, it was under the control of the UN, which did. Neither the Opinions of the third parties referred to by the applicants was inconsistent with the UN Charter, which provided for international control of such an operation through KFOR.

D. The submissions of the third parties

1. The Government of Denmark

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

97. The cases raised fundamental issues as to the scope of the Convention as a regional instrument and its application to acts of the international peace-keeping forces authorised under Chapter VII of the UN Charter. The States were thereby fulfilling their obligation of exercising control of such an operation through KFOR.

98. In the first place, even if the most relevant recognised instance of extra-territorial jurisdiction was the concept (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 all governmental powers in Kosovo and was answerable, via the SG and the SRSG, to the UNSC. Its staff were employed by the UN. The “unified command and control” structure of KFOR, a coherent multinational force established under the authority of the Secretary General and with a single line of command under the authority of COMKFOR, rendered untenable the proposition of individual TCN liability for the acts or inaction of their troops carried out in the exercise of international authority.

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes of the UN in Kosovo and was answerable, via the SG and the SRSG, to the UNSC. Its staff were employed by the UN. The “unified command and control” structure of KFOR, a coherent multinational force established under the authority of the Secretary General and with a single line of command under the authority of COMKFOR, rendered untenable the proposition of individual TCN liability for the acts or inaction of their troops carried out in the exercise of international authority.
ensure in its regulations human rights protection and monitoring, that implied that the Convention control mechanisms did not apply. In addition, the Human Rights Committee of the UN regarded the inhabitants of Kosovo as falling under the authority of UNMIK (see paragraph 89 above).

106. This Court could not review acts of the UN, not least since Article 103 of the UN Charter established the primacy of the UN legal order. The above-cited Bosphorus case could be distinguished since the impugned actions of the Irish authorities took place on Irish territory over which they were deemed to have full and effective control (relying on the above-cited judgment of Ila/g250cu and Others, §§ 312-33 and Assanidze v. Georgia [GC], no. 71503/01, §§ 19-142, ECHR 2004-II) whereas none of the present respondent States enjoyed any sovereign rights (e.g. with respect to the establishment of courts or the imposition of taxation) in Kosovo. Any determination by this Court of a complaint against UNMIK/KFOR would also breach the Monetary Gold principle (cited at paragraph 67 above).

107. Even if the respondent States were found to have “jurisdiction”, the impugned act could not be imputed to those States and, in this respect, the actual command structure was clearly of the UN. Any determination by this Court of a complaint against UNMIK/KFOR would also breach the principle of and the UN Charter, the Statute of the Council of Europe and the Convention.

108. Finally, the difficulties to which post-conflict situations gave rise were nowhere sufficiently met by the Convention and its jurisprudence which supported international co-operation, the proper functioning of international organisations (the above-cited cases of Bankovi/g252 and Others, at § 62, Ila/g250cu and Others, at § 332 and Assanidze v. Georgia, at § 150).

109. The legal basis for the civil and military presence in Kosovo was UNSC Resolution 1244, KFOR formed part, and acted in Kosovo under the direction of a multinational framework formed by the UN and NATO. Even assuming that KFOR (along with UNMIK) exercised effective control in Kosovo, that presence was under the control of the UN and/or NATO. Even once the TCNs stayed within the relevant mandate they did not exercise any individual control or jurisdiction in Kosovo. Referring to the Opinion of the Venice Commission (cited at paragraph 50 above), the Government concluded that any action/inaction of KFOR was attributable to the UN and/or NATO and not to the respondent States.
The UN, as set out in the Security Council Resolution 1244, was not exercising a formal international authority over Kosovo. Instead, UNMIK was tasked with civil administration and human rights matters, while KFOR did not control that administration. As the Court noted, KFOR's mandate was for the purpose of securing a ‘peaceful setting’ and, unlike in Northern Cyprus, did not entail a peacekeeping role with a coercive mandate.

114. Accordingly, the effect of UNSC Resolution 1244 was that, at the relevant time, the UNSC exercised the powers of government in Kosovo through an international administration supported by an international security presence to which the respondent States and other non-Contracting States had provided troops.

None of the respondent States was 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 sovereignty over Kosovo or its internal administration, and none had provided troops, in the absence of a mandate from the Court, that would otherwise have entitled them to do so.

115. The application raised fundamental questions about the relationship between the Convention (a regional treaty and “constitutional instrument of European public order”) and the universal human rights system. It was not appropriate for the Court to construe the Convention as establishing, as it were, a ‘Supranational court’ in such cases, with the power to control the activities of States in the field of human rights.

116. To avoid this result, Article 1 should be interpreted to mean that, where officials from States act together within the scope of an international operation authorised by the UN, they are agents of those States and, unless otherwise specified, do not bring those affected within the jurisdiction of the States or engage the Convention responsibility of those States.


117. They adopted the observations of the UK Government.
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 the mandate to detain and to de-mine. The Court has then examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term “attribution” in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has examined whether it is competent 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 or to 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 concerning its jurisdiction and consequently State responsibility of the Convention, as well as the specific character of the Court’s jurisdiction as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969, 1969 UNTS 161, and the above-cited decision of the European Court of Human Rights, Bankovic and Others, § 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 should have been held responsible. However, the Court notes that Article 9(e) of UN Resolution 1244 confirms that KFOR retained responsibility for supervising de-mining until UNMIK could take over. When UNMIK began operations, it was therefore placed under the direction of the Deputy SRSG of UNMIK, as pointed out by the UN, the above-cited decision of Pillar I, the UN, the above-cited decision of Pillar II, the UN, and the above-cited decision of Pillar III. The Court has examined whether KFOR or UNMIK had the mandate to detain and de-mine and whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term “attribution” in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has examined whether it is competent to review any such action or omission found to be attributable to the UN.
2. Can the impugned action and inaction be attributed to the UN?

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 ... 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.

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 agreed in the MTA to the deployment of international forces and the establishment of the UN administration. The MTA was adopted on the 17th of May 1999, and the Resolution on the deployment of international forces was adopted on the 18th of May 1999. The Resolution itself was adopted on the 19th of May 1999.

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, 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 in the Framework of "Authorisation"", EIL (2000) Vol 11, No. 4 341-347; and the references cited therein.)
NATO fulfilled its command mission via a chain of command from the NAC to SHAPE to CIC South to COMKFOR. The MBs were commanded by an official from NATO's European Command (COMCEN). The MBs were then operationalized by COMKFOR, the international commander of KFOR.

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

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.

In the first place, and as noted above, Chapter VII allowed the UNSC to delegate to "Member States and relevant international organisations". Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions (see the UN submissions, paragraph 18 above) could not be eliminated altogether as to allow the UNSC to exercise its overall authority and control on the Resolution itself. Finally, the Resolution allowed the SG to report to the UNSC on the military presence required to implement the terms of the Resolution, the control over the SG and the MNBs to be taken according to an operational plan devised by COMKFOR, the international commander of KFOR.

136. This delegation model demonstrates that, contrary to the applicants' argument at paragraph 77 above, direct operational command from the UNSC is not required. Chapter VII collective security missions are collective in nature. The relevant entities are the Member States, and possibly the IMO, rather than the UNSC itself.

137. The Court considers it essential to recall at this point that the necessary donation of troops by willing TCNs means that, in practice, those TCNs retain some authority over those troops (for reasons of safety, discipline and accountability) and certain obligations (in material provision including uniforms and equipment) not otherwise intended for such TCN involvement. The SG stated that the TCNs were "in charge of the mission" (ICC Report cited at paragraph 52 above).

138. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of KFOR's operational command. The Court does not find any indication in the record that the SG considered that the TCN delegations undermined the effectiveness of KFOR's operational command. Since TCN involvement was not part of the Resolution, the Court cannot consider it an issue of interpretation of the Resolution itself. The Court does not see how the failure to conclude a SOFA agreement (or any other form of agreement) could undermine the effectiveness or unity of NATO's command in KFOR.

139. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of KFOR's operational command. The Court does not find any indication in the record that the SG considered that the TCN delegations undermined the effectiveness of KFOR's operational command. Since TCN involvement was not part of the Resolution, the Court cannot consider it an issue of interpretation of the Resolution itself. The Court does not see how the failure to conclude a SOFA agreement (or any other form of agreement) could undermine the effectiveness or unity of NATO's command in KFOR.
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 orders to the KFOR forces, an international organisation under Article 109 of the Convention, does not mean that the applicants’ concern was not legitimate. The Court notes, however, that where such action was taken in compliance with an international legal obligation, Article 109(2)(b) required the UN to take “all reasonable measures to ensure that” the applicants obtained the protection of which they were deprived. Where an international legal obligation exists, the Court will generally consider whether the UN acted with diligence and good faith. NATO, however, under Article 109(2)(b), also had to provide the protection of which the applicants were deprived, while the UN, under Article 109(2)(a), had to notify the host FRY and the Member States of the status of the applicants as UN personnel, and to provide them with all the rights, privileges and immunities guaranteed to its personnel. The Court notes that NATO, the applicants at paragraph 78 above, said, that the applicants had taken part in activities of COMKFOR, rather than KFOR, and that the COMKFOR orders were made exclusively by KFOR, in accordance with its mandate.

140. Accordingly, even if the UN itself would accept that there is room for progress in co-operation and command structures between the UNSC, TCNs and contributing international organisations, such a co-operation was not “attributable to the UN” within the meaning of Article 109. The Court notes that, in order to determine whether the impugned action was, in principle, “attributable” to the UN, it is not necessary to determine whether the UN had a legal personality separate from that of its member states. The Court observes that, even if the UN has a legal personality separate from that of its member states, it is not necessary to determine whether the impugned action was attributable to the UN in the same sense, if the impugned action was “attributable” to the UN in the sense of Article 109 (2) (b).

141. In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, “attributable” to the UN within the meaning of the word “attributable” at paragraphs 29 and 121 above.

3. Is the Court competent ratione personae?

142. 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 the UN is not a Contracting Party to the Convention. 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.

143. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States) that the great majority of the current Contracting Parties joined the UN before they signed the Convention (see paragraph 122 above). The Court has therefore had regard to two comprehensive provisions of the Charter, Article 2(2) and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

144. Of greater significance is the imperative nature of the principle under Chapter VII of the Charter. The Court considers that the impugned action and inaction was, in principle, attributable to the UN in the same sense, if the impugned action was “attributable” to the UN in the same sense.
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. 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.

151. 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
Judgment of 18 July 2013 [Grand Chamber]

Joined cases C-584/10 P, C-593/10 P and C-595/10 P
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. Szijjártó and K. Molnár, acting as Agents,

Republic of Austria, represented by C. Wissels and M. Bulterman, acting as Agents,

Republic of Finland, represented by H. Leppo, acting as Agent,

Republic of Bulgaria, represented by B. Zaimov, T. Ivanov and E. Petranova, acting as Agents,

Republic of Austria, represented by B. Ricziová, acting as Agent,

Republic of Finland, represented by H. Leppo, acting as Agent,

interveners in the appeals in Cases C-584/10 P and C-595/10 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, interventer at first instance,

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and M. Berger, Presidents of Chambers, U. Lõhmus, E. Levits, A. Arabadžiev, 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 Charter of the United Nations in order to combat terrorist threats to international peace and security. Initially directed solely against the Taliban of Afghanistan, those resolutions were subsequently extended to include Usama bin Laden, Al-Qaeda and persons and entities associated with them. The resolutions provide, inter alia, for the freezing of assets of the organisations, entities and persons identified by the committee established by the Security Council in accordance with Resolution 1267 (1999) of 15 October 1999 (the Sanctions Committee) on a consolidated list (the Sanctions Committee Consolidated List).

In order to deal with delisting requests made by organisations, entities or persons named on that list, Security Council Resolution 1735 (2006) of 19 December 2006 (providing for examination of such requests. That local point was established in March 2007).

Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names of organisations, entities or persons to the Security Council for inclusion on the Consolidated List, they must provide a statement of case, including (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information; and (iii) supporting information or documents that may be provided. Under paragraph 6 of that Resolution, States are requested, at the time of submission, to identify those parts of the statement of case which may be publicly released and those parts which may be released upon request to interested States. Under paragraph 12 of Security Council Resolution 1822 (2008) of 30 June 2008, States must, inter alia, for each proposal, for inclusion on the Consolidated List, identify those parts of the statement of case which may be publicly released and those parts which may be released upon request to interested States.

As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an ‘Office of the Ombudsperson’, whose tasks include an individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, including law, human rights, counterterrorism, and sanctions. The mandate of the Ombudsperson, as described in Annex II to that resolution, covers a stage of gathering information from the organisation, entity or person requesting delisting, following the course of the Sanctions Committee Consultative List. As established in the Joint Declaration, the Ombudsperson must then consider whether to approve that request, decide whether to approve the request, and notify the Sanctions Committee of the Ombudsperson’s decision and action in accordance with the Sanctions Committee Consultative List.

By virtue of Article 48(2) of the Charter of the United Nations, States that are the members of the Sanctions Committee Consultative List, or the Security Council, are carried out by the agencies of which they are members.

By virtue of Article 103 of the Charter of the United Nations, States that are the members of the Sanctions Committee Consultative List, or the Security Council, are carried out by the agencies of which they are members.

By virtue of Article 2(1) of the Charter of the United Nations, the United Nations Security Council is to make recommendations, or decide what measures are to be taken, in accordance with Articles 41 and 42 of the Charter, to maintain or restore international peace and security. Under Article 41 of that Charter, 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 to call upon the Members of the United Nations directly and through their action in the appropriate international organisations, agencies and undertakings, to apply such measures.
Accordingly, the General Court, applying the standard of universal protection of the fundamental rights of the person relied on by Mr Kadi, as regards, in particular, the right to effective judicial review, the General Court stressed that Mr Kadi had been the subject of asset-freezing measures since 11 September 2001, against his will and without a review of evidence and evidence relied on by the Security Council and proportionality of those measures. The General Court added that any such lacuna in the judicial protection available to Mr Kadi is not in itself contrary to the EC Treaty.

In parallel with the regime described above, which is aimed solely at organisations, entities and persons suspected of being involved in terrorist activities, Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat the financing of terrorism (OJ 2001 L 349, p. 1). That resolution, which was likewise adopted in response to the terrorist attacks of 11 September 2001, provided for a list of organisations, entities or persons which is intended to cover any entity both in the European Union and under the United Nations regime, that engages in terrorist activities. That list contains a list, which is regularly reviewed, of organisations, entities and personal suspected of being involved in terrorist activities.

By judgment of 3 September 2008 in Joined Cases C-376 to C-384/07 Al-Khalaf and Others v Council and Commission, the Court set aside the judgment of the General Court in Case T-35/01 Kadi and Al-Barakaat International Foundation v Council and Regulation No 881/2002, so far as it concerned Mr Kadi. In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle of the rule of law. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when laws are adopted in response to the terrorist attacks of 11 September 2001, the EC Treaty precludes the implementation of Security Council resolutions that provide for asset-freezing measures, differences in principle from the measure which is the subject of the present case in that Regulation No 881/2002, in the light of fundamental rights, including such rights as Regulation No 881/2002, thereby immunity from jurisdiction. The Court added that the European Union is not bound by the Security Council resolution solely to implement a measure which is incompatible with such fundamental rights as are protected by the EC Treaty.

In those circumstances the Court held, in paragraphs 326 and 327 of the Kadi judgment, that the effects of the restrictive measures imposed on Mr Kadi in the light of fundamental rights, including such rights as Regulation No 881/2002, are designed to implement Security Council resolutions, and that the General Court reasoning was consequently vitiated by an error of law.

In the same judgment, the Court added that, since the Council had not communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures, imposed on him within a period of time, and that the evidence was adopted or as possible thereafter, in the same judgment, the Court added that, since the Council had not communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures, imposed on him within a period of time, and that the evidence was adopted or as possible thereafter.
On 23 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, the European Union authorities had decided not to pursue investigations into his alleged involvement in support of Al-Qaeda and arms trafficking. 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 22 October 2008 France’s Permanent Representative to the UN, and authorised its transmission to Mr Kadi.

That summary of reasons was also published on the website of the Sanctions Committee.

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.

The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a

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 investigations into allegations of his involvement in support of Al-Qaeda, facilitation, preparation, or perpetration 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’s 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 inculpate 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 the reasons relating to his being listed on the Sanctions Committee’s Consolidated List. 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.

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...
Regulation No 881/2002 was amended to that effect, inter alia, by the addition of the following:

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 breach of the principle of effective judicial protection, and the fifth plea alleged a disproportionate restriction on the right to property.

The General Court further stated, in paragraphs 138 to 146 of the judgment under appeal, that, in that regard, the General Court held in essence, in paragraphs 126 and 127 of the judgment under appeal, that it is obvious, particularly from paragraphs 326, 327, 336 and 342 to 344 of the judgment, that in the light of the facts and circumstances relied on in support of the restrictive measures at issue and determine whether the information and evidence on which that assessment is based is accurate, reliable and consistent, and such review cannot be barred on the ground that information and evidence is secret or confidential.

By order of the President of the Court of 9 February 2011, Cases C-584/10 P, C-593/10 P and C-595/10 P were joined for the purposes of the written and oral procedures and the judgment.
Kingdom of the Netherlands, the Slovak Republic and the Republic of Finland were granted leave to intervene in Cases C-584/10 P, C-593/10 P and C-595/10 P in support of the forms of order of the Commission, the Council and the United Kingdom.

49 In Case C-584/10 P, the Commission claims that the Court should:
– set aside the judgment under appeal in its entirety;
– dismiss Mr Kadi’s application for annulment of the contested regulation in so far as it concerns him as being unfounded, and
– order Mr Kadi to pay the Commission’s costs in this appeal and in the proceedings before the General Court.

50 In Case C-593/10 P, the Council claims that the Court should:
– set aside the judgment under appeal;
– dismiss Mr Kadi’s application for annulment of the contested regulation in so far as it concerns him as being unfounded, and
– order Mr Kadi to pay the costs in the proceedings at first instance and in the present appeal.

51 In Case C-595/10 P, the United Kingdom claims that the Court should:
– set aside the judgment under appeal in its entirety;
– dismiss Mr Kadi’s application for annulment of the contested regulation in so far as it concerns him, and
– order Mr Kadi to bear the United Kingdom’s costs in the proceedings before the Court of Justice.

52 Mr Kadi contends in all three cases that the Court should:
– dismiss the appeals;
– uphold the judgment under appeal and declare that it became immediately enforceable on the date of delivery; and
– order the appellants to pay Mr Kadi’s costs in the present appeal, including all costs incurred in responding to the observations of intervening Member States.

53 The French Republic, intervener at first instance, claims that in all three cases the Court should:
– set aside the judgment under appeal, and
– give final judgment as to the substance, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, and reject the forms of order sought by Mr Kadi at first instance.

54 The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, 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 claim that the judgment under appeal should be set aside and that Mr Kadi’s action for annulment should be dismissed.

The request to reopen the oral procedure

55 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.

56 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).

57 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).

58 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.

The appeals

59 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

60 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.
It follows that the judgment under appeal, in particular paragraph 126 thereof, is not vitiated by any error of law, with regard to the contested regulation immunity from jurisdiction.

The second and third grounds of appeal: respectively, errors of law relating to the level of judicial review determined by the General Court in its case-law relating to the regime referred to in paragraphs 14 and 15 of this judgment. The fact is that the General Court judgment contains no indication supporting the General Court's approach concerning the level of intensity of judicial review to be applied to a European Union measure, such as the contested regulation.

Arguments of the parties

The second and third grounds of appeal should be examined together, since the subject of both sets of arguments is the same. As far as the second ground of appeal is concerned, the Court is dealing essentially with the standard of review determined by the General Court in its case-law relating to the regime referred to in paragraphs 14 and 15 of this judgment. Further, the fact that the argument wholly ignores the fundamental differences between that regime and the regime at issue in the present case, with regard to the factual and legal basis for the decision under appeal, must necessarily prevent the argument from being examined properly.

Referring to various passages in that judgment, Mr Kadi disputes, in any event, that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law and to European Union law. Mr Kadi argues, in support of this position, that the General Court judgment, that in accordance with paragraphs 35 to 37 of the judgment under appeal, the contested regulation could not be afforded any immunity from jurisdiction on the ground that the objective of the measure is to implement resolutions adopted by the United Nations Security Council. The arguments on which Mr Kadi relies are essentially the same as those relied on by the Commission before the General Court under appeal.

Second, the Commission, the Council and the United Kingdom, supported by all the Member States intervening in the appeals, claim, on the basis of arguments taken from international law and European Union law broadly comparable to those set out in paragraphs 61 and 62 of this judgment, that the definition of the level of intensity of judicial review under appeal, that the contested regulation immunity from jurisdiction is contrary to international law and to European Union law.
by the General Court, in paragraphs 127 and 128 of the judgment under appeal, of the alteration made to the examination procedure introduced by Resolution 1822 (2008) has contributed to an improvement in the protection of fundamental rights, as demonstrated by the fact that the names of a great many persons and entities have been removed from the Sanctions Committee Consolidated List. As regards the Office of the Ombudsperson established by Resolution 1904 (2009), its creation represents a decisive new departure in this area by enabling the person of Mr Kadi's fundamental rights, applicable to the listing of Mr Kadi's name in Annex I to Regulation No 881/2002 following the evidence relied on against him might be restricted in order to ensure that the disclosure of sensitive information cannot lead to third parties becoming privy to that information and thereby evading measures taken to combat international terrorism. Moreover, the criticisms made in paragraphs 345 to 352 of that judgment related to the failure to communicate to Mr Kadi the identity of the States which requested the listing.

Fourth, the Commission, the Council and the United Kingdom claim that the General Court’s interpretation in paragraphs 171 to 188 and 192 to 194 of the judgment under appeal, relating to the requirements, stemming from respect for Mr Kadi’s fundamental rights, required the disclosure of the information and evidence held against Mr Kadi. That interpretation by the General Court wholly ignores the possibility stated in paragraphs 34 to 344 of its judgment that the Sanctions Committee may find particular circumstances which may make it unnecessary to disclose that information and evidence. Moreover, the criticisms made in paragraphs 157 and 177 of the judgment under appeal concerning the failure to disclose information and evidence held by the Sanctions Committee. Its purpose is solely to ensure observance of the Al-Qaeda network and with Usama bin Laden.

Fifth, the Commission contends that the General Court erred in holding that respect for those fundamental rights required the disclosure of the reasons supporting the requested delisting. The Court gave a perfectly clear indication, in the judgment under appeal, that the right to know the reasons for the listing of Mr Kadi’s name in Annex I to Regulation No 881/2002 following the evidence relied on against him might be restricted in order to ensure that the disclosure of sensitive information cannot lead to third parties becoming privy to that information and thereby evading measures taken to combat international terrorism. Moreover, the criticisms made in paragraphs 345 to 352 of that judgment related to the failure to communicate to Mr Kadi the identity of the States which requested the listing.

Further, the General Court’s approach does not take into account the many material obstacles that exist to the communication of such information and evidence to the European Union institutions, in particular the fact that such information and evidence is a statement of case sent to the Sanctions Committee by a Member of the UN; generally subject to a requirement of confidentiality due to its sensitivity.

In the present case, the summary of reasons provided by the Sanctions Committee which was disclosed to Mr Kadi enabled him to understand why his name was listed in Annex I to Regulation No 881/2002. Far from being limited to allegations against him which were general, unsubstantiated, vague and lacking in detail, set out in detail the evidence which had led the Sanctions Committee to take the view that Mr Kadi had personal and direct links with the Al-Qaeda network and Usama bin Laden.

Sixth, the Commission, the Council and the United Kingdom claim that the analysis carried out in paragraphs 175 and 177 of the judgment under appeal, relating to the requirement of confidentiality due to its sensitivity, is legally erroneous. That interpretation by the General Court wholly ignores the possibility stated in paragraphs 34 to 344 of its judgment that the Sanctions Committee may find particular circumstances which may make it unnecessary to disclose that information and evidence. Moreover, the criticisms made in paragraphs 157 and 177 of the judgment under appeal concerning the failure to disclose information and evidence held by the Sanctions Committee. Its purpose is solely to ensure observance of the Al-Qaeda network and with Usama bin Laden.

In the present case, the summary of reasons provided by the Sanctions Committee which was disclosed to Mr Kadi enabled him to understand why his name was listed in Annex I to Regulation No 881/2002. Far from being limited to allegations against him which were general, unsubstantiated, vague and lacking in detail, set out in detail the evidence which had led the Sanctions Committee to take the view that Mr Kadi had personal and direct links with the Al-Qaeda network and Usama bin Laden.
Third, after noting that the considerations of the General Court on the nature of the restrictive measures at issue are supplementary, Mr Kadi none the less argues that, in this particular case, both of their general and specific character has been subsumed to them for a very long time, a factor which justifies full and rigorous review of the contested regulation.

Fourth, Mr Kadi does not accept that the requirements imposed by the General Court for the purposes of respect for fundamental rights are vitiated by an error of law.

Fifth, Mr Kadi contends that the legal proceedings in the United States are of no relevance to the determination of the criteria for delisting from the Sanctions Committee Consolidated List and the power to decide to delist remain within the discretion of the Ombudsperson, any member of the Sanctions Committee, which may exercise their veto according to their discretion. The Office of the Ombudsperson depends, however, on the willingness of States to cooperate in gathering information.

The extent of the rights of the defence and of the right to effective judicial protection

As stated by the General Court in paragraphs 125, 126 and 171 of the judgment under appeal, in paragraph 326 of the judgment of 4 June 2013 in Case C-300/11 P Bamba v Commission, the person concerned must, in accordance with paragraph 53 of that judgment, enjoy the full review of the lawfulness of the decision taken in the exercise of the power of the body that will exclusively make the decision on delisting. Moreover, the Ombudsperson has no power to compel any action by the Members of the UN or by the Sanctions Committee, which enjoys a discretion. The persistent shortcomings of this procedure have been emphasised by, among others, the Office of the Ombudsperson itself in its first report of January 2011, which drew particular attention to the shortcomings of this procedure.

Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection. The Office of the Ombudsperson depends, moreover, on the willingness of States to cooperate in gathering information.

The first of those rights, which is affirmed in Article 41 of the Charter of Fundamental Rights of the European Union, is not a right which is limited to the principle of proportionality. That right is to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.

The second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based. Either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the Court to have jurisdiction to determine whether there is any point in the application of the compelling jurisdiction subject to the principle of proportionality, that is necessary and genuinely meets objectives of general interest recognised by the European Union.

Those shortcomings were not rectified by Resolution 1989 (2011). The recommendations of the Office of the Ombudsperson still do not have binding force. The determination of the criteria for delisting from the Sanctions Committee Consolidated List and the power to decide to delist remain within the discretion of the Office of the Ombudsperson, any member of which may exercise their veto according to their discretion.

Findings of the Court

In the second place, the General Court's approach is consistent with European Union law, as emphasised by the Court in Case C-550/10 P Al-Aqsa v Commission (2011 ECHR 10439, paragraph 53), including, the nature of the case of, for example, the context of its adoption and of the legal rules governing the judgments of 15 November 2012, in Joined Cases C-539/10 P and C-540/10 P Al-Aqsa v Council and Netherlands v Al-Aqsa, paragraphs 139 and 140, in Case C-417/11 P Council v Bamba, paragraph 53).

Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection. In particular, the person seeking the delisting of his name from the Sanctions Committee Consolidated List and the power to decide to delist remains within the discretion of the Office of the Ombudsperson, any member of which may exercise their veto according to their discretion.
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 United Nations Charter, to maintain or restore international peace and security, the Commission could lawfully decide to maintain the name of Mr Kadi on the list in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection.

In that context, as is apparent from recital 3 of the preamble to the contested regulation [Regulation No 881/2002 (OJ 2009 L 346 p. 42)] in order to amend the listing procedure following that judgment, as is explained in recital 4 of the preamble to Regulation No 1266/2009 (OJ 2009 L 346 p. 42), in order to amend the listing procedure following that judgment, it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the Security Council has the task, in accordance with the purposes of the Charter, to maintain or restore international peace and security, in accordance with the principles and purposes of the United Nations, including respect for human rights.

When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him (see, to that effect, Case C-259/04 P, Kolosov v Commission, [2006] ECR I-3573, paragraph 21; Case C-46/98 P, Medici v Commission, [1999] ECR I-787 and case-law cited).

When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, the competent Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter relating to such implementation (see the judgment, paragraphs 295 and 296).

In that context, as is apparent from the resolutions referred to in paragraphs 10 and 11 of this judgment, governing the regime of restrictive measures such as those at issue in this case, it is for that authority to assess, having regard, inter alia, to the content of any comments made by the individual concerned on the summary of reasons, the nature of that individual's defence and the evidence put forward in support of the registration, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective judicial protection, that individual's views on the grounds advanced against him.

Accordingly, both in respect of an initial decision to list the name of an organisation, entity or individual on the Consolidated List, and in respect of a decision to maintain such listing in Annex I to Regulation No 881/2002, the competent Union authority must, in order to give effect to that decision on behalf of the European Union, take the decision to list the name of the organisation, entity or individual on the Consolidated List on the basis of the information and documents supporting the registration in question.

Consequently, where, under the relevant Security Council resolutions, the competent Union authority is under an obligation to carry out any exculpatory evidence provided with those comments (see, by analogy, Case C-52/04 P, Gonzales Durante v Administration of the Port of Barcelona, [2005] ECR I-5333, paragraph 14; Case C-130/05 P, Spain v Commission, [2006] ECR I-5469, paragraph 14; Case C-525/04 P, Kossou v Commission, [2006] ECR I-5469, paragraph 14), that task, in that context, is for that authority to assess, having regard, inter alia, to the content of any comments made by the individual concerned on the summary of reasons, the nature of that individual's defence and the evidence put forward in support of the registration, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective judicial protection, that individual's views on the grounds advanced against him. As is apparent from recital 3 of the preamble to the contested regulation [Regulation No 881/2002 (OJ 2009 L 346 p. 42)] in order to amend the listing procedure following that judgment, as is explained in recital 4 of the preamble to Regulation No 1266/2009 (OJ 2009 L 346 p. 42), in order to amend the listing procedure following that judgment, it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the Security Council has the task, in accordance with the purposes of the Charter, to maintain or restore international peace and security, in accordance with the principles and purposes of the United Nations, including respect for human rights.
If the competent European Union authority finds itself unable to comply with the request by the Courts of the European Union, it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them, namely, in this case, the indications contained in the narrative summary of that information or evidence. The European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.

Lastly, without going so far as to require a detailed response to the comments made by the competent European Union authority, it is for the Courts of the European Union, before whom the secrecy or the less the task of the Courts of the European Union, before whom the secrecy or the confidentiality of information or evidence is at issue, to determine whether any reasons stated by an international body or, at the very least partial disclosure, sufficient to support the reasons relied on as ground to preclude the disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, the person concerned must be subject to the procedure set out in paragraphs 111 to 114 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure sufficient to support the reasons relied on as ground to preclude the disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, the person concerned must be subject to the procedure set out in paragraphs 111 to 114 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and that those reasons are deemed sufficient in itself to support the decision. In that regard, it is for the Court of the European Union to determine whether the reasons, or, at the very least partial disclosure, the reasons relied on as ground to preclude the disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, the person concerned must be subject to the procedure set out in paragraphs 111 to 114 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.
Having regard to the preventive nature of the restrictive measures at issue, if, in the course of this review, the Court, in the light of the observations made by the Sanctions Committee, considers that there are reasonable doubts as to the correctness of the reasons the Commission has provided for the listing or maintenance of the person concerned in Annex I to Regulation No 881/2002, it must order the immediate suspension of the application of the sanctions concerned, and, where the case so requires, annul the decision of 6 February 2002 suspending the application of the sanctions. In that event, the information and evidence underlying the reasons for maintaining the listing of Mr Kadi's name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had found that the Commission had not provided, in the form of a reasoned statement of reasons, the information and evidence on which the decision at issue was based, is accessible to the person concerned and, subsequently, to the Courts of the European Union.

Hence, in paragraphs 173, 184, 188 and 194 of the judgment under appeal, the General Court held that the failure of the Commission to disclose to Mr Kadi the information and evidence underlying the reasons for maintaining his name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had found that the Commission had not provided, in the form of a reasoned statement of reasons, the information and evidence on which the decision at issue was based, is accessible to the person concerned and, subsequently, to the Courts of the European Union. Information and evidence which are not disclosed to the person concerned and thus not subject to judicial review constitute an infringement of the rights of the defence or the right to effective judicial protection. The information and evidence underlying the reasons for maintaining the listing of Mr Kadi's name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had found that the Commission had not provided, in the form of a reasoned statement of reasons, the information and evidence on which the decision at issue was based, is accessible to the person concerned and, subsequently, to the Courts of the European Union.

Furthermore, in paragraphs 173, 184, 188 and 194 of the judgment under appeal, the General Court held that the failure of the Commission to disclose to Mr Kadi, or to the General Court, information and evidence which would, each in itself, demonstrate that the listing and the maintenance of the listing of Mr Kadi's name in the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had found that the Commission had not provided, in the form of a reasoned statement of reasons, the information and evidence on which the decision at issue was based, are not accessible to the person concerned and, subsequently, to the Courts of the European Union. Information and evidence which are not disclosed to the person concerned and thus not subject to judicial review constitute an infringement of the rights of the defence or the right to effective judicial protection. The information and evidence underlying the reasons for maintaining the listing of Mr Kadi's name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had found that the Commission had not provided, in the form of a reasoned statement of reasons, the information and evidence on which the decision at issue was based, is accessible to the person concerned and, subsequently, to the Courts of the European Union.
It must be observed, as regards the first reason relied on in the summary of reasons provided by the Sanctions Committee, that, in his comments of 10 November 2008 admitted to the General Court that the object of the exercise of the Mafawa Foundation was to provide humanitarian and administrative assistance to refugees and people in need in Afghanistan and, in the context of the judgment, the objects of the exercise of the Foundation were exclusively charitable and humanitarian, directed mainly towards providing relief to people suffering famine in the world, in particular in the Sudan. While admitting that he had been a founder of the Mafawa Foundation and had in January 2001 set up the Makhtab al-Khidamat, which was the predecessor to Al-Qaeda and which, following the dissolution of Makhtab al-Khidamat/Al Qaeda – founded by, among others, Usama bin Laden, which was sufficiently detailed and specific, in that it identifies the entity concerned and Mr Kadi’s role in relation to that foundation. It is however clear that no information or evidence has been produced to substantiate the allegations of Makhtab al-Khadaam/Al Qaeda and Al-Qaeda. In such circumstances, the indications concerning the time and context of the appointment in question and information on the individuals involved in the alleged project are not such as to justify the adoption of an adverse assumption against him.

As regards the second reason relied on in the summary of reasons provided by the Sanctions Committee, the Commission argued 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 link, had ceased operations by 1998 at the latest. The circumstance that the indication that it was in that institution that planning sessions for that alleged project take place is expressed as a possibility is not incompatible with the essential requirement of the duty to state reasons, since the reasons for listing on a European Union list may be based on suspicions of involvement in terrorist activities, without prejudice to the determination of whether those suspicions are justified.

In 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 ceased did not rule out the possibility that that entity, having continuous legal link, had ceased operations by 1998 at the latest. As regards the second reason relied on in the summary of reasons provided by the Sanctions Committee, it was based on the fact that, in order to manage the European offices of the Foundation, Mr Kadi appointed, in 1992, an individual named Al-Ayadi, who was Usama bin Laden’s close associate and who, at that time, was working with him on a project supporting vocational training for refugees in Bosnia and Herzegovina. In that capacity, Mr Al-Ayadi was one of the major shareholders in a Bosnian bank called Depositna Banka, which was closed in 1998. The Commission argued that the fact that the Mafawa Foundation was involved in international strategic decisions of the Foundation in Europe and that it provided financial support to a mujahidin battalion in Bosnia and Herzegovina, is sufficient to establish a link between the two entities. The Commission further argued that the fact that Mr Al-Ayadi held a position and acted as nominee for Mr Kadi, and where planning sessions for an attack against a United States facility in Saudi Arabia might have taken place, is sufficient to establish a link between the two entities. The Commission also argued that the fact that Mr Al-Ayadi listed on the Sanctions Committee Consolidated List. Lastly, Mr Al-Ayadi asserted that he had no knowledge of the terrorist activities of Mr Kadi and that organisation.

In its reply of 8 December 2008 to Mr Kadi’s comments, the Commission argued that the fact that Mr Al-Ayadi and Mr Kadi had been involved in a project supporting vocational training for refugees in Bosnia and Herzegovina, is sufficient to establish a link between the two entities. The Commission further argued that the fact that Mr Al-Ayadi held a position and acted as nominee for Mr Kadi, and where planning sessions for an attack against a United States facility in Saudi Arabia might have taken place, is sufficient to establish a link between the two entities. The Commission also argued that the fact that Mr Al-Ayadi listed on the Sanctions Committee Consolidated List. Lastly, Mr Al-Ayadi asserted that he had no knowledge of the terrorist activities of Mr Kadi and that organisation.

Although the exercise of the Mafawa Foundation was not based on the fact that Mr Kadi was one of the major shareholders in the Depositna Banka, which was closed in 1998, the Commission argued that the fact that Mr Al-Ayadi held a position and acted as nominee for Mr Kadi, and where planning sessions for an attack against a United States facility in Saudi Arabia might have taken place, is sufficient to establish a link between the two entities. The Commission also argued that the fact that Mr Al-Ayadi listed on the Sanctions Committee Consolidated List. Lastly, Mr Al-Ayadi asserted that he had no knowledge of the terrorist activities of Mr Kadi and that organisation.
Ayadi on the recommendation of Mr Julaidan and the alleged involvement of Mr Al-Ayadi 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 in the annex to Regulation No 881/2002, it must be observed that that material, not otherwise substantiated, cannot justify maintaining, after 2008, the listing of Mr Kadi’s name in that regulation, as amended by the contested regulation. Given how far apart in time those two measures are, that material, which refers to 1992, is no longer sufficient in itself to justify, in 2008, maintaining, at European Union level, the name of Mr Kadi in the list of persons and entities subject to the restrictive measures at issue.

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 no knowledge of Mr Talad Fuad Kassem. He also stated that he had never provided financial, logistic or any other support of any kind to that individual, to the organisation which he led or to mujahedin in Bosnia and Herzegovina. Mr Kadi also maintained that, so far as he was aware, neither the Muwafaq Foundation nor any of its employees had ever provided any such support of that kind.

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.

However, no information or evidence has been submitted which makes it possible to determine the accuracy of the statement attributed to Mr Talad Fuad Kassem in the summary of reasons provided by the Sanctions Committee and to assess, having regard, in particular, to Mr Kadi’s claim that he had no knowledge of Mr Talad Fuad Kassem, the probative value of that statement in respect of the allegations that the Muwafaq Foundation was providing support to terrorist activities in Bosnia and Herzegovina in association with Usama bin Laden. In such circumstances, the indication relating to the statement of Mr Talad Fuad Kassem does not constitute sufficient basis to justify the adoption, at European Union level, of restrictive measures against Mr Kadi.

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 having provided financial support to international terrorism through Depositna Banka or through any other entity. He explained that he had acquired an interest in that bank for entirely commercial reasons having regard to the prospects of social and economic reconstruction in Bosnia after the Dayton Peace Accord of 1995, and that he had, in order to comply with local law, appointed Mr Al-Ayadi, a Bosnian national, as his nominee to hold his shares in that bank. Relying on reports from international firms of auditors relating to the period from 1999 until 2002 and on the report of a financial analyst engaged by a Swiss magistrate covering the period from 1997 to 2001, he claimed that none of those reports suggest that Depositna Banka was involved in any way in the funding or support of terrorism. Mr Kadi disputed that that bank had been closed, explaining, and providing supporting documents, that it had merged with another bank in 2002. Further, he produced documents relating to an occasion, in 1999, when United States authorities, the manager of Depositna Banka and the political authorities in Bosnia were in contact to discuss legal issues relating to the banking sector in Bosnia and Herzegovina. Lastly, Mr Kadi claimed that if the Saudi Arabian authorities had had grounds to suspect that any attacks were planned, within the Depositna Banka, against United States interests in Saudi Arabia, they would inevitably have questioned him, as the Saudi Arabian owner of that institution. According to Mr Kadi the Saudi Arabian authorities have never done so.

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 that Mr Kadi had used his position for purposes other than ordinary business purposes.

However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Depositna Banka for terrorist acts in association with Al-Qaeda or Usama bin Laden, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him.

In those circumstances, the errors of law, identified in paragraphs 138 to 140 and 142 to 149 of this judgment, which vitiate the judgment under appeal are not such as to affect the validity of that judgment, given that its operative part, which annuls the contested regulation in so far as it concerns Mr Kadi, is well founded on the legal grounds stated in the preceding paragraph.

Consequently, the appeals must be dismissed.

Costs

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 by virtue of Article 184(1) of those Rules, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the appellants have been unsuccessful and Mr Kadi has applied for costs, they must be ordered to pay the costs. Where an interventer at first instance, which has not itself brought an appeal, participates in the proceedings before the Court, the Court may, under Article 184(4) of those Rules, decide that it is to bear its own costs. Article 140(1) of those Rules provides that Member States which have intervened in the proceedings are to bear their own costs.

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.

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 to bear their own costs.

[Signatures]

*Language of the case: English.*
United States District Court, Southern District of New York

Judgment of 9 January 2015

Case No. 13-CV-7146 (JPO)
Plaintiffs Delama Georges, Alius Joseph, Lisette Paul, Felicia Paule, and Jean Rony Silfort 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.

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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 vitiated 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 “the 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.2 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”); Brzak, 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

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2 Those situations are: “(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; and (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” Vienna Convention art. 31.