Montevideo, Uruguay
4–29 April 2016

INTERNATIONAL ORGANIZATIONS

PROFESSOR MÓNICA PINTO

Codification Division of the United Nations Office of Legal Affairs

INTERNATIONAL HUMANITARIAN LAW
PROFESSOR MÓNICA PINTO

International Organizations as Actors in the International Arena

REQUIRED READINGS *(printed format)*

Case Law

1. *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949,* p. 174
2. *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, I.C.J. Reports 1948,* p. 57
3. *Competence of General Assembly Regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* p. 4
4. *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
5. *European Commission and Others v. Yassin Abdullah Kadi (Joined cases C-584/10 P, 494 C-593/10 P and C-595/10 P), Judgment, European Court of Justice, 18 July 2013*

SUGGESTED READINGS *(not reproduced)*

6. Amerasinghe, C.F., *An Introduction to the Institutional Law of International Organizations*, New York, Cambridge University Press, 2005, pp. 1-6
7. Keohane, Robert, "International Institutions: Can Interdependence Work?", *Foreign Policy 1998*, Washington D.C, pp. 82-96

International Organizations as Law Makers

REQUIRED READINGS *(printed format)*

Case Law

8. *Prosecutor* v. *Duško Tadić, ICTY Appeals Chamber, 2 October 1995 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, pp. 1-5 and 9-18, paras. 1-12 and paras. 26-48

SUGGESTED READINGS *(not reproduced)*

9. Klabbers, Jan, *An Introduction to International Institutional Law*, New York, Cambridge University Press, 2002, pp. 197-212

International Organizations as Accountable Entities

REQUIRED READINGS *(printed format)*

Legal Documents

10. Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation, adopted by the Board of Governors on 30 April 1980 and amended on 31 July 2001 and on 18 June 2009

11. Rules of the World Bank Administrative Tribunal, as adopted by the Tribunal on September 26, 1980 and amended on 1 January 2002

Case Law

12. The Word Bank Administrative Tribunal, *Louis de Merode and others* v. *The World Bank, Decision of 5 June 1981, Decision No. 1,* paras.16-29

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.

1949.
April 11th.
General List.
No. 4.

April 11th, 1949.

REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS

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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, ZORIČIĆ, 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 Kaeckenbeeck, D.C.L., Minister Plenipotentiary of His Majesty the King of the Belgians, Head of the Division for Peace Conferences and International Organization at the Ministry for Foreign Affairs, Member of the Permanent Court of Arbitration;

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

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

* * *

The first question asked of the Court is as follows:

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

It will be useful to make the following preliminary observations:

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

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

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

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

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

* * *

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

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

This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar

in form, and both the direct subjects of international law. It is dealt with by means of negotiation, and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

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

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

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

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

The Charter has not been content to make the Organization created by it merely a centre "for harmonizing the actions of nations in the attainment of these common ends" (Article 1, para. 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5), and to accept and carry out the decisions of the Security Council ; by authorizing the General Assembly to make recommendations to the Members ;

by giving the Organization legal capacity and privileges and immunities in the territory of each of its Members ; and by providing for the conclusion of agreements between the Organization and its Members. Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. It must be added that the Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1) ; and in dealing with its Members it employs political means. The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

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

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

The next question is whether the sum of the international rights of the Organization comprises the right to bring the kind of international claim described in the Request for this Opinion. That is a claim against a State to obtain reparation in respect of the

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

* * *

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

In considering this aspect of Question I (*a*) and (*b*), it is necessary to keep in mind the reasons which have led the Court to give an affirmative answer to it when the defendant State is a Member of the Organization. It has now been established that the Organization has capacity to bring claims on the international

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

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

* * *

Question II is as follows:

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

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

In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.

The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense, and as between the Organization and its Members it draws attention to their duty to render "every assistance" provided by Article 2, paragraph 5, of the Charter.

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

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

* * *

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

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

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

FOR THESE REASONS,

The Court is of opinion

On Question I (a) :

(i) unanimously,

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

(ii) unanimously,

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

On Question I (b) :

(i) by eleven votes against four,

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

(ii) by eleven votes against four,

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

On Question II :

By ten votes against five,

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

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

(*Signed*) BASDEVANT,

President.

(*Signed*) E. HAMBRO,

Registrar.

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

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

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

(*Initialled*) J. B.

(*Initialled*) E. H.

International Court of Justice

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.

194
May
General
No.

May 28th, 1948.

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

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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, ZORIČIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO.

THE COURT,

composed as above,

gives the following advisory opinion:

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

> *"The General Assembly,*
>
> *Considering* Article 4 of the Charter of the United Nations,
>
> *Considering* the exchange of views which has taken place in the Security Council at its Two hundred and fourth, Two hundred and fifth and Two hundred and sixth Meetings, relating to the admission of certain States to membership in the United Nations,
>
> *Considering* Article 96 of the Charter,
>
> *Requests* the International Court of Justice to give an advisory opinion on the following question:
>
> > Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? 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 29th, the Secretary-General of the United Nations transmitted to the Registrar a copy of the Resolution of the General Assembly. In a telegram sent on December 10th, the Secretary-General informed the Registrar that the note of November 24th was to be regarded as the official notification and that certified true copies of the Resolution had been despatched. These copies reached the Registry on December 12th, and the question was then entered in the General List under No. 3.

The same day, the Registrar gave notice of the request for an opinion to all States entitled to appear before the Court, in accordance with paragraph 1 of Article 66 of the Statute. Furthermore,

as the question put mentioned Article 4 of the Charter, the Registrar informed the Governments of Members of the United Nations, by means of a special and direct communication as provided in paragraph 2 of Article 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 [1]. 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;

[1] See page 116.

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

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

—on behalf of the Government of the Kingdom of Belgium, by its representative, M. Georges Kaeckenbeeck, 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 [1].

* * *

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

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

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

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

[1] See page 119.

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

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

* * *

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

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

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

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

Accordingly, the Court holds that it is competent, on the basis of Article 96 of the Charter and Article 65 of the Statute, and

considers that there are no reasons why it should decline to answer the question put to it.

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

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

The requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a State ; (2) be peace-loving ; (3) accept the obligations of the Charter ; (4) be able to carry out these obligations ; and (5) be willing to do so.

All these conditions are subject to the judgment of the Organization. The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members. The question put is concerned with the individual attitude of each Member called upon to pronounce itself on the question of admission.

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

The terms "Membership in the United Nations is open to all other peace-loving States which...." and *"Peuvent devenir Membres des Nations unies tous autres États pacifiques"*, indicate that States which fulfil 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 1 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.

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

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

FOR THESE REASONS,

THE COURT,

by nine votes to six,

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

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

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

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

(*Signed*) J. G. GUERRERO,

President.

(*Signed*) E. HAMBRO,

Registrar.

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

Judges BASDEVANT, WINIARSKI, MCNAIR, READ, ZORIČIĆ and KRYLOV, declaring that they are unable to concur in the opinion of the Court, have availed themselves of the right conferred on them by Article 57 of the Statute and appended to the opinion a statement of their dissenting opinion.

(*Initialled*) J. G. G.

(*Initialled*) E. H.

International Court of Justice

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

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

ADVISORY OPINION

Present : President BASDEVANT ; *Vice-President* GUERRERO ; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir Arnold MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; *Registrar* Mr. HAMBRO.

THE COURT,

composed as above,

gives the following Advisory Opinion :

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

> *"The General Assembly,*
>
> *Keeping in mind* the discussion concerning the admission of new Members in the *Ad Hoc* Political Committee at its fourth regular session,
>
> *Requests* the International Court of Justice to give an advisory opinion on the following question :
>
> 'Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend ?' "

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

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

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

were communicated to all Members of the United Nations, who were informed that the President had fixed February 16th, 1950, as the opening date of the oral proceedings.

In accordance with Article 65 of the Statute of the Court, the Secretary-General sent to the Registry the documents which are enumerated in the list annexed to the present Opinion [1]. These documents reached the Registry on January 23rd, 1950. The Assistant Secretary-General in charge of the Legal Department also announced by a letter of January 23rd, 1950, that he did not intend to take part in the oral proceedings, unless the Court so desired.

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

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

* * *

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

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

With regard to the second objection, the Court notes that the General Assembly has requested it to give the legal interpretation of paragraph 2 of Article 4. As the Court stated in the same Opinion, it "cannot attribute a political character to a request

[1] See p. 35.

which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision".

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

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

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

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

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

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

Article 4, paragraph 2, is as follows :

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

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

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. 11, p. 39):

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

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

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

The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 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

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.

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

(*Initialled*) J. B.

(*Initialled*) E. H.

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 [1]

1. Provisional Rules of Procedure of the Security Council (S/96/Rev. 3. January 27th, 1948).
2. Rules of Procedure of the General Assembly (A/520. December 12th, 1947).
3. Rules governing the admission of new Members (Report of the Committee of the General Assembly) (A/384, p. 4, September 12th, 1947).
4. Report by the Executive Committee to the Preparatory Commission of the United Nations (PC/EX/113/Rev. 1. November 12th, 1945).
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6. Records of the Security Council Committee of Experts Meetings concerning the Rules on the admission of new Members:

1946. S/Procedure 91.
,, 91, Corr. 1.
,, 92.
,, 93.
,, 93, Corr. 1.
,, 94.
,, 99.
,, 99, Corr. 1.

1947. S/C.1/SR.96.
,, 96, Corr. 1.
,, 101.
,, 102.
,, 103.
,, 104.

[1] These documents had already been transmitted to the Court in accordance with the Resolution of the General Assembly of November 17th, 1947.

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.11/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.11.

8. Report of the Security Council Committee on the admission of new Members, 1946 (*Security Council Official Records*, First Year, Second Series, Supplement No. 4, p. 53).

9. Report of the Security Council to the General Assembly on the admission of new Members, 1946 (A/108, October 15th, 1946).

10. Records of the Security Council Meetings concerning the admission of new Members, 1946.
Security Council Official Records, First Year, Second Series:

No. 1.
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,, 23.
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11. 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:

Journal 22, Suppl. No. 1—A/C.1/22.
,, 24, ,, ,, 1—A/C.1/31.
,, 25, ,, ,, 1—A/C.1/37.
,, 26, ,, ,, 3—A/C.3/43.
,, 27, ,, ,, 1—A/C.1/39.
,, 28, ,, ,, 1—A/C.1/41.
,, 29, ,, A—A/P.V.47.
,, 31, ,, ,, 1—A/C.1/45.
,, 32, ,, —A/C.1/47.
,, 37, ,, A—A/P.V.48.
,, 38, ,, A—A/P.V.49.

12. Records of the Plenary Meetings of the Second Part of the First Session of the General Assembly concerning the admission of new Members, 1946. (Journal No. 66, Supplement A—A/P.V. 67.)
13. Report of the Security Council Committee on the admission of new Members, 1947. *Security Council Official Records*, Second Year, Special Supplement No. 3, Lake Success, New York, 1947.
14. Reports of the Security Council to the General Assembly on the admission of new Members, 1947 (A/406. October 9th, 1947.—A/515. November 22nd, 1947).
15. Records of the Security Council Meetings concerning the admission of new Members, 1947.

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

S/P.V.136.
S/P.V.137.
S/P.V.151.
S/P.V.152.
S/P.V.154.
S/P.V.161.
S/P.V.168.
S/P.V.178.
S/P.V.186.
S/P.V.190.
S/P.V.197.
S/P.V.204.
S/P.V.205.
S/P.V.206.
S/P.V.221.
S/P.V.222.

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

A/C.1/SR. 59.
,, 59, Corr. 1.
,, 59, Corr. 2.
,, 97.
,, 98.
,, 99.
,, 100.
,, 101.

A/C.1/SR. 102.
,, 102, Corr. 1.
,, 102, Corr. 2.
,, 103.

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.
,, 84.
,, 85.
,, 86.
,, 87.
,, 88.
A/P.V.89.
,, 90.
,, 92.
,, 96.
,, 117.
,, 118.

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.

Records of the General Committee, 43rd, 49th and 50th meetings.

Records of the General Assembly, 142nd and 158th plenary meetings.

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 Albanie, Austria, Bulgaria, Finland, Hungary, Ireland, Italy, Mongolian 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
Australia : draft resolution	A/AC.24/14
Argentina : draft resolution	A/AC.24/15
Sweden : draft resolution	A/AC.24/17
Bolivia : amendments to the draft resolution proposed by Sweden (A/AC.24/17)	A/AC.24/18
India : amendment to the draft resolution proposed by Sweden (A/AC.24/17)	A/AC.24/19
Burma : amendment to the draft resolution proposed by Belgium (A/AC.24/12)	A/AC.24/23
Burma : amendment to the Australian draft resolution concerning Ceylon (A/AC.24/14)	A/AC.24/32
Draft resolution submitted by the Sub-Committee appointed at the 22nd meeting of the *Ad hoc* Political Committee	A/AC.24/35
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 J proposed by the *Ad hoc* Political Committee (A/761)	A/771

Plenary meetings of the General Assembly.

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. 1
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 Chilean 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.

Records of proceedings.

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.*

Records of proceedings.

25th meeting.
26th meeting.
27th meeting.
28th meeting.
29th meeting.

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	A/AC.31/L.18
Union of Soviet Socialist Republics : draft resolution	A/AC.31/L.19
Note by the Rapporteur (revised draft resolution by Argentina)	A/AC.31/L.20
Iraq : draft resolution	A/AC.31/L.21
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.

436

Plenary meetings of the General Assembly.

Document.

Union of Soviet Socialist Republics : draft resolution	A/1079

Plenary meetings of the General Assembly.

Resolution.

296 (IV). Admission of new Members.

V. Records of Security Council

Records of proceedings.

261st meeting (excerpt).
279th meeting.
280th meeting.
318th meeting.
351st meeting.
383rd meeting.
384th meeting.
385th meeting.
386th meeting.
409th meeting.
410th meeting.
413th meeting.
414th meeting.
423rd meeting.
427th meeting.
428th meeting.
429th meeting.
430th meeting.
431st meeting.
439th meeting.
440th meeting.
441st meeting.
442nd meeting.
443rd meeting.
444th meeting.
445th 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 Provisional 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 — S/1017/Add. 1

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/1033

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/1035

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

Israel's application for membership in the United Nations and declaration accepting the obligations contained in the Charter — S/1093

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 S/1170

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 S/1170/Add. 1

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 S/1238

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 S/1247

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 S/1256

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 S/1259

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 S/1266

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 S/1266/Add. 1

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. S/1267

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) S/1276

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 S/1281

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 S/1305

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 S/1331

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 S/1332

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

Argentina: draft resolution submitted at the 427th meeting of the Security Council, 16 June, 1949, concerning the admission of Ceylon to membership in the United Nations S/1337

Union of Soviet Socialist Republics: draft resolution submitted at the 428th meeting of the Security Council, 21 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

Union of Soviet Socialist Republics: draft resolution submitted at the 440th meeting of the Security Council, 9 September, 1949, concerning the applications of Albania, the Mongolian

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 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:

> "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." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.)

51. Article VI, Section 23, of the General Convention provides that "[p]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves". In exercising protection of United Nations experts, the Secretary-General is therefore protecting the mission with which the expert is entrusted. In that respect, the Secretary-General has the primary responsibility and authority to protect the interests of the Organization and its agents, including experts on mission. As the Court held:

> "In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . ." (*Ibid.*, p. 183.)

52. The determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case. In the present case, the Secretary-General, or the Legal Counsel of the United Nations on his behalf, has on numerous occasions informed the Government of Malaysia of his finding that Mr. Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that he consequently was entitled to immunity from "every kind" of legal process.

53. As is clear from the written and oral pleadings of the United Nations, the Secretary-General was reinforced in this view by the fact that it has become standard practice of Special Rapporteurs of the Commission to have contact with the media. This practice was confirmed by the High Commissioner for Human Rights who, in a letter dated 2 October 1998, included in the dossier, wrote that: "it is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public informed of their work".

54. As noted above (see paragraph 13), Mr. Cumaraswamy was explicitly referred to several times in the article "Malaysian Justice on Trial" in *International Commercial Litigation* in his capacity as United Nations Special Rapporteur on the Independence of Judges and Lawyers. In his reports to the Commission (see paragraph 18 above), Mr. Cumaraswamy

had set out his methods of work, expressed concern about the independence of the Malaysian judiciary, and referred to the civil lawsuits initiated against him. His third report noted that the Legal Counsel of the United Nations had informed the Government of Malaysia that he had spoken in the performance of his mission and was therefore entitled to immunity from legal process.

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

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

* *

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

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

59. The Court wishes to point out that the request for an advisory opinion refers to "the legal obligations of Malaysia in this case". The difference which has arisen between the United Nations and Malaysia originated in the Government of Malaysia not having informed the competent

Malaysian judicial authorities of the Secretary-General's finding that Mr. Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process (see paragraph 17 above). It is as from the time of this omission that the question before the Court must be answered.

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

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

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

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

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

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State." (*Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.)

Because the Government did not transmit the Secretary-General's finding to the competent courts, and the Minister for Foreign Affairs did not refer to it in his own certificate, Malaysia did not comply with the above-mentioned obligation.

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

*

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

*

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

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

*

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

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

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

* * *

67. For these reasons,

THE COURT

Is of the opinion:

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

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

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

AGAINST: *Judge* Koroma;

(b) By fourteen votes to one,

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

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, 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 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

JUDGMENT OF THE COURT (Grand Chamber)

18 July 2013 (*)

(Appeal – Common Foreign and Security Policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Regulation (EC) No 881/2002 – Freezing of funds and economic resources of a person included in a list drawn up by a body of the United Nations – Listing of that person's name in Annex I to Regulation (EC) No 881/2002 – Action for annulment – Fundamental rights – Rights of the defence – Principle of effective judicial protection – Principle of proportionality – Right to respect for property – Obligation to state reasons)

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. Szíjjártó and K. Molnár, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. Bulterman, acting as Agents,

Slovak Republic, 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,

Council of the European Union, represented by M. Bishop, E. Finnegan and R. Szostak, acting as Agents,

appellant,

supported by:

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

Czech Republic, represented by K. Najmanová, E. Ruffer, M. Smolek and D. Hadroušek, acting as Agents,

Kingdom of Denmark, represented by L. Volck Madsen, acting as Agent,

Ireland, represented initially by D. O'Hagan and subsequently by E. Creedon, acting as Agents, and by N. Travers BL and P. Benson, Solicitor, with an address for service in Luxembourg,

Kingdom of Spain, represented by M. Muñoz Pérez and N. Díaz Abad, acting as Agents, with an address for service in Luxembourg,

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. Szíjjártó and K. Molnár, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and M. Bulterman, acting as Agents,

Republic of Austria, represented by C. Pesendorfer, acting as Agent, with an address for service in Luxembourg,

Slovak Republic, represented by B. Ricziová, acting as Agent,

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

interveners in the appeal in Case C-593/10 P,

the other parties to the proceedings being:

Yassin Abdullah Kadi, represented by D. Vaughan QC, V. Lowe QC, J. Crawford SC, M. Lester and P. Eeckhout, Barristers, G. Martin, Solicitor, and by C. Murphy,

applicant at first instance,

French Republic, represented by E. Belliard, G. de Bergues, D. Colas, A. Adam and E. Ranaivoson, acting as Agents,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, M. Ilešič, L. Bay Larsen, T. von Danwitz and M. Berger, Presidents of Chambers, U. Lõhmus, E. Levits, A. Arabadjiev, C. Toader, J.-J. Kasel, M. Safjan and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 October 2012,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2013,

gives the following

Judgment

1 By their appeals, the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland seek to have set aside the judgment of the General Court of the European Union of 30 September 2010 in Case T-85/09 *Kadi* v *Commission* [2010] ECR II-5177 ('the judgment under appeal'), by which that Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2008 L 322, p. 25; 'the contested regulation'), in so far as that measure concerns Mr Kadi.

Legal context

The Charter of the United Nations

2 Under Article 1(1) and (3) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the purposes of the United Nations are inter alia to 'maintain international peace and security' and to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

3 Under Article 24(1) of the Charter of the United Nations, the United Nations Security Council ('the Security Council') is given primary responsibility for the maintenance of international peace and security. Article 24(2) thereof provides that, in discharging those duties, the Security Council is to act in accordance with the purposes and principles of the United Nations.

4 Under Article 25 of the Charter of the United Nations, the Members of the United Nations [UN] agree to accept and carry out the decisions of the Security Council in accordance with that Charter.

5 Chapter VII of the Charter of the United Nations, headed 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression', defines the action to be taken in such cases. Article 39 of that Charter, which introduces Chapter VII, provides that the Security Council is to determine the existence of any such threat, any such breach or any such act and 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 it may call upon the Members of the United Nations to apply such measures.

6 By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security are to 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.

7 Article 103 of the Charter of the United Nations states that in the event of a conflict between the obligations of the Members of the United Nations under that Charter and their obligations under any other international agreement, their obligations under that Charter are to prevail.

Actions of the Security Council against international terrorism and the implementation of those actions by the European Union

8 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').

9 In order to deal with delisting requests made by organisations, entities or persons named on that list, Security Council Resolution 1730 (2006) of 19 December 2006 provided for the establishment of a 'focal point' within the Security Council, responsible for examination of such requests. That focal point was established in March 2007.

10 Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names of organisations, entities or persons to the Sanctions Committee for inclusion on the Consolidated List, they must 'provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, 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 can 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 for the purposes of notifying the listed [on the Sanctions Committee Consolidated List] individual or entity, and those parts which may be released on request to interested States'.

11 Under paragraph 12 of Security Council Resolution 1822 (2008) of 30 June 2008, States must, inter alia, 'for each such proposal [of names to the Security Council for inclusion on the Consolidated List] identify those parts of the statement of case that may be publicly released, including for use by the [Sanctions] Committee for development of the summary described in paragraph 13 below or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States.' Paragraph 13 of that resolution provides, first, that the Sanctions Committee, when it adds a name to its Consolidated List, is to make accessible on its website 'a narrative summary of reasons for listing' and, secondly, that that committee is to make accessible on the same site, 'narrative summaries of reasons for listing' names on that list before the adoption of Resolution 1822/2008.

12 As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an 'Office of the Ombudsperson', whose task, under paragraph 20 thereof, is to assist the Sanctions Committee in the consideration of such requests. Under that same paragraph, the person appointed to be the Ombudsperson must be an individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, including law, human rights, counter-terrorism, and sanctions. The mandate of the Ombudsperson, as described in Annex II to that resolution, covers a stage of gathering information from the State concerned and a stage of consultation, in the course of which dialogue may be engaged with the organisation, entity or person requesting delisting from the Sanctions Committee Consolidated List. Following those two stages, the Ombudsperson must draw up a 'comprehensive report' and present it to the Sanctions Committee, which must then consider the delisting request, with the assistance of the Ombudsperson, and after doing so decide whether to approve that request.

13 Since the Member States considered, in a number of Common Positions adopted under the

Common Foreign and Security Policy, that European Union action was required in order to implement the Security Council Resolutions on combating international terrorism, the Council adopted a series of regulations providing for, inter alia, the freezing of the assets of organisations, entities and individuals identified by the Sanctions Committee.

14 In parallel with the regime described above, which is aimed solely at organisations, entities and individuals designated by name by the Sanctions Committee as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban, there exists a wider regime of sanctions provided for by Security Council Resolution 1373 (2001) of 28 September 2001, which was likewise adopted in response to the terrorist attacks of 11 September 2001. That resolution, which also provides for asset-freezing measures, differs from the resolutions mentioned above in that the identification of the organisations, entities or persons which it is intended to cover is left entirely to the discretion of the States.

15 At European Union level, Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and by Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70, and corrigendum, OJ 2010 L 52, p. 58). Those measures contain a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

Background to the proceedings

The case which gave rise to the Kadi judgment

16 On 17 October 2001 Mr Kadi, identified as being an individual associated with Usama bin Laden and the Al-Qaeda network, was listed on the Sanctions Committee Consolidated List.

17 Mr Kadi's name was subsequently added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1), by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25). He was subsequently listed in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9).

18 On 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review.

19 By judgment of 21 September 2005 in Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, the General Court dismissed that action. In essence, the General Court held that it followed from the principles governing the relationship between the international legal order under the United Nations and the European Union legal order that Regulation No 881/2002, being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review of its internal lawfulness and thus enjoyed immunity from jurisdiction, except as regards its compatibility with rules falling within the ambit of *jus cogens*, understood as a body of rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible.

20 Accordingly, the General Court, applying the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*, ruled out, in the given case, any infringement of the rights relied on by Mr Kadi. As regards, in particular, the right to effective judicial review, the General Court stated that it was not for it to review indirectly whether Security Council Resolutions are compatible with such fundamental rights as are protected by the European Union legal order, nor to verify that there had been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it had taken, nor, again, to review indirectly the appropriateness 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 *jus cogens*.

21 By its judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351 ('the *Kadi* judgment'), the Court set aside the judgment of the General Court in Case T-315/01 *Kadi* v *Council and Commission* and annulled Regulation No 881/2002 in so far as it concerned Mr Kadi.

22 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 that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when implementing Security Council resolutions, it does not follow from the principles governing the international legal order under the United Nations that an act adopted by the European Union such as Regulation No 881/2002 thereby enjoys immunity from jurisdiction. The Court added that there is no basis for such immunity in the EC Treaty.

23 In those circumstances the Court held, in paragraphs 326 and 327 of the *Kadi* judgment, that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court's reasoning was consequently vitiated by an error of law.

24 Ruling on the action brought by Mr Kadi before the General Court, the Court held, in paragraphs 336 to 341 of the *Kadi* judgment, that the effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard. The Court stated that, as regards a decision that a person's name should be listed for the first time, for reasons connected with the effectiveness of the restrictive measures at issue and with the objective of the regulation concerned, it was necessary that that disclosure and that hearing should occur not prior to the adoption of that decision but when that decision was adopted or as swiftly as possible thereafter.

25 In paragraphs 345 to 349 of the *Kadi* judgment, the Court added that, since the Council had neither communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not been in a position effectively to make known his point of view in that regard, with the consequence that the rights of defence and the right to effective judicial review had been infringed. The Court also stated, in paragraph 350 of that judgment, that that infringement had not been remedied before the Courts of the European Union, given that the Council had not adduced before them any such evidence. In paragraphs 369 to 371 of that judgment, the Court concluded, on the same grounds, that Mr

Kadi's fundamental right to respect for property had been infringed.

26 The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the infringements found.

The response of the European Union institutions to the Kadi judgment and the contested regulation

27 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.

28 That summary of reasons is worded as follows:

'The individual Yasin Abdullah Ezzedine Qadi … satisfies the standard for listing by the [Sanctions Committee] because of his actions in (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; (b) supplying, selling, or transferring arms and related material to; (c) recruiting for; or (d) otherwise supporting acts or activities of; Al-Qaeda, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof (see United Nations Security Council Resolution 1822 (2008), paragraph 2).

Mr Qadi has acknowledged that he is a founding trustee and directed the actions of the Muwafaq Foundation. The Muwafaq Foundation historically operated under the umbrella of Makhtab Al-Khidamat/Al Kifah (QE.M.12.01), an organisation founded by Mr Abdullah Azzam and Mr Usama Muhammed Awad bin Laden (QI.B.8.01), and the predecessor to Al-Qaeda (QE.A.4.01). Following the dissolution of Makhtab Al-Khidamat/Al Kifah in early June 2001 and its absorption into Al-Qaeda, a number of NGOs formerly associated with Makhtab Al-Khidamat/Al Kifah, including the Muwafaq Foundation, also joined with Al-Qaeda.

In 1992, Mr Qadi hired Mr Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (QI.A.25.01) to head the European offices of the Muwafaq Foundation. During the mid-1990s, Mr Al-Ayadi also headed the Muwafaq Foundation branch in Bosnia and Herzegovina. Mr Qadi hired Mr Al-Ayadi on the recommendation of known Al-Qaeda financier Mr Wa'el Hamza Abd Al-Fatah Julaidan (QI.J.79.02), who fought with Mr bin Laden in Afghanistan in the 1980s. At the time of his appointment by Mr Qadi as the Muwafaq Foundation's European director, Mr Al-Ayadi was operating under agreements with Mr bin Laden. Mr Al-Ayadi was one of the principal leaders of the Tunisian Islamic Front, went to Afghanistan in the early 1990s to receive paramilitary training, and then went to Sudan with others to meet Mr bin Laden, with whom they concluded a formal agreement regarding the reception and training of Tunisians. They later met with Mr bin Laden a second time, securing an agreement for bin Laden collaborators in Bosnia and Herzegovina to receive Tunisian mujahidin from Italy.

In 1995, the leader of Al-Gama'at Al-Islamiya, Mr Talad Fuad Kassem, said that the Muwafaq Foundation had provided logistical and financial support for a mujahidin battalion in Bosnia and Herzegovina. In the mid-1990s, the Muwafaq Foundation was involved in providing financial support for terrorist activities of the mujahidin, as well as arms trafficking from Albania to Bosnia and Herzegovina. Some involvement in the financing of these activities was provided by Mr bin Laden.

Mr Qadi was also a major shareholder in the now closed Sarajevo-based Depositna Banka, in which Mr Al-Ayadi also held a position and acted as nominee for Mr Qadi's shares. Planning sessions for an attack against a United States facility in Saudi Arabia may have taken place at this bank.

Mr Qadi further owned several firms in Albania which funnelled money to extremists or employed extremists in positions where they controlled the firm's funds. Mr Bin Laden provided the working capital for four or five of Mr Qadi's companies in Albania.'

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

30 On 22 October 2008 France's Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No 881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

31 On 10 November 2008 Mr Kadi sent his comments to the Commission. He argued, on the basis of documents certifying that the Swiss, Turkish and Albanian authorities had decided not to pursue criminal investigations against him concerning his alleged support of terrorist organisations or involvement in financial crime, that, whenever he had been given the opportunity to express his point of view on the evidence said to 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 reasons relating to his being listed on the Sanctions Committee Consolidated List and the relevant documents in the Commission's file, and asked that he be allowed to submit comments on that evidence. While drawing attention to the vagueness and generality of a number of the allegations contained in that summary of reasons, he disputed, with supporting evidence, that any of the reasons relied on against him were well founded.

32 On 28 November 2008 the Commission adopted the contested regulation.

33 According to recitals 3 to 6, 8 and 9 of the preamble to that regulation:

'(3) In order to comply with [the *Kadi* judgment], the Commission has communicated the … [summary] of reasons provided by the … Sanctions Committee, to Mr Kadi … and given [him] the opportunity to comment on these grounds in order to make [his] point of view known.

(4) The Commission has received comments by Mr Kadi … and examined these comments.

(5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by the … Sanctions Committee, includes Mr Kadi …

(6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for reasons of his association with the Al-Qaida network.

…

(8) In view of this, Mr Kadi … should be added to Annex I.

(9) This Regulation should apply from 30 May 2002, given the preventive nature and objectives of the freezing of funds and economic resources under Regulation … No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the *Kadi* judgment].'

34 In accordance with Article 1 of the contested regulation and the annex thereto, Annex I to

Regulation No 881/2002 was amended to that effect, inter alia, by the addition of the following entry under the heading 'Natural persons':

'Yasin Abdullah Ezzedine Qadi (alias (a) Kadi, Shaykh Yassin Abdullah; (b) Kahdi, Yasin; (c) Yasin Al-Qadi). Date of birth: 23.2.1955. Place of birth: Cairo, Egypt. Nationality: Saudi Arabian. Passport number: B 751550, (b) E 976177 (issued on 6.3.2004, expiring on 11.1.2009). Other information: Jeddah, Saudi Arabia.'

35 The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008 and is applicable from 30 May 2002.

36 By letter of 8 December 2008, the Commission replied to Mr Kadi's comments of 10 November 2008.

The procedure before the General Court and the judgment under appeal

37 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 rights of the defence and of the right to effective judicial protection, and the fifth plea alleged a disproportionate restriction on the right to property.

38 In the judgment under appeal, the General Court, relying on paragraphs 326 and 327 of the *Kadi* judgment, first held, in paragraph 126 of the judgment under appeal, that its task was to ensure 'in principle the full review' of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union. It added, in paragraphs 127 to 129 of the judgment under appeal, that, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, the review carried out by the Courts of the European Union of Union measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.

39 The argument of the Commission and the Council concerning the Court of Justice's failure to comment, in the *Kadi* judgment, on the scope and intensity of such judicial review was held, in paragraph 131 of the judgment under appeal, to be clearly wrong.

40 In that regard, the General Court held in essence, in paragraphs 132 to 135 of the judgment under appeal, that it is obvious, particularly from paragraphs 326, 327, 336 and 342 to 344 of the *Kadi* judgment, that it was the intention of the Court of Justice that judicial review, in principle full review, should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.

41 The General Court further stated, in paragraphs 138 to 146 of the judgment under appeal, that, by repeating the essence of its reasoning, in connection with the regime mentioned in paragraphs 14 and 15 of this judgment, in its judgment of 12 December 2006 in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, the Court of Justice approved and endorsed the standard and intensity of judicial review determined in that judgment, namely that the Courts of the European Union must review the assessment made by the institution concerned 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 that information and evidence is secret or confidential.

42 After having also emphasised, in paragraphs 148 to 151 of the judgment under appeal, that the effect on Mr Kadi's rights of the restrictive measures to which he had been subject for almost ten years was marked and long-lasting, in paragraph 151 of that judgment the General Court confirmed 'the principle of a full and rigorous judicial review of [freezing measures such as those at issue in this instance]'.

43 Examining, next, the second and fifth pleas in law in support of annulment, the General Court found, in paragraphs 171 to 180 of the judgment under appeal, that there was a breach of Mr Kadi's rights of defence, after observing, in essence, that:

– those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi's comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi;

– Mr Kadi was refused access by the Commission to the evidence against him despite his express request, whilst no balance was struck between his interests and the need to protect the confidentiality of the information in question, and

– the few pieces of information and the vague allegations in the summary of reasons relating to the listing of Mr Kadi on the Sanctions Committee Consolidated List, for example, that Mr Kadi was a shareholder in a Bosnian bank in which planning sessions for an attack on a United States facility in Saudi Arabia 'may have' taken place, were clearly insufficient to enable Mr Kadi to mount an effective challenge to the allegations against him.

44 The General Court also found, in paragraphs 181 to 184 of the judgment under appeal, that the principle of effective judicial protection had been infringed on the grounds, first, that since Mr Kadi was afforded no proper access to the information and evidence used against him, Mr Kadi had been unable to defend his rights with regard to that information and evidence in satisfactory conditions before the Courts of the European Union and, secondly, that that infringement had not been remedied in the course of the proceedings before the General Court, given that no evidence of that kind or any indication of the evidence relied on against Mr Kadi had been disclosed to the General Court by the institutions concerned.

45 The General Court further held, in paragraphs 192 to 194 of the judgment under appeal, that since the contested regulation had been adopted without Mr Kadi having been able to put his case to the competent authorities, notwithstanding the fact that the measures freezing his assets, given their general application and duration, represented a significant restriction on his right to property, the imposition of such measures constituted an unjustified restriction of that right, and consequently that Mr Kadi's claim that the infringement by that regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

46 The General Court therefore annulled the contested regulation in so far as it concerns Mr Kadi.

Procedure before the Court and forms of order sought

47 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.

48 By order of the President of the Court of 23 May 2011, first, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain and the Republic of Austria were granted leave to intervene in Case C-593/10 P in support of the forms of order of the Council, and, secondly, the Republic of Bulgaria, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the

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.

61 Referring to paragraphs 114 to 120 of the judgment under appeal, the Council, supported by Ireland and the Italian Republic, claims that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law. That refusal wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement. It disregards the obligation to act in good faith and the duty to provide mutual assistance which must be respected when implementing Security Council measures. That approach leads the European Union's institutions to substitute themselves for the international bodies which have the relevant powers. It amounts to reviewing the legality of Security Council resolutions in the light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligations.

62 The refusal to grant the contested regulation immunity from jurisdiction is also contrary to European Union law. It wholly ignores the fact that, under that law, the European Union institutions are bound to comply with international law and with the decisions of organs of the UN, where those institutions exercise, on the international stage, powers that have been transferred to them by the Member States. It disregards the need to strike a balance between the maintenance of international peace and security, on the one hand, and the protection of human rights and fundamental freedoms, on the other.

63 Mr Kadi contends that any challenge to the position that a European Union measure such as the contested regulation does not have immunity from jurisdiction is contrary to the principle of *res judicata*, given that that challenge concerns a question of law which was settled between the same parties by the *Kadi* judgment following consideration of the same arguments as those raised in the present case.

64 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.

Findings of the Court

65 In paragraph 126 of the judgment under appeal, the General Court held that, in accordance with paragraphs 326 and 327 of the *Kadi* judgment, the contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

66 Various factors, set out in paragraphs 291 to 327 of the *Kadi* judgment, were advanced in support of the position stated by the Court in that judgment, and there has been no change in those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law (see Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44, and judgment of 26 June 2012 in Case C-335/09 P *Poland* v *Commission*, paragraph 48), by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

67 That European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction has moreover been confirmed in Joined Cases C-399/06 P and C-403/06 P *Hassan and Ayadi* v *Council and Commission* [2009] ECR I-11393, paragraphs 69 to 75, and, more recently, in the judgment of 16 November 2011 in Case C-548/09 P *Bank Melli Iran* v *Council* [2011] ECR I-11381, where it is stated, in paragraph 105, with reference to the *Kadi* judgment, that, without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law.

68 It follows that the judgment under appeal, in particular paragraph 126 thereof, is not vitiated by any error of law with regard to the General Court's refusal, in accordance with the *Kadi* judgment, to afford the contested regulation immunity from jurisdiction.

69 The first ground of appeal must therefore be rejected.

The second and third grounds of appeal: respectively, errors of law relating to the level of intensity of judicial review defined in the judgment under appeal and errors committed by the General Court in the examination of the pleas for annulment based on infringement of the rights of the defence, the right to effective judicial protection and the principle of proportionality

70 The second and third grounds of appeal should be examined together, since the subject of both is, in essence, a criticism of errors of law vitiating the interpretation of the rights of the defence and the right to effective judicial protection adopted by the General Court in the judgment under appeal.

Arguments of the parties

71 In relation to the second and third grounds of appeal, the Commission, the Council and the United Kingdom, supported by 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, claim, first, that the judgment under appeal is vitiated by an error of law in that, contrary to what is stated in paragraphs 132 to 147 of that judgment, the *Kadi* 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.

72 In the first place, the requirement, set out in paragraph 326 of the *Kadi* judgment, that there should be 'review, in principle full review', of the lawfulness of the contested regulation should be placed in the international context to the adoption of that measure, as described, in particular, in paragraphs 292 to 297 of that judgment.

73 In the second place, it is claimed that the General Court wrongly held, in paragraph 138 of the judgment under appeal, that the Court had, in the *Kadi* judgment, endorsed 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. The fact is that the *Kadi* judgment contains no reference to that case-law of the General Court. Further, that argument wholly ignores the fundamental differences between that regime and the regime at issue in the present case, with regard to the discretion of the institutions of the European Union and their access to the information and evidence pertaining to the restrictive measures adopted.

74 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 set out in paragraphs 123 to 147 of the judgment under appeal is wrong in law. They add that the excessively interventionist approach followed by the General Court in the judgment under appeal cannot be reconciled with settled case-law in favour of restricted judicial review, limited to manifest error

of assessment, when the measures concerned are the outcome of choices resulting from complex assessments and the exercise of a wide discretion exercised in pursuit of broadly defined goals.

75 Third, the Commission, the Council and the United Kingdom claim that the General Court erred, in paragraphs 148 to 151 of the judgment under appeal, in suggesting that the restrictive measures at issue in this case should now be regarded as equivalent to a criminal penalty. Supported by the Czech Republic, Ireland, the French Republic, the Italian Republic, Hungary and the Republic of Austria, they claim that the purpose of those measures, which are essentially precautionary, is to anticipate and prevent current or future threats to international peace and security, and that they can be distinguished from criminal penalties, which are imposed, for their part, in respect of punishable past acts which have been objectively established. Moreover, the measures at issue are intended to be temporary and are accompanied by derogations.

76 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, applicable to the listing of Mr Kadi's name in Annex I to Regulation No 881/2002 following the *Kadi* judgment is legally erroneous.

77 Supported by the Republic of Bulgaria, the Czech Republic, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, they claim that the General Court erred in holding that respect for those fundamental rights required the disclosure of the information and evidence relied on against Mr Kadi.

78 That interpretation by the General Court wholly ignores the possibility, stated in paragraphs 342 to 344 of the *Kadi* judgment, that the right of a party concerned to the disclosure of 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 reasons for the listing of his name in Annex I to Regulation No 881/2002, and not to the failure to disclose information and evidence held by the Sanctions Committee.

79 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 the source of that 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.

80 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, that summary, contrary to what is stated in paragraphs 157 and 177 of the judgment under appeal, 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 with Usama bin Laden.

81 Fifth, the Commission contends that the General Court erred by failing, except as regards the finding of fact made in paragraph 67 of the judgment under appeal, to take into account the parallel proceedings brought by Mr Kadi before courts in the United States in order to dismiss Mr Kadi's objections concerning the alleged lack of effective judicial protection and the alleged impossibility of obtaining access to the relevant information and evidence.

82 Sixth, the Commission, the Council and the United Kingdom claim that the analysis carried out by the General Court, in paragraphs 127 and 128 of the judgment under appeal, of the alterations made to the re-examination procedures established at United Nations level is defective.

83 Supported by all the Member States intervening in the appeals, they claim that the *ex officio* periodic re-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 concerned to argue his case before an independent and impartial authority, which has the task of submitting, if appropriate, to the Sanctions Committee reasons supporting the requested delisting.

84 Security Council Resolution 1989 (2011) of 17 June 2011 confirms the desire constantly to improve the process for dealing with requests for removal from the Sanctions Committee Consolidated List. In particular, such a delisting is no longer dependent on the unanimous consent of the members of the Sanctions Committee. It becomes effective 60 days after that Committee has completed consideration of a recommendation to that effect and of a comprehensive report both submitted by the Ombudsperson, unless there is a consensus to the contrary within the Sanctions Committee or there is a request that the file be referred back to the Security Council. In the event that the Ombudsperson's recommendation is not followed, the obligation on the Sanctions Committee to state reasons and its duty of transparency have been extended. Resolution 1989 (2011) is also intended to improve the access of the Ombudsperson to confidential information held by the Members of the United Nations and the disclosure of the identity of the States which requested the listing.

85 Mr Kadi responds, first, that the General Court correctly held, in the judgment under appeal, that the Court gave a perfectly clear indication, in the *Kadi* judgment, of the scope and intensity of judicial review applicable in this case. The Court explicitly stated, in the *Kadi* judgment, that the review of lawfulness should be a full review, extending, subject only to confidentiality requirements relating to public security, to the information and evidence relied on against Mr Kadi. Further, the fact that, unlike the regime referred to in paragraphs 14 and 15 of this judgment, the regime at issue in this case does not involve, prior to the procedure at European Union level, any procedure safeguarding respect for the rights of the defence subject to effective judicial review is an argument which supports the enhancement of effective judicial protection at European Union level, as stated by the General Court in paragraphs 186 and 187 of the judgment under appeal.

86 Second, Mr Kadi does not accept that the requirement stated in the judgment under appeal in relation to the level of intensity of judicial review applicable in this case is incorrect.

87 In the first place, the General Court's approach does not disregard international law. Judicial review of the lawfulness of the contested regulation is not equivalent to review of the validity of the resolution which that regulation implements. That review does not challenge either the primary responsibility of the Security Council in the area concerned or the primacy of the Charter of the United Nations over any other international agreement. Nor is such judicial review intended to substitute the political judgment of the Courts of the European Union for that of the competent international authorities. Its purpose is solely to ensure observance of the requirement that Security Council Resolutions are implemented within the European Union in a manner compatible with the fundamental principles of European Union law. More specifically, such review contributes to ensuring that a balance is struck between the requirements of international peace and security, on the one hand, and the protection of fundamental rights, on the other.

88 In the second place, the General Court's approach is consistent with European Union law, which requires respect for fundamental rights and the guarantee of independent and impartial judicial review, including review of European Union measures based on international law.

89 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 his particular case, those measures can no longer be described as preventive and have become punitive, by reason both of their general scope and the fact that he has been subject to them for a very long time, a factor which justifies full and rigorous review of the contested regulation.

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

91 Mr Kadi contends, in this regard, that effective judicial review is impossible when there is a complete failure to disclose the information and evidence held by the bodies of the UN. As these very bodies accept, the narrative summary of reasons provided by the Sanctions Committee is not designed to be used as evidence. It merely comprises a useful indication of the past activities of the person concerned and of the existence of evidence known to members of that committee.

92 The fact that there is no formal procedure for the exchange of information between the Security Council and the institutions of the European Union is no bar to an exchange of the information necessary to ensuring the achievement of their common goal of safeguarding fundamental human rights when applying restrictive measures. In the present case, despite Mr Kadi's express request, the Commission has not even attempted to obtain disclosure by the Sanctions Committee of a detailed statement of the facts or evidence justifying the listing of Mr Kadi's name on the lists at issue.

93 As regards the narrative summary of reasons provided by the Sanctions Committee, it contains a number of general and unsubstantiated allegations, which Mr Kadi has not been in a position effectively to rebut.

94 Fifth, Mr Kadi contends that the legal proceedings in the United States are of no relevance to this case, given that the purpose of those proceedings is the annulment of his listing on the list of the Office of Foreign Assets Control, of the United States Treasury Department, for reasons wholly distinct from the grounds at issue in this case. Those proceedings concern neither the contested regulation nor the Security Council Resolutions which that regulation is designed to implement.

95 Sixth, Mr Kadi contends that, when the contested regulation was adopted, the only re-examination procedure established at United Nations level was that of the Focal Point. As regards the creation of the Office of the Ombudsperson, which, although post-dating that adoption, was taken into account by the General Court, that does not offer any guarantee of judicial protection. In particular, the person seeking the delisting of his name from the Sanctions Committee Consolidated List does not have available to him a detailed statement of the reasons for his being placed on that list, nor the evidence relied on against him, and he does not have the right to be heard by the Sanctions Committee, 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 lack of access to classified or confidential information and the fact that the applicant remains unaware of the identity of the State or States that proposed his inclusion in that list.

96 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 Sanctions Committee. Where a delisting recommendation is made by the Office of the Ombudsperson, any member of the Sanctions Committee may refer the matter to the Security Council, the five permanent members of which may exercise their veto according to their discretion. The Office of the Ombudsperson depends, moreover, on the willingness of States to cooperate in gathering information.

Findings of the Court

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

97 As stated by the General Court in paragraphs 125, 126 and 171 of the judgment under appeal, the Court held, in paragraph 326 of the *Kadi* judgment, that the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations (see also, to that effect, *Hassan and Ayadi* v *Council and Commission*, paragraph 71, and *Bank Melli Iran* v *Council*, paragraph 105). That obligation is expressly laid down by the second paragraph of Article 275 TFEU.

98 Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection.

99 The first of those rights, which is affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, Case C-27/09 P *France* v *People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraph 66), includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.

100 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 having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question (see judgment of 4 June 2013 in Case C-300/11 *ZZ*, paragraph 53 and case-law cited).

101 Article 52(1) of the Charter nevertheless allows limitations on the exercise of the rights enshrined in the Charter, subject to the conditions that the limitation concerned respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest recognised by the European Union (see *ZZ*, paragraph 51).

102 Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case (see, to that effect, Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 63), including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see, to that effect, as regards compliance with the duty to state reasons, the judgments of 15 November 2012 in Joined Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraphs 139 and 140, and in Case C-417/11 P *Council* v *Bamba*, paragraph 53).

103 In this case, it is necessary to determine whether, in the light of the requirements stated, in particular, in Article 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international peace and security while respecting international law, and specifically the principles of the Charter of the United Nations, the fact that Mr Kadi and the Courts of the European Union did not have access to the information and evidence relied on against him, to which the General Court draws attention, particularly in paragraphs 173, 181 and 182 of the judgment under appeal, constitutes an infringement of the rights of the defence and the right to effective judicial protection.

104 In that regard, as the Court has previously stated, specifically in paragraph 294 of the *Kadi* judgment, it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the Security Council has been invested by the members of the UN with the primary responsibility for the maintenance of international peace and security. To that end, it is the task of the Security Council to determine what constitutes a threat to international peace and security and to take the measures necessary, by means of the adoption of resolutions under Chapter VII of that Charter, to maintain or restore international peace and security, in accordance with the purposes and principles of the United Nations, including respect for human rights.

105 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 the task of the Sanctions Committee, on the proposal of a UN member supported by a 'statement of case' which should provide 'as much detail as possible on the basis(es) for the listing', the 'nature of the information' and 'supporting information or documents that can be provided', to designate, applying the criteria laid down by the Security Council, the organisations, entities and individuals whose funds and other economic resources are to be frozen. That designation, put into effect by the listing of the name of the organisation, entity or individual concerned on the Sanctions Committee Consolidated List which is maintained at the request of the Member States of the UN, is to be based on a 'summary of reasons' which is to be produced by the Sanctions Committee in the light of the material which the Member State proposing the listing has identified as capable of disclosure, particularly to the party concerned, and which is to be made accessible on its website.

106 When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action adopted by the Member States pursuant to the provisions of the EU Treaty relating to the common foreign and security policy, the competent European 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 *Kadi* judgment, paragraphs 295 and 296).

107 Consequently, where, under the relevant Security Council resolutions, the Sanctions Committee has decided to list the name of an organisation, entity or individual on its Consolidated List, the competent European Union authority must, in order to give effect to that decision on behalf of the Member States, take the decision to list the name of that organisation, entity or individual, or to maintain such listing, in Annex I to Regulation No 881/2002 on the basis of the summary of reasons provided by the Sanctions Committee. On the other hand, there is no provision in those resolutions to the effect that the Sanctions Committee is automatically to make available to, in particular, the European Union authority responsible for the adoption by the European Union of its decision to list or maintain a listing, any material other than that summary of reasons.

108 Accordingly, both in respect of an initial decision to list the name of an organisation, entity or individual in Annex I to Regulation No 881/2002 and, as in the present case, in respect of a decision to maintain such a listing originally adopted before 3 September 2008, the date of the *Kadi* judgment, Article 7a(1) and (2) and Article 7c(1) and (2) of Regulation No 881/2002, inserted by Council Regulation (EU) No 1286/2009 of 22 December 2009 amending 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 1286/2009, refer exclusively to the 'statement of reasons' provided by the Sanctions Committee for the purposes of the taking of such decisions.

109 In the particular case of Mr Kadi, it is apparent from the file that the initial listing of his name, on 17 October 2001 in the Sanctions Committee Consolidated List followed a request by the United States on the basis of the adoption on 12 October 2001 of a decision in which the Office of Foreign Asset Control identified Mr Kadi as a 'Specially Designated Global Terrorist'.

110 As is apparent from recital 3 of the preamble to the contested regulation [Regulation No 1190/2008], following the *Kadi* judgment the Commission, by means of that regulation, decided to maintain the name of Mr Kadi on the list in Annex I to Regulation No 81/2002 on the basis of the narrative summaries of reasons which had been transmitted by the Sanctions Committee. As the General Court recorded in paragraph 95 of the judgment under appeal, and as the Commission confirmed at the hearing before the Court, the Commission was not, for that purpose, put in possession of evidence other than such a summary of reasons.

111 In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the *Kadi* judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.

112 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-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36, and judgment of 22 November 2012 in Case C-277/11 *M.*, paragraph 87 and case-law cited).

113 As regards a decision whereby, as in this case, the name of the individual concerned is to be maintained on the list in Annex I to Regulation No 881/2002, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing (see, in that regard, the *Kadi* judgment, paragraphs 336 to 341 and 345 to 349, and *France* v *People's Mojahedin Organization of Iran*, paragraph 61), precede the adoption of that decision (see *France* v *People's Mojahedin Organization of Iran*, paragraph 62). It is not disputed that, in the present case, the Commission, the author of the contested regulation, complied with that obligation.

114 When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments (see, by analogy, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 58, and *M.*, paragraph 88).

115 In that context, it is for that authority to assess, having regard, inter alia, to the content of any such comments, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective

cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.

116 Lastly, without going so far as to require a detailed response to the comments made by the individual concerned (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 141), the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraphs 140 and 142, and *Council* v *Bamba*, paragraphs 49 to 53).

117 As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name in Annex I to Regulation No 881/2002, the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed (see, to that effect, the *Kadi* judgment, paragraphs 121 to 236; see also, by analogy, the judgment of 13 March 2012 in Case C-376/10 P *Tay Za* v *Council*, paragraphs 46 to 72).

118 The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119 The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the *Kadi* judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council*, paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 68). That entails a verification of the factual allegations in the summary of reasons underpinning that decision (see to that effect, *E and F*, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120 To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (see, by analogy, *ZZ*, paragraph 59).

121 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 not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

122 For that purpose, there is no requirement that that authority produce before the Courts of the European Union all the information and evidence underlying the reasons alleged in the summary provided by the Sanctions Committee. It is however necessary that the information or evidence produced should support the reasons relied on against the person concerned.

123 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 reasons provided by the Sanctions Committee, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent European Union authority to those observations. If that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.

124 If, on the other hand, the competent European Union authority provides relevant information or evidence, the Courts of the European Union must then determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned.

125 Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned. In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process (see, to that effect, the *Kadi* judgment, paragraphs 342 and 344; see also, by analogy, *ZZ*, paragraphs 54, 57 and 59).

126 To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded (see, by analogy, *ZZ*, paragraphs 61 and 62).

127 If the Courts of the European Union conclude that those reasons do not preclude disclosure, at the very least partial disclosure, of the information or evidence concerned, it shall give the competent European Union authority the opportunity to make such disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, in whole or in part, the Courts of the European Union shall then undertake an examination of the lawfulness of the contested measure solely on the basis of the material which has been disclosed (see, by analogy, *ZZ*, paragraph 63).

128 On the other hand, if it turns out that the reasons relied on by the competent European Union authority do indeed preclude the disclosure to the person concerned of information or evidence produced before the Courts of the European Union, it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations (see, by analogy, *ZZ*, paragraph 64).

129 In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the European Union to assess whether and to what the extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence (see, by analogy, *ZZ*, paragraph 67).

130 Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, as defined in paragraphs 117 to 129 of this judgment, the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision.

131 Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned (see, to that effect, *E and F*, paragraph 57), those being shared values of the UN and the European Union.

132 Notwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke (see, to that effect, the *Kadi* judgment, paragraphs 358, 369 and 375; *France* v *People's Mojahedin Organization of Iran*, paragraph 64; *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 120, and judgment of 28 May 2013 in Case C-239/12 P *Abdulrahim* v *Council and Commission*, paragraph 70 and case-law cited).

133 Such a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and *ex officio* re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, *Nada* v. *Switzerland* (No 10593/08, not yet published in the *Reports of Judgments and Decisions*).

134 The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (see, to that effect, *Abdulrahim* v *Council and Commission*, paragraphs 67 to 84).

– The errors of law affecting the judgment under appeal

135 It follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136 Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

137 On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed. However, in such a situation, the Courts of the European Union, which are called upon to review whether the reasons contained in the summary provided by the Sanctions Committee are well founded in fact, taking into consideration any observations and exculpatory evidence produced by the person concerned and the response of the competent European Union authority to those observations, will not have available to it supplementary information or evidence. Consequently, if it is impossible for the Courts to find that those reasons are well founded, those reasons cannot be relied on as the basis for the contested listing decision.

138 Hence, in paragraphs 173, 181 to 184, 188 and 192 to 194 of the judgment under appeal, the General Court erred in law by basing its finding that the rights of the defence and the right to effective judicial protection and, consequently, the principle of proportionality had been infringed, on the failure of the Commission to disclose to Mr Kadi and to the General Court itself 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 recognised, both in order to reject Mr Kadi's application for a measure of organisation of procedure in order to secure that disclosure and in the course of the hearing, that the Commission was not in possession of that information and evidence.

139 Contrary to what is stated in paragraphs 181, 183 and 184 of the judgment under appeal, the passages in the *Kadi* judgment to which the General Court referred in those paragraphs do not indicate that the fact that the party concerned and the Courts of the European Union do not have access to information or evidence which the competent Union authority does not have in its possession constitutes, as such, an infringement of the rights of the defence or the right to effective judicial protection.

140 Further, and bearing in mind that the assessment, by the General Court, of whether the statement of reasons is or is not sufficient is subject to review by the Court on an appeal (see, to that effect, *Council* v *Bamba*, paragraph 41 and case-law cited), the General Court erred in law by basing, as is apparent from paragraphs 174, 177, 188 and 192 to 194 of the judgment under appeal, its finding that there had been such an infringement on the fact that, in its opinion, the allegations made in the summary of reasons provided by the Sanctions Committee were vague and lacking in detail, even though such a general conclusion cannot be drawn if each of those reasons is examined separately.

141 Admittedly, as the General Court correctly ruled by endorsing, in paragraph 177 of the judgment under appeal, the argument of Mr Kadi set out in the fourth indent of paragraph 157 of that judgment, the last of the reasons stated in the summary provided by the Sanctions Committee, namely the allegation that Mr Kadi had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the 'extremists' who allegedly benefitted from that conduct.

142 On the other hand, the same cannot be said of the other reasons stated in the summary provided by the Sanctions Committee.

143 The first reason, based on Mr Kadi's acknowledgement that he is a founding trustee and directed the activities of the Muwafaq Foundation, which always operated under the umbrella of Makhtab al-Khidamat/Al Kifah – founded by, among others, was Usama bin Laden, which was the predecessor to Al-Qaeda and which, following the dissolution of Makhtab al-Khidamat/Al Kifah in June 2001, was absorbed into Al-Qaeda – is sufficiently detailed and specific, in that it identifies the entity concerned and Mr Kadi's role in relation to it, together with mention of an alleged link between that entity, on the one hand, and Usama bin Laden and Al-Qaeda, on the other.

144 The second reason is based on the fact that, in order to manage the European offices of the Muwafaq Foundation, Mr Kadi appointed, in 1992, Mr Al-Ayadi on the recommendation of Mr Julaidan, a financier who had fought alongside Usama bin Laden in Afghanistan in the 1980s. When he was appointed, Mr Al-Ayadi was said to be one of the principal leaders of the Tunisian Islamic Front and to be operated under agreements with Usama bin Laden. Mr Al-Ayadi is said to have gone to Afghanistan, in the early 1990s, to receive paramilitary training there, then, with other individuals, to Sudan to conclude there with Usama bin Laden an agreement regarding the reception and training of Tunisians and, later, an agreement regarding the reception of Tunisian mujahidin from Italy by Usama bin Laden's collaborators in Bosnia and Herzegovina.

145 That second reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and context of the appointment in question and information on the individuals involved in the allegation that that appointment was connected with Usama bin Laden.

146 The third reason, which is based on a statement allegedly made in 1995 by Mr Talad Fuad Kassem, the leader of the Al-Gama'at al Islamiyya, to the effect that the Muwafaq Foundation provided logistical and financial support to a mujahidin battalion in Bosnia and Herzegovina, is based on the fact that, that Foundation was said to be involved, in the mid 1990s, alongside Usama bin Laden, in providing financial support for terrorist activities of those mujahidin and to have assisted in the trafficking of arms from Albania to Bosnia and Herzegovina.

147 That third reason is sufficiently detailed and specific, since it identifies the person who made the statement concerned, the forms of activity reported, the time when they were allegedly carried out and their alleged link with the activities of Usama bin Laden.

148 The fourth reason is based on the fact that Mr Kadi was one of the major shareholders in the Bosnian bank Depositna Banka, now closed, in which 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.

149 Contrary to what is stated in paragraph 175 of the judgment under appeal, that fourth reason is sufficiently detailed and specific, in that it identifies the financial institution through which Mr Kadi allegedly contributed to terrorist activities and the nature of the alleged terrorist project concerned. The circumstance that the indication that it was in that institution that planning sessions for that alleged project took place is expressed as a possibility is not incompatible with the essential requirements 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.

150 Although it emerges from paragraphs 138 to 140 and 142 to 149 of this judgment that errors of law were made by the General Court, it is necessary to determine whether, notwithstanding those errors, the operative part of the judgment under appeal can be seen to be well founded on legal grounds other than those maintained by the General Court, in which event an appeal must be dismissed (see, to that effect, judgment of 19 April 2012 in Case C-221/10 P *Artegodan* v *Commission*, paragraph 94 and case-law cited).

– The unlawfulness of the contested regulation

151 It must be observed, as regards the first reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 143 of this judgment, that, in his comments of 10 November 2008 submitted in support of his action before the General Court, Mr Kadi, while acknowledging that he had been a founding trustee of the Muwafaq Foundation, denied that it had provided any support to terrorism and that there was any link between it and Makhtab al-Khidamat/Al Kifah. Attaching to those comments the Muwafaq Foundation's Constitution and Declaration of Trust, Mr Kadi claimed that the objects and purpose of that 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 was involved in international strategic decisions of the Muwafaq Foundation, he denied any involvement in the day-to-day management of its activities across the world, particularly in the recruitment of local staff. He also disputed that the Muwafaq Foundation joined Al-Qaeda in June 2001, stating in particular, and providing documents in support of his contention, that the foundation had ceased operations by 1998 at the latest.

152 In its reply of 8 December 2008 to the comments of Mr Kadi, also submitted to the General Court, the Commission contended that the fact that some or all of the activities of the entity concerned had ceased did not rule out the possibility that that entity, having continuous legal personality, had joined Al-Qaeda.

153 It is however clear that no information or evidence has been produced to substantiate the allegations of the Muwafaq Foundation's involvement in international terrorism in the form of links with Makhtab al-Khidamat/Al Kifah and Al-Qaeda. In such circumstances, the indications of the role and duties of Mr Kadi in relation to that foundation are not such as to justify the adoption, at European Union level, of restrictive measures against him.

154 As regards the second reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 144 of this judgment, Mr Kadi, in his comments of 10 November 2008, while accepting that he had recruited, in 1992, on the recommendation of Mr Julaidan, Mr Al-Ayadi to head the European offices of the Muwafaq Foundation, none the less asserted that the sole aim of that foundation in Europe was to provide support to refugees from Bosnia and Croatia during the Balkans conflict in the 1990s. Mr Kadi stated that Mr Julaidan, who, at that time, was working with him on a project supporting vocational training for refugees from Croatia, had recommended Mr Al-Ayadi to him because of his professional experience in the management of humanitarian work and because of his integrity. Mr Kadi also claimed that, in 1992, he had no grounds to suspect that Mr Al-Ayadi and Mr Julaidan were supporting terrorist activities, stating that, in the 1980s, Usama bin Laden was regarded as an ally of the West against the Soviet Union, that only after 1996 was Usama bin Laden described as a threat to international security, and that only in October 2001 and September 2002 respectively were Mr Al-Ayadi and Mr Julaidan listed on the Sanctions Committee Consolidated List. Lastly, Mr Kadi asserts that he had no knowledge of the Tunisian Islamic Front and the alleged links between Mr Al-Ayadi and that organisation.

155 In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the recruitment of Mr Al-Ayadi by Mr Kadi on the recommendation of Mr Julaidan, combined with the fact that Mr Al-Ayadi and Mr Julaidan had contacts with Usama bin Laden, justified the conclusion that those various individuals had acted in concert or were part of one single network. The Commission added that, in such circumstances, it was of no consequence that Mr Kadi claimed to have been unaware of the alleged links between Mr Al-Ayadi and the Tunisian Islamic Front.

156 In that regard, while it is conceivable that the material relied on in the summary of reasons provided by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-

Ayadi 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 same 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.

157 As regards the third reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 146 of this judgment, in his comments of 10 November 2008, Mr Kadi asserted that he had 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 mujahidin 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.

158 In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the statement of Mr Talad Fuad Kassem served as partial corroboration of the fact that Mr Kadi had used his position for purposes other than ordinary business purposes. The Commission added that, in such circumstances, it was irrelevant whether or not Mr Kadi knew Mr Talad Fuad Kassem.

159 However, 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.

160 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.

161 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.

162 However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Depozitna 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.

163 It follows, from the analysis set out in paragraph 141 and paragraphs 151 to 162 of this judgment, that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.

164 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.

165 Consequently, the appeals must be dismissed.

Costs

166 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which apply to the procedure on appeal 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 intervener 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.

167 Since the Commission, the Council and the United Kingdom have been unsuccessful, they must be ordered, in accordance with Mr Kadi's pleadings, to pay the costs.

168 The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, as interveners, are to bear their own costs.

On those grounds, the Court (Grand Chamber):

1. Dismisses the appeals;

2. Orders the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland to pay the costs;

3. Orders the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand

Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland to bear their own costs.

[Signatures]

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* Language of the case: English.

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

Before:
Judge Cassese, Presiding
Judge Li
Judge Deschênes
Judge Abi-Saab Judge Sidhwa

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 octobre 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

Mr. Richard Goldstone, Prosecutor
Mr. Grant Niemann
Mr. Alan Tieger
Mr. Michael Keegan
Ms. Brenda Hollis

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Milan Vujin
Mr. Krstan Simic

I. INTRODUCTION

A. The Judgement Under Appeal

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

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

As the Prosecutor of the International Tribunal has acknowledged at the hearing of 7 and 8 September 1995, the Statute is general in nature and the Security Council surely expected that it would be supplemented, where advisable, by the rules which the Judges were mandated to adopt, especially for "*Trials and Appeals*" (Art.15). The Judges did indeed adopt such rules: Part Seven of the Rules of Procedure and Evidence (Rules of Procedure and Evidence, 107-08 (adopted on 11 February 1994 pursuant to Article 15 of the Statute of the International Tribunal, as amended (IT/32/Rev. 5))(hereinafter *Rules of Procedure*)).

5. However, Rule 73 had already provided for "*Preliminary Motions by Accused*", including five headings. The first one is: "objections based on lack of jurisdiction." Rule 72 (B) then provides:

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

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

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

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

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

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

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It 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 temporis, loci, personae and materiae*). But jurisdiction is not merely an ambit or sphere (better described in this case as "competence"); it is basically - as is visible from the Latin origin of the word

itself, *jurisdictio* - 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

of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It 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." (United Nations Charter, 26 June 1945, Art. 39.)

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

In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." (Id., Art. 24(2).)

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

29. What is the extent of the powers of the Security Council under Article 39 and the limits thereon, if any?

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the **determination** that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes **recommendations (i.e.,** opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.
The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

30. It is not necessary for the purposes of the present decision to examine any further the question of the limits of the discretion of the Security Council in determining the existence of a "threat to the peace", for two reasons.

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the

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

the first phrase of this sentence.

36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of "collective measures" that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute *faute de mieux,* or a "second best" for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

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

(b) Can The Security Council Establish A Subsidiary Organ With Judicial Powers?

37. 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.

Plainly, the Security Council is not a judicial organ and is not provided with judicial powers (though it may incidentally perform certain quasi-judicial activities such as effecting determinations or findings). The principal function of the Security Council is the maintenance of international peace and security, in the discharge of which the Security Council exercises both decision-making and executive powers.

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own 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.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards,* the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

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.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

41. Appellant challenges the establishment of the International Tribunal by contending that it has not been established by law. The entitlement of an individual to have a criminal charge against him determined by a tribunal which has been established by law is provided in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. It provides: "

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." (ICCPR, art. 14, para. 1.)

Similar provisions can be found in Article 6(1) of the European Convention on Human Rights, which states: "

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))

and in Article 8(1) of the American Convention on Human Rights, which provides: "

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law." (American Convention on Human Rights, 22 November 1969, art. 8, para. 1, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (hereinafter ACHR).)"

Appellant argues that the right to have a criminal charge determined by a tribunal established by law is one which forms part of international law as a "general principle of law recognized by civilized nations", one of the sources of international law in Article 38 of the Statute of the International Court of Justice. In support of this assertion, Appellant emphasises the fundamental nature of the "fair trial" or "due process" guarantees afforded in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. Appellant asserts that they are minimum requirements in international law for the administration of criminal justice.

42. 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 proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law

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 is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

44. A second possible interpretation is that the words "established by law" refer to establishment of international courts by a body which, though not a Parliament, has a limited power to take binding decisions. In our view, one such body is the Security Council when, acting under Chapter VII of the United Nations Charter, it makes decisions binding by virtue of Article 25 of the Charter.

According to Appellant, however, there must be something more for a tribunal to be "established by law." Appellant takes the position that, given the differences between the United Nations system and national division of powers, discussed above, the conclusion must be that the United Nations system is not capable of creating the International Tribunal unless there is an amendment to the United Nations Charter. We disagree. It does not follow from the fact that the United Nations has no legislature that the Security Council is not empowered to set up this International Tribunal if it is acting pursuant to an authority found within its constitution, the United Nations Charter. As set out above (paras. 28-40) we are of the view that the Security Council was endowed with the power to create this International Tribunal as a measure under Chapter VII in the light of its determination that there exists a threat to the peace.

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)

45. The third possible interpretation of the requirement that the International Tribunal be "established by law" is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm.

43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

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

Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation

Adopted by the Board of Governors on 30 April 1980 and amended on 31 July 2001 and on 18 June 2009

Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation

as adopted by the Board of Governors on 30 April 1980 and amended on 31 July 2001 and on 18 June 2009

Article I

1. There is hereby established a Tribunal of the International Bank for Reconstruction and Development (hereinafter referred to individually as the "Bank"), the International Development Association and the International Finance Corporation (together with the Bank hereinafter referred to collectively as the "Bank Group") to be known as the World Bank Administrative Tribunal.

2. The Tribunal is a judicial body that functions independently of the management of the Bank Group. The independence of the Tribunal shall be guaranteed and respected by the Bank Group at all times.

Article II

1. The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan.

2. No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

(i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and

(ii) the application is filed within one hundred and twenty days after the latest of the following:

(a) the occurrence of the event giving rise to the application;

(b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or

(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

3. For the purpose of this statute:

the expression "member of the staff" means any current or former member of the staff of the Bank Group, any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death, and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

Article III

In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the Tribunal.

Article IV

1. The Tribunal shall be composed of seven members, all of whom shall be nationals of Member States of the Bank, but no two of whom shall be nationals of the same State. The members of the Tribunal shall be persons of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence in relevant fields such as employment relations, international civil service and international organization administration. Current and former staff of the Bank Group shall not be eligible to serve as members of the Tribunal and members may not be employed by the Bank Group following their service on the Tribunal.

2. The members of the Tribunal shall be appointed by the Executive Directors of the Bank from a list of candidates nominated by the President of the Bank after appropriate consultation. For this purpose, the President shall appoint an advisory committee composed of four members with relevant experience.

3. The members of the Tribunal shall be appointed for a term of five years; they may be reappointed for one additional term of five years. However, of the seven members appointed in 2001, the terms of three members shall expire at the end of three years. Any member who shall have served one or more full terms of office as of October 1, 2001 shall be eligible for reappointment for one additional term.

4. A member appointed to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term, and may be appointed and reappointed in accordance with the provisions of paragraphs 2 and 3 of this Article IV.

5. The members of the Tribunal shall hold office until replaced.

6. Members of the Tribunal shall enjoy the same immunities that apply to officials of the Bank Group with respect to acts performed by them in the exercise of their functions.

ARTICLE V

1. A quorum of five members shall suffice to constitute the Tribunal.

2. The Tribunal may, however, at any time form a panel of not less than three of its members for dealing with a particular case or group of cases. Decisions of such a panel shall be deemed to be taken by the Tribunal.

ARTICLE VI

1. The Tribunal shall elect a President and two Vice-Presidents from among its members.

2. The President of the Bank shall make the administrative arrangements necessary for the functioning of the Tribunal, including designating an Executive Secretary who, in the discharge of duties, shall be responsible only to the Tribunal.

3. The expenses of the Tribunal shall be borne by the Bank Group. The Tribunal shall prepare and manage its budget independently.

ARTICLE VII

1. Subject to the provisions of the present Statute, the Tribunal shall establish its rules.

2. The rules shall include provisions concerning:

(a) election of the President and Vice-Presidents;

(b) constitution of panels envisaged in Article V above;

(c) presentation of applications and the procedure to be followed in respect of them;

(d) intervention by persons to whom the Tribunal is open under paragraph 3 of Article II, whose rights may be affected by the judgment;

(e) hearing, for purposes of information, of persons to whom the Tribunal is open under paragraph 3 of Article II; and

(f) other matters relating to the functioning of the Tribunal.

ARTICLE VIII

1. The Tribunal shall hold sessions at dates to be fixed in accordance with its rules.

2. The Tribunal shall hold its sessions at the principal office of the Bank, unless it considers that the efficient conduct of the proceedings upon an application necessitates holding sessions elsewhere.

ARTICLE IX

The Tribunal shall decide in each case whether oral proceedings are warranted. Oral proceedings shall be held in public, unless the Tribunal decides that exceptional circumstances require that they be held in private.

ARTICLE X

1. The Tribunal shall take all its decisions by a majority of the members present.

2. In the event of an equality of votes, the President or the member who acts in such place shall have a casting vote.

ARTICLE XI

1. Judgments shall be final and without appeal.

2. Each judgment shall state the reasons on which it is based. Dissenting and concurring opinions, as well as clarifications, may be set out in the judgment.

ARTICLE XII

1. If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked unless the Tribunal finds that the Respondent institution has reasonably determined that such rescission or specific performance would not be practicable or in the institution's interest. In that event, the Tribunal shall, instead, order such institution to pay restitution in the amount that is reasonably necessary to compensate the applicant for the actual damages suffered.

2. Should the Tribunal find that the procedure prescribed in the rules of the respondent institution has not been observed, it may, at the request of the President of such respondent and prior to the determination of the merits, order the case remanded for institution or correction of the required procedure.

3. In all applicable cases, compensation fixed by the Tribunal shall be paid by the respondent institution.

4. The filing of an application shall not have the effect of suspending execution of the decision contested.

ARTICLE XIII

1. A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

2. The request shall contain the information necessary to show that the conditions laid down in paragraph 1 of this Article have been complied with. It shall be accompanied by the original or a copy of all supporting documents.

ARTICLE XIV

The original copy of each judgment shall be filed in the archives of the Bank. A copy of the judgment shall be delivered to each of the parties concerned. Copies shall also be made available on request to interested persons.

ARTICLE XV

The Bank may make agreements with any other international organization for the submission of applications of members of their staff to the Tribunal. Each such agreement shall provide that the organization concerned shall be bound by the judgments of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization; the agreement shall also include, inter alia, provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing of the expenses of the Tribunal.

ARTICLE XVI

The present Statute may be amended by the Board of Governors of the Bank.

ARTICLE XVII

Notwithstanding Article II, paragraph 2 of the present Statute, the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979, provided, however, that the application is filed within 90 days after the entry into force of the present Statute.

Rules of The World Bank Administrative Tribunal

Adopted by the Tribunal on September 26 1980 and Amended on 1 January 2002

Rules of The World Bank Administrative Tribunal

as adopted by the Tribunal on September 26, 1980 and amended on 1 January 2002

(Sub-headings are for ease of reference only, do not form part of the rules, and do not constitute an interpretation thereof.)

CHAPTER I: Organization

Rule 1: Term of Office of Members

Subject to any contrary decision of the Executive Directors of the International Bank for Reconstruction and Development (hereinafter referred to individually as the "Bank" and collectively, together with the International Development Association and the International Finance Corporation, as the "Bank Group"), the term of office of members of the Tribunal shall commence on the first day of October of the year of their appointment by the Executive Directors of the Bank.

Rule 2: President and Vice Presidents

1. The Tribunal shall elect a President and two Vice Presidents for terms of three years. The President and Vice Presidents thus elected shall take up their duties immediately. They may be re-elected.
2. The retiring President and Vice Presidents shall remain in office until their successors are elected.
3. If the President should cease to be a member of the Tribunal or should resign the office of President before the expiration of the normal term, the Tribunal shall elect a successor for the unexpired portion of the term. In the case of a vacancy of a Vice President, the President may arrange for the election of a successor by correspondence.
4. The elections shall be by majority vote.

Rule 3: Duties of President

1. The President shall direct the work of the Tribunal and of its Secretariat. He shall represent the Tribunal in all administrative matters and shall preside at meetings of the Tribunal.
2. If the President is unable to act, one of the Vice Presidents designated by the President shall act as President. In the absence of any such designation by the President, the Vice President designated by the Tribunal shall act as President.
3. No case shall be heard by the Tribunal except under the chairmanship of the President or one of the Vice Presidents.

Rule 4: Executive Secretary and Staff

In addition to an Executive Secretary, the Tribunal shall have other staff placed at its disposal by the President of the Bank. The Executive Secretary, if unable to act, shall be replaced by an official appointed by the President of the Bank.

CHAPTER II: Sessions

Rule 5: Plenary Sessions

Plenary Sessions
The Tribunal shall hold a plenary session once a year on a date fixed by the President for the purpose of hearing cases, forming panels, electing officers and any other matters affecting the administration or operation of the Tribunal. When, however, there are no cases on the list referred to in Rule 14, paragraph 1, which in the opinion of the President would justify the holding of a session for their consideration, the President may, after consulting the other members of the Tribunal, decide to postpone the plenary session to a later date.

Special Plenary Sessions
A special plenary session may be convened by the President when, in his or her opinion, the number or urgency of cases requires such a session or it is necessary to deal with a question affecting the operation of the Tribunal.

Notices of Sessions
Notice of the convening of a plenary session or a special plenary session shall be given to the members of the Tribunal at least thirty days in advance of the date of the opening of such a session.

Quorum
Five members of the Tribunal shall constitute a quorum for plenary sessions.

Rule 6: Panels

1. When the Tribunal decides to form a panel provided for in Article V, paragraph 2 of the Statute, it shall determine the particular case or group of cases for which such panel is formed.
2. A panel when formed shall include the President or one of the Vice Presidents, who, as the case may be, shall preside over that panel.
3. The presiding member of a panel shall exercise all the functions of the President of the Tribunal in relation to cases before that panel, including determining the dates of sessions of the panel.

CHAPTER III: Proceedings

Rule 7: Applications

Applications

1. Applications instituting proceedings shall be submitted to the Tribunal through the Executive Secretary. Such applications shall be divided into four sections, which shall be entitled respectively:

I. Information concerning the personal and official status of the applicant;
II. Pleas;
III. Explanatory statement; and
IV. Annexes.

2. The information concerning the personal and official status of the applicant shall be presented in the form contained in Annex I of these rules.

Pleas

3. The pleas shall indicate all the measures and decisions which the applicant is requesting the Tribunal to order or take. They shall specify:

(a) any preliminary or provisional measures, such as the production of additional documents or the hearing of witnesses, which the applicant is requesting the Tribunal to order before proceeding to consider the merits;

(b) the decisions which the applicant is contesting and whose rescission is requested under Article XII, paragraph 1, of the Statute;

(c) the obligations which the applicant is invoking and the specific performance of which is requested under Article XII, paragraph 1, of the Statute;

(d) the amount of compensation claimed by the applicant in the event that the Tribunal finds that the respondent institution has determined, in accordance with Article XII, paragraph 1, of the Statute, that rescission or specific performance would not be practicable or in the institution's interest;

(e) any other relief which the applicant may request in accordance with the Statute; and

(f) the amount of costs requested by the applicant.

Explanatory Statement

4. The explanatory statement shall set out the facts and the legal grounds on which the pleas are based. It shall specify, inter alia, the provisions of the contract of employment or of the terms of appointment the non-observance of which is alleged.

Annexes

5. The annexes shall contain the texts of all documents referred to in the first three sections of the application. They shall be presented by the applicant in accordance with the following rules and Annex I, Part II, of these rules:

(a) each document shall be annexed in the original or, failing that, in the form of a copy bearing the words "Certified true copy";

(b) documents shall be accompanied by any necessary translations; and documents shall be accompanied by any necessary translations; and

(c) unless part of the document is irrelevant to the application, each document, regardless of its nature, shall be annexed in its entirety.

Copies

6. The applicant shall prepare eight copies of the application in addition to the original. Each copy shall reproduce all sections of the original, including the annexes. However, the Executive Secretary may grant the applicant permission, upon request, to omit the text of an annex of unusual length from a specified number of copies of the application.

Authentication

7. The applicant shall sign the last page of the original application. In the event of the applicant's incapacity, the required signature shall be furnished by his or her legal representative. The applicant may instead, by means of a letter transmitted for that purpose to the Executive Secretary, authorize his or her lawyer or the staff member or retired staff member who is representing the applicant to sign in his or her stead.

Filing

8. The applicant shall file the duly signed original and the eight copies of the application with the Executive Secretary. Where the President of the respondent institution and the applicant have agreed to submit the application directly to the Tribunal in accordance with the option given to them under Article II, paragraph 2(i), of the Statute, the filing shall take place within ninety days of the date on which the President of the respondent institution notifies the applicant of agreement for direct submission. In all other cases, the filing shall take place within the time limits prescribed by Article II, paragraph 2(ii), of the Statute and by Rule 24.

Corrections

9. If the formal requirements of this rule are not fulfilled, the Executive Secretary may call upon the applicant to make the necessary corrections in the application and the copies thereof within a period which the Executive Secretary shall prescribe. He or she shall return the necessary papers to the applicant for this purpose. The Executive Secretary may also, with the approval of the President, make the necessary corrections when the defects in the application do not affect the substance.

Transmission

10. After ascertaining that the formal requirements of this rule have been complied with, the Executive Secretary shall transmit a copy of the application to the respondent.

Reservation of Application

11. If it appears that an application is clearly irreceivable or devoid of all merit, the President may instruct the Executive Secretary to take no further action thereon until the next session of the Tribunal. The Tribunal shall then consider the application and may either adjudge that it be summarily dismissed as clearly irreceivable or devoid of all merit, or order that it should be proceeded with in the ordinary way.

Rule 8

Preliminary Objections

1. Any objection by the respondent to the jurisdiction of the Tribunal or to the admissibility of the application, or any other objection for which a decision is sought before any further proceedings on the merits take place, shall be made in writing within twenty-one days of the date of the receipt by the respondent of the application.
2. The preliminary objection shall set forth the facts and the law upon which the objection is based.
3. Upon receipt by the Executive Secretary of a preliminary objection, the proceedings on the merits shall be suspended and the President of the Tribunal shall fix the time-limit within which the applicant may present a written answer to the objection.
4. The President of the Tribunal shall decide whether and to what extent additional pleadings may be required of the parties.
5. The Tribunal or, when the Tribunal is not in session, the President of the Tribunal may join the preliminary objection to the merits if there appears to be significant overlap of issues or contentions.

Rule 9

Answer

1. The respondent's answer shall be submitted to the Tribunal through the Executive Secretary. The answer shall include pleas, an explanatory statement and annexes. The annexes shall contain the complete texts of all documents referred to in the other sections of the answer not annexed to the application. They shall be presented in accordance with the rules established for the application in Rule 7, paragraph 5, and Annex I(II).

Copies

2. The respondent shall prepare eight copies of the answer in addition to the original. Each copy shall reproduce all sections of the original, including annexes. However, the Executive Secretary may grant the respondent permission, upon request, to omit the text of an annex of unusual length from a specified number of copies of the answer.

Authentication

3. The representative of the respondent shall sign the last page of the original answer.

Filing

4. Within sixty days of the date on which the application is transmitted to the respondent by the Executive Secretary, the respondent shall file the duly signed original and the eight copies of the answer with the Executive Secretary.

Transmission

5. After ascertaining that the formal requirements of this rule have been complied with, the Executive Secretary shall transmit a copy of the answer to the applicant.

Rule 10

Reply

1. The applicant may, within forty-five days of the date on which the answer is transmitted to him or her, file with the Executive Secretary a written reply to the answer.
2. The complete text of any document referred to in the written reply shall be annexed thereto in accordance with the rules established for the application in Rule 7, paragraph 5, and Annex I(II).
3. The written reply shall be filed in an original and eight copies drawn up in accordance with the rules established for the application in Rule 7, paragraph 6. The original shall be signed in accordance with the rules established for the application in Rule 7, paragraph 7.
4. After ascertaining that the formal requirements of this rule have been complied with, the Executive Secretary shall transmit a copy of the written reply to the respondent.

Rule 11

Rejoinder

1. The respondent may, within thirty days of the date on which the reply is transmitted to the respondent, file with the Executive Secretary a written rejoinder.
2. The complete text of any document referred to in the written rejoinder shall be annexed thereto in accordance with the rules established for the application in Rule 7, paragraph 5, and Annex I(II).
3. The written rejoinder shall be filed in an original and eight copies drawn up in accordance with the rules established for the answer in Rule 9, paragraph 2. The original rejoinder shall be signed on the last page by the representative of the respondent.
4. After ascertaining that the formal requirements of this rule have been complied with, the Executive Secretary shall transmit a copy of the written rejoinder to the applicant.
5. Without prejudice to Rule 12, the written proceedings shall be closed after the rejoinder has been filed.

Rule 12

Additional Statements and Documents

1. In exceptional cases, the President may, on his or her own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he or she shall fix. The additional documents shall be furnished in the original or in properly authenticated form. The written statements and additional documents shall be accompanied by eight copies. Any document shall be accompanied by any necessary translations. In exceptional cases, the President may, on his or her own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he or she shall fix. The additional documents shall be furnished in the original or in properly authenticated form. The written statements and additional documents shall be accompanied by eight copies. Any document shall be accompanied by any necessary translations.

2. Each written statement and additional document shall be communicated by the Executive Secretary, on receipt, to the other parties, unless at the request of one of the parties and with the consent of the other parties, the Tribunal decides otherwise. The personnel files communicated to the Tribunal shall be made available to the applicant by the Executive Secretary in accordance with instructions issued by the Tribunal.

Obtaining Information

3. In order to complete the documentation of the case prior to its being placed on the list, the President may obtain any necessary information from any party, witnesses or experts. The President may designate a member of the Tribunal or any other disinterested person to take oral statements. Any such statement shall be made under declaration as provided to the parties in accordance with Rule 18, paragraph 2.

Delegation of Functions

4. The President may in particular cases delegate his or her functions under this rule to one of the Vice Presidents.

Rules 13

Provisional Relief

1. The filing of an application shall not suspend the execution of the decision contested. However, the applicant may submit to the President of the Tribunal a request to suspend the contested decision until the Tribunal renders its judgment in the case.
2. A request for the suspension of the contested decision shall, unless it is manifestly unfounded, be transmitted to the respondent for its answer within a period of time to be determined by the President of the Tribunal.
3. The Tribunal or, when the Tribunal is not in session, the President of the Tribunal may grant such a request in a case in which the execution of the decision is shown to be highly likely to result in grave hardship to the applicant that cannot otherwise be redressed.

Rule 14

Listing of Case for Decision

1. When the President considers the documentation of a case to be sufficiently complete, he or she shall instruct the Executive Secretary to place the case on the list and to transmit the dossier of such case to the members designated to decide it. The Executive Secretary shall inform the parties as soon as the inclusion of the case in the list is effected. No additional statements or documents may be filed after the case has been included in the list.
2. As soon as the date of opening of the session or panel at which a case has been entered for deciding has been fixed, the Executive Secretary shall notify the parties of the date.
3. Any application for the adjournment of a case shall be decided by the President, or, when the Tribunal is in session, by the Tribunal.

Rule 15

Executive Secretary's Functions

1. The Executive Secretary shall be responsible for transmitting all documents and making all notifications required in connection with proceedings before the Tribunal.
2. The Executive Secretary shall make for each case a dossier which shall record all actions taken in connection with the preparation of the case for trial, the dates thereof, and the dates on which any document or notification forming part of the procedure is received in or dispatched from his or her office.

Rule 16

Presentation of Case

1. An applicant may present his or her case before the Tribunal in person, in either written or oral proceedings if allowed pursuant to Rule 17, paragraph 1. Subject to Rule 7, paragraph 7, the applicant may designate a staff member or retired staff member of the Bank Group to represent him or her, or may be represented by a lawyer authorized to practice in any country which is a member of the Bank.
2. The respondent institution shall be represented either by one of its officials or retired officials designated for that purpose or by a lawyer authorized to practice in any country which is a member of the respondent institution.

Rule 17

Oral Proceedings

1. Oral proceedings shall be held if the Tribunal members hearing a case so decide or if either party so requests and the Tribunal so agrees. The oral proceedings may include the presentation and examination of witnesses or experts, and each party shall have the right of oral argument and of comment on the evidence given.
2. In sufficient time before the opening of the oral proceedings each party shall inform the Executive Secretary and, through him or her, the other parties of the names and description of witnesses and experts whom he or she desires to be heard, indicating the points to which the evidence is to refer.
3. The Tribunal shall decide on any application for the hearing of witnesses or experts and shall determine the sequence of oral proceedings. Where appropriate, the Tribunal may decide that witnesses shall reply in writing to the questions of the parties. The parties shall, however, retain the right to comment on any such written reply.

Rule 18

Witnesses and Experts

1. The Tribunal may examine the witnesses and experts. The parties, their representatives or lawyers may, under the control of the presiding member, put questions to the witnesses and experts.

Rule 19

Production of Documents and Inquiry

The Tribunal may at any stage of the proceedings call for the production of documents or of such other evidence as may be required. It may arrange for any measures of inquiry as may be necessary.

CHAPTER IV: Remand of a Case

Rule 20

Remand

1. If, in the course of the deliberations, the Tribunal finds that the case should be remanded in order that the required procedure may be instituted or corrected under Article XII, paragraph 2, of the Statute, it shall notify the parties accordingly.
2. The Tribunal shall decide on the substance of the case if, on the expiry of the time limit of two working days reckoned from the date of the notification under paragraph 1 above, no request for a remand has been made by the President of the respondent institution.

CHAPTER V: Intervention

Rule 21

Intervention by Individuals

1. Any person to whom the Tribunal is open under Article II, paragraph 3, and Article XV of the Statute may apply to intervene in a case at any stage thereof on the ground that he or she has a right which may be affected by the judgment to be given by the Tribunal. Such person shall for that purpose draw up and file an application in the form of Annex II for intervention in accordance with the conditions laid down in this rule.
2. The rules regarding the preparation and submission of applications specified in Rules 7 through 16 above shall apply mutatis mutandis to the application for intervention.
3. After ascertaining that the formal requirements of this rule have been complied with, the Executive Secretary shall transmit a copy of the application for intervention to the applicant and to the respondent institution. The President shall decide which documents, if any, relating to the proceedings are to be transmitted to the intervenor by the Executive Secretary.
4. The Tribunal shall rule on the admissibility of every application for intervention submitted under this rule.

Rule 22

Intervention by Organizations

1. The President of the Bank, the chief executive officer of an international organization to which the competence of the Tribunal has been extended in accordance with the Statute, or the Chairman of the Pension Benefits Administration Committee of the Bank, may, on giving previous notice to the President of the Tribunal, intervene at any stage, if such person considers that his or her respective administration may be affected by the judgment to be given by the Tribunal.

Rule 23

Potential Intervenors

1. When it appears that a person may have an interest in intervening in a case under Rules 21 or 22, the President, or the Tribunal when in session, may instruct the Executive Secretary to transmit to such person a copy of the application submitted in the case.

CHAPTER VI: Applications Concerning Decisions of the Pension Benefits Administration Committee

Rule 24

Pension Cases

Where an application is brought against a decision of the Pension Benefits Administration Committee of the Bank, the time limits prescribed in Article II of the Statute are reckoned from the date of the communication of the contested decision to the party concerned.

CHAPTER VII: Miscellaneous Provisions

Rule 25

Persons Furnishing Information

1. The Tribunal may, for purposes of information, permit persons to whom the Tribunal is open under Article II, paragraph 3, of the Statute, whenever such persons may be expected to furnish information pertinent to the case, to submit written or oral observations as may be appropriate.

Amicus Curiae

2. The Tribunal may permit any person or entity with a substantial interest in the outcome of a case to participate as a friend-of-the-court. It may also permit the duly authorized representatives of the Staff Association of a respondent institution so to participate. A request so to participate shall be accompanied by a brief and shall be filed not later than the date fixed for the filing of the applicant's reply under Rule 10(1). If the Tribunal grants the request, the Executive Secretary shall transmit a copy of the accompanying brief to the parties who may

comment thereon within thirty days of the date on which the brief is transmitted to them.

Rule 26

Representative Cases

1. Either the applicant or the respondent to a case brought before the Tribunal may request that the Tribunal's judgment in the case be applied to all staff members similarly situated, whether or not such staff members have made application to or intervened in the proceedings before the Tribunal. The request must be made by the applicant not later than the date fixed for the filing of the reply, or by the respondent not later than the date fixed for the filing of the rejoinder.
2. The President of the Tribunal may grant the request under such conditions as he or she may find appropriate in the circumstances where it is shown that there exists an identifiable group of similarly situated staff who share a common legal or factual position and where such a ruling would best serve judicial efficiency in clarifying the rights or obligations of the specified group.
3. The Tribunal may determine in its judgment the extent to which its judgment will apply and to whom it may apply within the specified group.

Rule 27

Consolidation of Cases or Pleadings

1. Applicants in separate cases, or the respondent, may request the Tribunal to consolidate the cases in question, or any aspect of the pleadings in the cases. In deciding on the request, the Tribunal will consider the extent to which identical issues of law or fact are presented.
2. The Tribunal may on its own initiative order the consolidation of cases, or aspects of pleadings in separate cases, where it deems that identical issues of law or fact are presented.

Rule 28

Anonymity

1. An applicant who wishes that his or her name not be made public may request anonymity at the time when the application instituting proceedings is submitted to the Tribunal and, in any event, no later than by the date of the filing of his or her written reply to the answer.
2. A request for anonymity shall be transmitted to the respondent for comment within a period of time to be determined by the President of the Tribunal.
3. The President of the Tribunal may grant a request for anonymity in cases where publication of the applicant's name is likely to be seriously prejudicial to the applicant.

Rule 29

Costs

1. An application for costs should be submitted not later than seven days after the listing of the case.

Rule 30

Publication of Decisions

1. The Executive Secretary shall arrange for the publication of the decisions of the Tribunal.

Rule 31

Modification and Supplementation of Rules
The Tribunal, or, when the Tribunal is not in session, the President after consultation where appropriate with the members of the Tribunal, may:

i. in exceptional cases modify the application of these rules, including any time limits thereunder;
ii. deal with any matter not expressly provided for in the present rules.

Rule 32

Entry Into Force

The present rules shall apply to all applications submitted after January 1, 2002 and may apply to applications before that date if both the applicant and the respondent so inform the Tribunal.

ANNEX I

I. Form of first section of application drawn up in accordance with Rule 7

Information concerning the personal and official status of the applicant:

1. Name of respondent.
2. Applicant:
    a. name and first names;
    b. date and place of birth;
    c. marital status;
    d. nationality; and
    e. address for purposes of the proceedings.
3. Name and address of lawyer or staff member or retired staff member representing the applicant before the Tribunal.
4. Official status of applicant:
    a. organization of which the applicant was a staff member at the time of the decision contested;
    b. date of employment;
    c. title and level at time of decision contested;
    d. salary of applicant at the time of decision contested;
    e. type of applicant's appointment; and
    f. visa status, if applicable.
5. If the applicant was not a staff member at the time of the contested decision, state:
    a. the name, first names, nationality and official status of the staff member whose rights are relied on; and
    b. the relation of the applicant to the said staff member which entitles the former to come before the Tribunal.
6. Date of the occurrence of the event or date of decision giving rise to the application.
7. Date of receipt of notice (after the applicant has exhausted all other remedies available within the Bank Group) that the relief asked for or recommended will not be granted.
8. Date of receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.
9. Description of remedies exhausted within the respondent institution.
10. Applicants who are filing applications after they have been separated from the Bank's employment should indicate all employment, including self-employment, since the date of separation, stating the nature and periods of such employment, the names of all employers and gross payments received in

respect of such employment.

Requirements regarding annexes

1. Each document shall constitute a separate annex and shall be numbered with an Arabic numeral. The word "ANNEX," followed by the number of the document, shall appear at the top of the first page;
2. The annexed documents shall be preceded by a table of contents indicating the number, title, nature, date and, where appropriate, symbol of each annex;
3. The words "see annex," followed by the appropriate number, shall appear in parentheses after each reference to an annexed document in the other sections of the application; and
4. Whenever possible, annexes should be attached in chronological order.

ANNEX II

Form of first section of application for intervention drawn up in accordance with Article 7

Information concerning the personal and official status of the intervenor:

1. Case in which intervention is sought.
2. Intervenor:
    a. name and first names;
    b. date and place of birth;
    c. marital status;
    d. nationality; and
    e. address for purposes of the proceedings.
3. Name and address of lawyer or staff member or retired staff member representing the intervenor before the Tribunal.
4. Official status of intervenor:
    a. organization of which the intervenor is a staff member;
    b. date of employment;
    c. title and level;
    d. salary of intervenor at the time of decision contested;
    e. type of intervenor's appointment; and
    f. visa status of intervenor, if applicable.
5. If the intervenor was not a staff member at the time of the contested decision, state:
    a. the name, first names, nationality and official status of the staff member whose rights are relied on; and
    b. the title under which the intervenor claims he or she is entitled to the rights of the said staff member.
6. Intervenors who are filing applications after they have been separated from the Bank's employment should indicate all employment, including self-employment, since the date of separation, stating the nature and periods of such employment, the names of all employers and gross payments received in respect of such employment.

The World Bank Administrative Tribunal

Louis de Merode and Others *v.* The World Bank
Decision of 5 June 1981

Decision No. 1

Decision No. 1

Louis de Merode,
Frank Lamson-Scribner, Jr.,
David Gene Reese,
Judith Reisman-Toof,
Franco Ruberl,
Nina Shapiro,
Applicants

v.

The World Bank,
Respondent

The World Bank Administrative Tribunal,

Composed of E. Jimenez de Arechaga, President, T. O. Elias, P. Weil, Vice Presidents, A.K. Abul-Magd, R. Gorman, N. Kumarayya** Judge Kumarayya has taken part in all the deliberations in this case. He was prevented for reasons of health from attending the hearing but has since had an opportunity of listening to a tape recording of it. and E. Lauterpacht, Members.

1. The Tribunal is seized of applications dated September 29, 1980 filed by Applicants de Merode, Lamson-Scribner, Reese, Reisman-Toof, Ruberl and Shapiro (hereinafter collectively called “the Applicants”). By a Decision dated September 26, 1980 the Applicants were permitted to add by October 19, 1980 a Memorandum of Law to their applications and the Respondent** For the purposes of this decision, the term "World Bank" means the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation. was given until December 10, 1980 (subsequently extended to January 15, 1981) to submit its Answer.

2. The Applicants submitted their observations on the Answer by February 27, 1981, and the Respondent was allowed to submit a supplemental statement by a decision of the Tribunal dated March 16, 1981. The case was listed on March 16, 1981 and was heard on May 28, 1981. At that hearing counsel for the Applicants and the Respondent orally developed certain parts of their respective cases.

I. INTRODUCTION

3. The Tribunal is presented in this, the first case to be decided by it, with the question whether the implementation in relation to the Applicants of the decisions adopted on May 25, 1979 by the Executive Directors of the Bank regarding tax reimbursement and salary adjustment amounts to non-observance by the Bank of the contracts of employment or terms of appointment of the Applicants. The legal issues involved in this question are basic and important. They do not lend themselves to summary treatment.

4. The Tribunal is, by Article II of its Statute, given jurisdiction to hear applications alleging non-observance of the contract of employment or terms of appointment of staff members, and this phrase is stated to include “all pertinent regulations and rules in force at the time of alleged nonobservance including the provisions of the Staff Retirement Plan”. In order to avoid constant repetition of all these terms, the Tribunal will in this Judgment use the phrase “conditions of employment” to describe compendiously the various elements which together determine the content of the legal relationship between the Bank and a member of its staff.

5. The circumstances in which the present case has come before the Tribunal reflect some of the many

changes which the activities and operations of the Bank have undergone since its establishment in 1945 – changes in the purposes of its loans, in the character of the borrower countries, in the magnitude and range of its projects, in its sources of finance and, most relevant of all, in the number of personnel engaged in the pursuit of the Bank's objectives. By reason of the last, the closeness of the relationship between the Bank management and the general body of Bank personnel which marked the earlier years of the Bank has unavoidably been affected. In addition, external economic conditions have understandably given rise to concern on the part of the staff members regarding the maintenance of the real value of their remuneration in the face of inflation and of the increase in the cost of living. At the same time, some of the Bank's Members have found occasion to question some elements of the Bank's compensation policies in comparison with those applied to their own officials and the employees of domestic banking and other similar enterprises.

6. In 1977, the President of the Bank proposed to the Executive Directors that:

> “a Joint Bank and Fund Committee should be established to examine compensation issues and to agree on a set of principles which would provide a more stable framework for the process of determining compensation.”

7. The Joint Committee on Staff Compensation Issues (the Kafka Committee, so called because it was chaired by Alexandre Kafka, an Executive Director of the International Monetary Fund), composed of Executive Directors of the World Bank and the International Monetary Fund and outside experts, issued its 516-page Report in January 1979 containing detailed findings as to salaries and benefits at the World Bank and the Fund and making recommendations for the future. After allowing a period for comment the Executive Directors of both the Bank and the Fund decided in May 1979 to adopt, subject to some changes, many of the Committee's recommendations.

8. By Administrative Circular AC/23/79 of May 25, 1979, the staff of the Bank was informed that:

> “The Executive Directors have completed their consideration of the main policy issues stemming from the report of the Joint Committee on Staff Compensation Issues. Among the more important matters, the Executive Directors have agreed that:
> ....
>
> “... unless the Governments concerned agree to exempt their nationals from taxes or income derived from the Bank, the present system of tax reimbursement will be replaced, effective January 1, 1980, by a system based on average deductions with a five-year transition period and appropriate safeguards. The details of how this system is to be implemented are yet to be agreed.
>
> “The Executive Directors have also approved a 9.5% increase in net salaries effective March 1, 1979 ... This is in line with average real pay increases of the US private sector comparators over the past year.”

The methods of implementing the new system of tax reimbursement were set out in Personnel Manual Circular 1/80 of January 21, 1980.

9. These decisions were regarded by members of the staff as affecting them in two respects. The new tax reimbursement system would result, when fully phased in, in a reduction of 23% in tax reimbursements to existing staff of United States nationality. As regards the decision relating to salary increases, staff members considered that this involved the repudiation by the Bank of a decision taken in 1968 to adjust salaries automatically in proportion to the increase in the Consumer Price Index in the Washington Metropolitan Area (“CPI”). As a consequence of this decision the adjustment of 9.5% (effective March 1, 1979) and a subsequent adjustment of 8.3% (effective March 1, 1980) were lower than the increases in the CPI of 11.26% and 11.68% during the two preceding 12-month periods respectively.

10. From these decisions more than 1,300 World Bank staff members appealed to the Appeals Committee of

the Bank alleging violation of their conditions of employment. On January 8, 1980, the Appeals Committee decided that it had no jurisdiction over the matter and expressed regret that there was "no forum in the world in which such decisions can be challenged, reviewed, and possibly overturned if found illegal." On April 30, 1980 the Board of Governors adopted the Statute of this Tribunal which entered into force on July 1, 1980. Article XVII of the Statute provides that:

> "... the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to January 1, 1979, provided, however, that the application is filed within 90 days after the entry into force of the present Statute."

11. On September 29, 1980, that is to say, within the period fixed by Article XVII, the applications of the six named Applicants were filed with the Tribunal. These were identified by counsel for the Applicants as being "representative of the broad spectrum of Bank employees who have been financially harmed by these two changes". The Bank has agreed that, if and to the extent that the Tribunal renders a decision in favor of an Applicant or Applicants in the representative cases on the basis of general principles rather than on the basis of particular facts relating to the application of a given individual, the Bank will treat all staff members similarly situated in accordance with the Tribunal's decision, whether or not such staff members have made application to or intervened in the proceedings before the Tribunal. As a result, 874 applications have been filed by staff members who believe their cases should be disposed of on the basis of the particular facts of their own individual cases. In addition, the Secretariat of the Tribunal has received 8 applications for intervention which have been joined with the 874 so-called "non-representative" applications.

12. All of the six named Applicants complain of the decisions of the Bank relating to salary adjustments. They contend that, as a result of these decisions, their salaries for the years 1979 and 1980 were respectively 11% and 29% lower than they would have been if the Bank had not unilaterally abandoned its previous policy, established in 1968, of automatically adjusting salaries on the basis of the CPI. In addition, four of the six Applicants, Lamson-Scribner, Reese, Reisman-Toof and Shapiro complain of substantial reductions in their gross income resulting from changes made by the Bank, with effect from January 1, 1980, in the method of calculating tax reimbursement.

13. The Applicants ask the Tribunal:

1. To order the rescission of certain administrative circulars, namely, Administrative Circulars 23/79, dated May 25, 1979, and 13/80, dated March 14, 1980, as regards salary adjustment, and the Personnel Manual Circular 1/80, dated January 21, 1980, as regards tax reimbursement;

2. To order specific performance of their contract of employment;

3. To order the Bank to pay them the difference between their salaries and/or the tax reimbursements which they actually received on the basis of the above-mentioned circulars, and the payments to which they claim they are entitled in law;

4. (a) To order the payment of interest at the prevailing rate on the difference;

(b) To order the Bank to reimburse all their fees, costs and disbursements incurred in the preparation of this case, including reasonable attorney's costs.

14. The competence of the Tribunal to pass judgment upon these Applications has not been contested by the Respondent. As the applications allege non-observance of the contracts of employment or terms of appointment of the Applicants, the Tribunal decides that it is competent to determine these matters.

15. Does the World Bank have the power – and, if so, within what limits – unilaterally to change the conditions of employment of its staff? May Bank personnel invoke the concept of acquired rights to prevent the application to them of changes unilaterally introduced by the Bank? These two questions represent two different formulations of the principal legal issue involved in the present proceedings. The Tribunal will approach its task

of resolving these questions by first identifying the conditions of employment of Bank personnel. It will then examine the issue of the Bank's right to amend these terms. Finally, the Tribunal will consider the specific issues raised by the problems of tax reimbursement and salary adjustment.

II. THE CONDITIONS OF EMPLOYMENT

16. Normally, members of the staff enter the service of the Bank as a result of an exchange of a letter of appointment and a letter of acceptance. The letter of appointment conveys to the prospective staff member "the formal offer of an appointment to the staff of the Bank". It sets out certain specific details of the appointment, such as initial assignment, salary, dependency allowances, entry date, and information about benefits, visas, etc. It also states:

> "Your basic salary and your dependency allowances will be net of income taxes as presently or hereafter provided in the By-Laws and Regulations of the Bank ...
>
> "Your appointment is subject to the conditions of employment of the Bank as at present in effect and as they may be amended from time to time."

In his letter of acceptance the prospective employee states that he accepts appointment to the staff of the Bank

> "... under the terms and conditions set forth in my letter of appointment and the policies and procedures of the Bank as they may be in effect from time to time".

17. Employment by the Bank thus results from an offer followed by an acceptance, that is to say, a contract, and not, as is the case with employment in the civil service of certain individual countries, as a result of a unilateral act of nomination by the administration.

18. However, the fact that the Bank's employees enter its service on the basis of an exchange of letters does not mean that these contractual instruments contain an exhaustive statement of all relevant rights and duties. The two sides are agreed on this point. The contract may be the sine qua non of the relationships, but it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the Bank and its staff members. In the case of other organizations one looks for these other elements principally in the constituent instrument of the organization and in its Staff Rules and Regulations. As the Bank has at present no Staff Rules or Regulations one must look to the Articles of Agreement of the Bank and to the By-Laws and, depending on their content, to certain manuals, circulars, notes and statements issued by the management of the Bank as well as to certain other sources which will be examined presently.

19. As regards the Articles of Agreement, Article V, Section 1 prescribes that the Bank shall have, in addition to a Board of Governors, the Executive Directors and a President, such other officers and staff to perform such duties as the Bank may determine.

Article V, Section 2 provides:

> "(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."

Article V, Section 5 provides:

> "(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 technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible."

Article VII, Section 9(b) provides:

"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."

20. The Tribunal turns from the constitutional foundation to the next general instrument which controls the Bank's power to act as an employer. Reference has already been made to the power accorded to the Board of Governors and the Executive Directors by Article V, Section 2(f), to adopt rules and regulations necessary or appropriate to the conduct of the Bank's business. This power has been exercised in a variety of ways of which the most formal in character is the By-Laws. The main provision in these By-laws referring to staff members is that in Section 14(b) which related, in the period prior to 1980, to tax reimbursement.

21. Likewise, the decision of the Board of Governors to establish this Tribunal introduced into the conditions of employment of Bank staff the right of recourse to this Tribunal, in accordance with the conditions laid down in the Statute. This right forms an integral part of the legal relationship between the Bank and its staff members.

22. Further elements of the legal relationship between the Bank and its personnel are also to be found in the Personnel Manual, the Field Office Manual, various administrative circulars and in certain notes and statements of the management. However, it is important to observe that not all the provisions of these manuals, circulars, notes, and statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in each case whether the provision constitutes one of the conditions of employment.

23. The practice of the organization may also, in certain circumstances, become part of the conditions of employment. Obviously, the organization would be discouraged from taking measures favorable to its employees on an ad hoc basis if each time it did so it had to take the risk of initiating a practice which might become legally binding upon it. The integration of practice into the conditions of employment must therefore be limited to that of which there is evidence that it is followed by the organization in the conviction that it reflects a legal obligation, as was recognized by the International Court of Justice in its Advisory Opinion on Judgments of the Administrative Tribunal of the ILO (ICJ Reports 1956, p. 91).

24. The specific circumstances of each case may also have some bearing on the legal relationship between the Bank and an individual member of the staff, particularly the actual conditions in which the appointment has been made.

25. Another source of the rights and duties of the staff of the Bank consists of certain general principles of law, the applicability of which has in fact been acknowledged by the Bank in its written and oral pleadings.

26. The parties have discussed the question whether the conditions of employment incorporate in addition the rights and duties defined in relation to other international organizations by administrative tribunals comparable to this one. Or, to put it another way, do there exist rules common to all international organizations, and which must, therefore, ipso facto apply in the legal relations between the Bank and its employees, in such a way as to determine the rights and duties of the two parties in the present case? Is there a common corpus juris shared by all international officials?

27. The Tribunal, which is an international tribunal, considers that its task is to decide internal disputes between

the Bank and its staff within the organized legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment.

28. The Tribunal does not overlook the fact that each international organization has its own constituent instrument; its own membership; its own institutional structure; its own functions; its own measure of legal personality; its own personnel policy; and that the difference between one organization and another are so obvious that the notion of a common law of international organization must be subject to numerous and sometimes significant qualifications. But the fact that these differences exist does not exclude the possibility that similar conditions may affect the solution of comparable problems. While the various international administrative tribunals do not consider themselves bound by each other's decisions and have worked out a sometimes divergent jurisprudence adapted to each organization, it is equally true that on certain points the solutions reached are not significantly different. It even happens that the judgments of one tribunal may refer to the jurisprudence of another. Some of these judgments even go so far as to speak of general principles of international civil service law or of a body of rules applicable to the international civil service. Whether these similar features amount to a true corpus juris is not a matter on which it is necessary for the Tribunal to express a view. The Tribunal is free to take note of solutions worked out in sufficiently comparable conditions by other administrative tribunals, particularly those of the United Nations family. In this way the Tribunal may take account both of the diversity of international organizations and the special character of the Bank without neglecting the tendency towards a certain rapprochement.

29. It is important to emphasize that the legal basis for the application to each employee of rules outside his own "contract" stricto sensu does not rest on those terms of the letter of appointment and the letter of acceptance which provide that the appointment is "subject to the conditions of employment of the Bank" and which mention specifically the Bank's policy in respect to dependency allowance, benefits, retirement, insurance, etc. True, one might say that, in accepting the appointment "offered" by the Bank, the staff member at the same time "accepted" as a whole the relevant rules and policies. The applicability of these to the employee is, however, the consequence of their objective existence as part of the legal system to which the staff member becomes subject by entering into a contract with the organization. The determination of the law applicable by this Tribunal cannot depend on subjective considerations of a highly individual character which would result, if one were to adopt them, in the application to staff members of different rules of law according to the expectations of each one at the moment he "accepted" his appointment. The Tribunal will revert to this subject later.

III. THE BANK'S POWER OF AMENDMENT

30. The first consequence of the fact that the legal position of Bank employees is in large part fixed by objective rules of a general and impersonal character is that the organization must apply these rules to each member of the staff individually, and that, if it fails to observe them, the latter may turn to this Tribunal and seek the remedies set out in Article XII of the Statute. In other words, because every authority is bound by its own rules for so long as such rules have not been amended or abrogated individual decisions must conform to the general rules.

31. A second and no less important consequence of the dominantly objective nature of the legal situation of the staff of the Bank is that the Bank possesses, in common with other international organizations, an inherent power to change – subject to conditions which the Tribunal will examine later – the general and impersonal rules establishing the rights and duties of the staff. It is a well-established legal principle that the power to make rules implies in principle the right to amend them. This power flows from the responsibilities of the competent authorities of the Bank.

32. While the power of the Bank to change the general rules defining the rights and obligations of the staff cannot be denied – and indeed is not denied by the Applicants – the question whether the changes introduced by the Bank may be applied to staff members employed before their adoption is a matter on which the parties express divergent views.

33. The Applicants rely principally on what they call the doctrine of acquired rights, under which “the employer organization may not unilaterally make substantial adverse changes in the essential terms of an employee's appointment”. They maintain that, even if the staff member has accepted in advance in his contract of employment, without any reservation or limitation, the organization's power to amend the contract – which is the case in the letters of appointment and acceptance of the Bank – this power cannot go so far as to authorize the organization unilaterally to prejudice the acquired rights of the staff members. The Respondent rejects the Applicants’ contention in regard to acquired rights as unreasonable and unrealistic: acceptance of such a theory, the Respondent argues, would prevent the Bank from adjusting its personnel policies to changing circumstances and would place it in an administrative straitjacket. Moreover, adds the Respondent, the doctrine of acquired rights could not be applied here without disregarding the clear language of the Applicants' letters of appointment.

34. However, once these strongly contrasting and at first sight irreconcilable positions are studied at closer range, they appear to have been put forward by the parties with some nuances. The Applicants qualify their theory of acquired rights by two limitations. First, acquired rights stand in the way only of “substantial adverse changes in the essential terms of the employee's appointment”. This implies a contrario that the Bank may make (i) favorable changes; (ii) insubstantial changes; and (iii) changes in nonessential terms. Moreover, Applicants admit that there may be instances of “exigent circumstances” or “overwhelming contingencies” under which the acquired rights doctrine gives way to the Bank's need to act. The Respondent, on the other hand, though denying the existence of any so-called “doctrine of acquired rights” as invoked by the Applicants, acknowledges that the Bank cannot act in an unfettered manner. Its power of unilateral amendment, in Respondent's own view as elaborated during the oral pleadings, is subject to general principles of law such as the principle of non-retroactivity, the principle of nondiscrimination and the principle of reasonable relationship between aims and means.

35. The Tribunal is of the view that the Bank has the power unilaterally to change conditions of employment of the staff. At the same time, significant limitations exist upon the exercise of such power.

36. The existence of the Bank's power unilaterally to change conditions of employment rests on its implied power to pursue fully and efficiently the purposes and objectives for which it was created. As the legal relationship between the Bank and its staff does not rest on any national legal system, it is in the Bank's own internal law that the basis for the Bank's power must be found. To deny the existence of any power unilaterally to amend the conditions of employment of existing staff would lead to a situation in which there are as many rules as there are employees who entered the service of the Bank at different dates. This would create unjustifiable inequalities between the various staff members and would be contrary to the elementary requirements of good administration. The existence of objective rules of a general and impersonal character implies not only the power of the organization to change these rules, but also a power to decide that the new rules should apply immediately to personnel already employed.

37. The Applicants advance the idea that the elements of the conditions of employment must remain at least as favorable to the staff member during the whole period of his employment as they were at the date of the commencement of his service to the Bank. It is on those conditions of employment, so the Applicants maintain, that the staff member placed his “reliance” and his “expectations”; without them he would not have agreed to become an employee or would not subsequently have remained in the service of the Bank.

38. In the opinion of the Tribunal the conditions of employment can not be frozen at the date the staff member joins the Bank. It is relevant to note that Article II, paragraph 1, of the Statute, after defining the jurisdiction of the Tribunal by reference to “non-observance of the contract of employment or terms of appointment”, provides:

> “The words 'contract of employment' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non- observance....”

This provision clearly establishes that the conditions of employment for which the Tribunal must assure respect

are not those which existed at the date of appointment of the claimant but those which exist at the date of the alleged non-observance; it implies, by its very words, possible changes in the conditions of employment.

39. The same considerations which underlie the existence of a power of unilateral amendment, namely, the internal law of the Bank and its implied powers, lead the Tribunal to reject the idea that this power should be totally unlimited. Such an idea would run counter to “the paramount importance of securing the highest standards of efficiency and of technical competence” (Article V, Section 5(d) of the Articles of Agreement). No one would wish to be employed in an organization in which there were no limits at all to the power of the employer.

40. How then is a distinction to be drawn between those unilateral amendments which are permissible and those which are not? The Tribunal notes, first, that such distinction cannot rest on the extent to which a staff member accepted such power of amendment in his letter of appointment. Even if no reservation of the power of amendment were expressly included in the letters of appointment, such a power would be implied from the internal law of the Bank. Likewise, even in those cases where a power of amendment is reserved in terms which impose no limitation upon its exercise, this cannot be construed to accord to the organization an unrestricted power of amendment. The scope of the words as used in the exchange of letters must be read against the background of the Bank's internal law, and it is not on the strength and extent of any individual's acceptance that the power of amendment and its limitations may be defined.

41. Nor can the distinction between what is permissible and what is impermissible rest on the state of mind or the intentions of staff members at the time of taking their employment, on their “expectations” or “reliance” or on the motivating factors which might have induced them to accept or remain in employment with the Bank. Subjective considerations are at best difficult to identify and the difficulty increases with time. The possibility exists that different considerations may prevail with different individuals, thus occasioning a diversity of governing rules where uniformity is necessary. Moreover, there are at least two subjective intentions in any contract. There is no more reason to attach greater weight to the intention of the staff member than to that of the Bank, Furthermore, staff members are entitled to the observance of their conditions of employment as they may exist from time to time, and not only of those terms of appointment which induced them to accept service with the Bank and on the maintenance of which they have placed their “expectations” and their “reliance”. In entering the service of the Bank, the staff member expects, or should expect, that these elements may be altered in the future to take account of changing circumstances.

42. The Tribunal considers that in examining the numerous and varied elements of the conditions of employment, a major distinction must be drawn. Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to the limits and conditions which will be examined later. In various forms and with differing terminology this distinction is found in the Jurisprudence of other international administrative tribunals.

43. The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable. Each distinction turns upon the circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination. However, this difficulty has not prevented distinctions of this kind playing a central role in the application of the law generally and the Tribunal sees no reason for rejecting the relevance of such a distinction in the internal law of the Bank. Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely – both principle and implementation – to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential.

44. In describing the distinction between essential and non-essential elements, the Tribunal prefers not to use such terminology as “contractual rights” as opposed to “statutory rights”. Some of the conditions contained in the “contract,” that is, in the letters of appointment and acceptance, may be non-fundamental and non-essential, while some of the conditions lying outside the “contract”, and therefore called “statutory”, may be fundamental and essential. Likewise, the Tribunal prefers not to invoke the phrase “acquired rights” in order to describe essential rights. The content of this phrase is difficult to identify. It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls “the doctrine of acquired rights” does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.

45. As has been stated, while the fundamental and essential elements of the conditions of employment may not be amended unilaterally, the non-fundamental and non-essential elements are subject to unilateral amendment. This power is discretionary and it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank in exercising that discretion. However, the Bank's power to amend non-essential terms may be exercised subject only to certain limitations. Discretionary power is not absolute power.

46. First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

47. The principle of non-retroactivity is not the only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing “the highest standards of efficiency and of technical competence”. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.

48. The Tribunal must satisfy itself in each case that the Bank's power to change the non-fundamental elements in the conditions of employment of its employees has not been exercised either retroactively or in an arbitrary or otherwise improper manner.

IV. TAX REIMBURSEMENT

49. In the light of the principles and rules of law which have just been stated, the Tribunal now intends to examine whether the introduction in relation to the Applicants Lamson-Scribner, Reese, Reisman-Toof and Shapiro, of a new system of tax reimbursement with affect from January 1, 1980 constituted a non-observance of their contracts of employment or terms of appointment.

50. The origins of the system of tax reimbursement go back to 1945. As already pointed out, Article VII, Section 9(b) of the Articles of Agreement of the Bank provides: “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.” At its inaugural meeting, the Board of Governors adopted on 16 March 1946 a resolution recommending to the Members of the Bank that they take necessary action to exempt from national taxation salaries and allowances paid to the staff of the Bank. The resolution stated:

> “Appropriate measures for the elimination or equalization of the burden of national taxes upon salaries and allowances paid by (the Bank) are indispensable to the achievement of equity among its members and equality among its personnel.”

However, as the solution of relevant legal and other problems to achieve this aim would take time, the Board of Governors, at its first Annual Meeting in the autumn of 1946, adopted By-Laws containing the following provision (Section 14(b)):

> “Pending the necessary action being taken by members to exempt from national taxation salaries and allowances paid out of the budget of the Bank, the Governors and the Executive Directors, and their Alternates, the President, and the staff members shall be reimbursed by the Bank for the taxes which they are required to pay on such salaries and allowances.
>
> “In computing the amount of tax adjustment to be made with respect to any individual, it shall be presumed for the purposes of the computation that the income received from the bank is his total income. All salaries and allowances prescribed by or pursuant to this section are stated as net on the above basis.”

51. In the early years of the Bank, it was expected that its Members, including especially the United States, would become Parties to the Convention on the Privileges and Immunities of the Specialized Agencies with respect to the Bank, with the effect that each such member would have exempted its own nationals from income taxes on compensation for World Bank employment. The United States Government among others did not accede to the Convention, so that all of the more than 1,500 United States nationals employed by the Bank, whether in the United States or elsewhere, have remained subject to United States federal, state and local income taxes on their Bank salaries while all other staff members (except for a few French nationals working in the Bank's Paris office and a few British nationals working in its London office) are entirely exempt from national taxation of their Bank compensation. The Bank was therefore left with a system under which it has to reimburse all its United States staff for the taxes which they are required to pay on the Bank's salaries and allowances.

52. While the principle of reimbursement of the taxes that United States staff members "are required to pay” was easy to state, the method of calculating the amount gave rise to complex questions. One of the reasons for this complexity lies in the United States tax system. On this subject the Respondent has provided the Tribunal with the following information, which has not been contested by the Applicants:

> “The federal government of the United States imposes income taxes at rates which increase progressively as the amount of taxable income rises. The increment of income to which a given rate applies is commonly referred to as a ‘tax bracket’. Most states of the United States (including Virginia and Maryland), the District of Columbia, and, in some cases, county or city governments within States also impose income taxes upon persons subject to their taxing jurisdiction.
>
> “The U.S. federal income tax system requires that the taxpayer report his gross income to the U.S. Internal Revenue Service at least annually. From gross income, the taxpayer may make certain deductions (for example, 60% of certain capital gains, unreimbursed travel expenses incurred as an employee, and certain moving expenses) to reach ‘adjusted gross income’. From adjusted gross income, he may make additional deductions for personal exemptions (a specific dollar amount for each taxpayer and each of the taxpayer's dependents), for the zero bracket amount and for itemized deductions insofar as their total amount exceeds the zero bracket amount. The zero bracket amount is a flat dollar amount deductible from adjusted gross income on each taxpayer's federal income tax return.
>
> “There are numerous itemized deductions provided for. They include, among others, the dollar amount paid during the taxable year for interest, state and local income taxes, real estate taxes, charitable contributions, and certain medical expenses. The result of subtracting deductions for personal exemptions, the zero bracket amount, and itemized deductions in excess of the zero bracket amount from adjusted gross income is ‘taxable income’.
>
> “From the time the Bank was organized until 1977, however, the U.S. Internal Revenue Code did not contain provision for a zero bracket amount, but rather it provided for a ‘standard deduction’. The taxpayer

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> was allowed to deduct from his adjusted gross income the greater of his total itemized deductions or the standard deduction, but not both. The standard deduction during most of this time was the lesser of a flat dollar amount or of a specified percentage of adjusted gross income."

Thus, when today one uses the term "standard deduction", it is no longer, as it was from 1946 to 1977, a "standard deduction" stricto sensu (that is the lesser of a flat dollar amount or of a specified percentage of adjusted gross income), but, more exactly, a zero bracket amount. The term "standard deduction", in contrast with "itemized deductions", continues to be used for reasons of convenience.

53. In this context, two basic problems had to be resolved in the formulation of any system of tax reimbursement.

54. The first problem was that of determining whether outside income should be taken into account and, if so, by what method. As the Kafka Report noted, since the United States tax system is progressive, it makes a difference to the amount to be reimbursed if outside income is regarded as top or bottom income, or if it is given equal weight with organization income. As has been seen, the By-Laws adopted the principle that "it shall be presumed for the purposes of the computation that the income received from the Bank is his (the employee's) total income". Special problems were to arise, however, regarding the effect of a spouse's income.

55. The second problem related to deductions. It has been explained in the following terms in the memorandum of the General Counsel and of the Treasurer, dated December 5, 1946:

> "The taxpayer may, at his option, in making his tax return take as deductions the actual amounts of his expenditures for the allowable items [interest, real estate taxes, charitable gifts, etc.], in which case he must be prepared to justify the deductions taken, or he may take what are called standard deductions, that is, a lump sum which covers all such deductions and which he does not have to justify.... Obviously as among individual employees of the Bank there will be a great diversity as to whether they take the standard deductions or actual deductions, and, in the latter case, as to the kinds and amounts of the deductions which are taken. If the Bank should undertake to compute the amount of deductions taken by the particular employee in computing his income tax, that would mean that the Bank would have to make an inquiry into each employee's tax return. Furthermore, in the case of employees having income other than their salaries from the Bank, it would mean that the Bank would have to determine how the deductions should be allocated between the employee's salary and his other income, because in many cases it would be highly inequitable to allocate all such deductions to the employee's salary. The amount of accounting and investigating work involved would be considerable, not to mention the annoyance to employees of such a scrutiny of their personal affairs."

56. The Tribunal does not consider it necessary to examine the problem of the treatment of outside income as only the problem relating to deductions arises in the present case.

57. Other international organizations were also affected by the problem. That is why a "Steering Committee on Tax Problems of International Organizations Respecting Methods of Tax Reimbursement by International Organizations" was established. In a Report issued in October 1946, the Committee spoke of "the problems and issues respecting various methods of tax reimbursement of employees by international organizations", and indicated that "the current reimbursement systems adopted by international organizations need not be uniform as to the treatment of exemptions and deductions". The Report of the Technical Sub-Committee annexed to the Report of the Steering Committee emphasized that "None of the tax reimbursement methods analyzed would achieve complete equality between nationals of different countries .... Only substantial equality of salaries after taxes is practical". The Sub-Committee added that the method to be adopted should satisfy equally the conditions of "simplicity in the administration of tax reimbursement and understandability by the employees". The Sub-Committee proceeded to a detailed comparison of the "advantages and disadvantages of three plans for tax reimbursement by international organizations" and proposed one which "on balance, meets the requirements set forth above". It added that "the Committee is strongly of the opinion.... that a system of

standard deductions will prove necessary under any method of tax reimbursement to avoid difficult administrative and policy problems".

58. As a result of the Steering Committee's Report, the General Counsel and the Treasurer of the Bank recommended to the President on December 5, 1946 that, for the reasons of simplicity mentioned by the Committee, the Bank adopt a tax reimbursement system based on the standard deduction. They also recommended that the reimbursement be in an amount that, "when added to .... net salary, will yield a net income for the year, after deducting U.S. income taxes, at least equal to such net salary".

59. On December 10, 1946, the Executive Directors adopted the recommendations of Bank Management. They decided inter alia that:

> "In computing the amount of such tax reimbursement, there should be deducted from the amount of the salary of the particular employee .... (b) the amount of the standard deductions from such salary which are allowable under the U.S. Federal income tax law and regulations."

60. The system thus adopted by the Bank presented one peculiarity to which it is necessary to draw attention. As has been said, the United States tax system permits a taxpayer to deduct from his "adjusted gross income", with a view to the calculation of his "taxable income", at his option, either a "standard deduction" or "itemized deductions" (interest, charitable contributions, state and local taxes, etc.) Obviously each taxpayer will make the choice which assures him the largest deduction; that is, a choice which produces the smallest taxable income and taxes. Since the Bank decided in 1946 to calculate tax reimbursement on the basis of the standard deduction, even in cases where the employees in fact claimed itemized deductions in a greater amount, it followed inevitably that in the latter cases the employees were reimbursed sums in excess of the taxes actually paid by them – in short they were "over-reimbursed". On the other hand, there was no possibility of "under-reimbursement". With the standard deduction system a staff member would always receive a reimbursement at least equal to his actual federal tax liability on his Bank salary because every taxpayer was entitled to the standard deduction under United States tax law; by virtue of the standard deduction, his after-tax income could not fall below his stated net-of-tax salary.

61. The fact that there could be cases of reimbursement in excess of taxes was taken into consideration at the time of the recommendation and decision in 1946. The Steering Committee expressly mentioned this possibility: "All taxpayers... with deductions larger than standard would receive net salaries higher than stipulated", but the Committee immediately added: "However, these additional amounts are generally not relatively large and in our opinion would constitute tolerable differences". Likewise the General Counsel and the Treasurer drew attention to this possible consequence of the standard deduction system and to the cost that it would involve for the Bank; but, they added: "It is not believed that the saving to the Bank which would result from a more exact method of computation would be sufficient to offset the disadvantage to the Bank in having to make a special investigation and computation in each case".

62. Over the years the system established in 1946 underwent a number of changes. Most of the changes are not relevant to the present problem, either because they did no more than make necessary adjustments in consequence of changes in United States tax legislation, or because they were concerned with aspects of reimbursement other than that of deductions. Only one amendment requires special consideration. Large increases in the amounts of state and local taxes levied on employees resulted in payment by some employees of state and local taxes that exceeded, sometimes by a considerable sum, the amount of the standard deduction. These state and local taxes were reimbursed by the Bank. Since an employee could claim the amount of his state and local taxes as a deduction on his federal tax return, it became clear that some employees had deductions exceeding the standard deduction used as the basis for the Bank's calculations, and therefore were reimbursed in excess of their actual federal income taxes. In 1963, in recognition of the changed circumstances, the Bank modified its policy so that reimbursements would henceforth be calculated using the standard deduction or the amount of state and local taxes, whichever was greater. Although this modification produced an adverse impact on employees who were already working for the Bank, since they would receive a lower reimbursement than under the former policy and thus would have a lower gross salary,

the change was applied across the board and without protest from the staff.

63. The tax reimbursement system was codified in the Personnel Manual Statement No. 3.05 issued December 1973, paragraph 10 of which reads:

> "The Bank Group will reimburse taxes on net-of-tax salaries and on allowances and other non-salary payments which are required to be included in taxable income, and with respect to which no expenses are deductible. Taxes will not be reimbursed on allowances or non-salary payments which are not required to be included in taxable income or with respect to which expenses are deductible. Tax reimbursements will be computed on the basis of normal filing of tax returns at the applicable tax rates and the exemptions and the standard deduction which a staff member is entitled to claim on his tax returns, except that in any case in which the state or local tax reimbursements made to a staff member during a year exceeded his standard deduction for federal tax purposes his state or local tax reimbursements will be used in lieu of the standard deduction in computing his federal tax reimbursement. In computing reimbursement for a state or local tax when no standard deduction is provided for by law the Bank Group will use a deduction of 10 per cent of compensation up to $5,000 or $500, whichever is less." (emphasis added)

64. Gradually, doubts arose as to the adequacy of this system in new economic conditions. Inflation had led to increased salary payments, which placed their recipients in constantly higher brackets. The standard deduction, on the other hand, had not been significantly increased. Also it appeared that an increasing number of staff members had come to use itemized deductions, thus obtaining more by way of reimbursement than they had paid by way of tax. The possibility of reimbursement in excess of taxes paid, which in 1946 had been thought of as remaining infrequent and unimportant, in fact had become increasingly frequent and more important. Correspondingly, the cost of the system became constantly heavier for the Bank.

65. In order to assess the exact size of these changes, the Bank and the Fund in 1977 commissioned a survey of tax reimbursement by a specialized firm. Based on the income tax returns for 1976 of 1,147 Bank and Fund United States staff members, this survey led to the following conclusions:

- About 74% of staff members entitled to reimbursement claimed itemized deductions; only 26% used the standard deduction on which the tax reimbursement system was based. Of those claiming itemized deductions, most were in the middle or higher income levels; only 36% had a net organization income of less than $20,000. Virtually all (98%) of those claiming the standard deduction had net organization incomes of less than $25,000.

- Nearly 50% of those entitled to reimbursement received reimbursement in excess of the actual tax paid on their total family income, that is not merely in respect of organization compensation, but in respect of all sources of income.

- The overall average excess reimbursement was over $2,300 per staff member. This excess ranged from $150 at the low income levels to a maximum of more than $4,000 at the highest income levels.

- More than 68% of all staff surveyed who had income above the $20,000 level received a reimbursement in excess of tax paid on total family income.

- Slightly more than 50% paid some tax on total family income in excess of their tax reimbursement. However, the authors of the survey did not feel able to draw any conclusion from this fact, since whenever a staff member had non-organization income it would be reasonable that some tax in excess of the reimbursement would be payable.

66. In 1977, the problem of tax reimbursement was submitted, together with other aspects of compensation policy, to the Joint Committee on Staff Compensation Issues (the Kafka Committee). Chapter 6 of the Kafka Report identified the following factors as profoundly altering the reasons which had led to the adoption of the 1946 system:

> "Over time, inflation and changes within the United States tax structure have widened the difference between standard deductions and those which may be claimed by itemizing deductions. The tax brackets and absolute amounts of standard deductions under the U.S. Tax Code have not been fully adjusted to reflect price level changes, but itemized deductions, such as mortgage interest payments and real estate taxes, have generally kept pace with these changes. This has led to a considerable increase in the practice of itemizing."

The Report added that the cost to the Bank of tax reimbursement had mounted from $300,000 in 1946 to $18,902,000 in 1978, representing an increase from 2.4% of the total administrative budget to 7.2% and stated:

> "In the light of these results, we concluded that the present system is indefensible and should be changed."

67. In order to replace this system and to find a solution which was appropriate "in terms of internal equity and economy for the institutions", the Report stated that there were a variety of systems available, none of which was by itself entirely satisfactory:

> "There is clearly scope for disagreement, not merely about the objectives of a tax reimbursement system, but about their relative importance. Even a cursory examination of possible alternative systems reveals that no single one fully meets all the objectives."

The principal objective of the system should, according to the Report, be the achievement of equity. However, the Report added, this was a difficult notion to define, for various kinds of equity might be identified – as between United States nationals and expatriate staff ("internal equity"); as between United States nationals employed by the organizations and those employed outside ("external equity"); and among United States nationals at different income levels and with or without outside income. Other objectives had, according to the Report, also to be borne in mind: ease of administration – "some systems are far more complicated than others"; cost – "the cost to the institutions is certainly a factor to be taken into account but cannot be the sole criterion for choosing one system as against another"; comprehensibility; and, as a subsidiary consideration, confidentiality.

68. The Report considered several possible alternatives, including the system used in the United Nations, and set out their respective advantages and disadvantages. It expressed a preference for an average deductions system under which the tax reimbursed would not exceed the average tax paid by persons throughout the United States at the same income level as the staff member. This system implied that it would still be open to the individual staff member to claim a standard deduction or to itemize his deductions but in no case would his reimbursement exceed the average paid by his counterpart in outside employment. The Report saw various advantages for this system, particularly in view of "the perception of Americans outside the Bank and Fund of how their compatriots inside the two institutions are treated". However, while expressing their preference for this system over others, the authors of the Report took care to emphasize that there was no single characteristic of any one scheme which conclusively indicated that that scheme should be favoured before all others.

69. On the basis of this Report, the Executive Directors decided on May 24, 1979 to introduce the average deductions system, with effect from January 1, 1980, subject to two conditions which had not been proposed by the Kafka Committee, namely, a five-year transition period and other appropriate safeguards.

70. The Personnel Manual Circular 1/80, dated January 21, 1980, which informed staff of the new system stated:

> "... the arrangements for the reimbursement of taxes on salaries and allowances paid by the World Bank, as described in Personnel Manual Statement 3.05, should be replaced, effective January 1, 1980, by a system of tax allowances based on average deductions ... This circular, therefore, amends and supersedes in fact the provisions of PMS 3.05 ... PMS 3.05 will be revised in due course. In the meantime, its provisions will continue to apply except to the extent necessary to reflect the changes announced in this Manual Circular."

The Circular recalled that "the basic concept of the new system is to provide for U.S. staff members a tax allowance equivalent to the average taxes paid by the generality of U.S. taxpayers at the same income level". Consequently, according to the Circular, the Executive Directors recommended to the Board of Governors that Section 14(b) of the Bank's By-Laws be amended effective January 1, 1980 to read:

> "Pending the necessary action being taken by members to exempt from national taxation salaries and allowances paid out of the budget of the Bank, the Governors and the Executive Directors, their Alternates, the President, and staff members and other employees of the Bank, except those whose employment contracts state otherwise, shall receive from the Bank a tax allowance that the Executive Directors determine to be reasonably related to the taxes paid by them on such salaries and allowances.
>
> "In computing the amount of tax adjustment to be made with respect to any individual, it shall be presumed for the purposes of the computation that the income received from the Bank is his total income. All salaries and allowances prescribed by or pursuant to this section are stated as net on the above basis." (emphasis added)

This recommendation was subsequently adopted by the Board of Governors and now forms Section 13(b) of the By-Laws.

71. The Executive Directors decided, so the Circular stated, that the new system should apply immediately and fully only to those staff members "who accept offers of appointment on or after January 1, 1980". As regards the "existing staff", that is, the staff who were on duty prior to January 1, 1980 or who had formally accepted offers of appointment before that date, two special provisions were laid down. First, "in order to alleviate the impact of the change, for existing staff the new system of tax allowances will be introduced progressively over a five-year period". Second, the Executive Directors wished to take into account the fact that the tax allowances under the new system would only be "reasonably related" to the taxes effectively paid by each staff member in such a way that, in the terms of the Circular, "the tax allowances will rarely exactly equal the taxes payable – it may be more, it may be less". That is why it was decided, said the Circular,

> "... that the Bank will continue to apply to existing staff, for the duration of their service with the Bank, a safeguard consistent with the provisions of section 14(b) of the former By-Laws of the Bank so as to ensure that, as a minimum, such staff are reimbursed for the taxes they are required to pay on their income from the Bank" (emphasis in the original text).

The Circular stated that in consequence "any existing staff member who ... considers that the total amount of the tax allowance received ... is less than the taxes due on Bank income may choose to apply for a supplementary payment". This provision is commonly referred to as the "safety-net".

72. The Tribunal must now assess whether in adopting the new tax reimbursement system the Bank has made an unlawful unilateral change in the conditions of employment of the four Applicants affected.

73. The Respondent contended that the standard deduction system was not included in the conditions of employment of the Applicants prior to 1979 but instead amounted to no more than a mere procedure not forming part of the legal relationship between the Bank and the Applicants. The Tribunal cannot accept this view. The Bank ruled in 1946, and subsequently confirmed this ruling on various occasions, particularly by issuing P.M.S. 3.05 in December 1973, that the amount of reimbursement should be calculated on the basis of the presumption that all United States staff members had benefited from the standard deduction, without taking account of the individual positions in which this or that staff member had in fact claimed larger itemized deductions. The Bank ruled in 1963 that the standard deduction should be replaced by a deduction corresponding to state and local tax payable in cases where those payments exceeded the amount of the standard deduction. Such rulings, by which the competent authorities of the Bank established legal norms, were undeniably part of the conditions of employment of the staff members. The Tribunal considers therefore that the provisions of P.M.S. 3.05 providing for tax reimbursement on the basis of the standard deduction

established by United States legislation formed part of the conditions of employment of the Applicants Lamson-Scribner, Reese, Reisman-Toof and Shapiro at the date when the Bank took the decision to "replace", "amend" and "supersede" them by the terms of Circular 1/80.

74. Having reached this conclusion, the Tribunal must now consider whether the introduction of the new provisions in relation to the four Applicants changes the fundamental and essential elements of their conditions of employment.

75. The conditions in which the tax reimbursement system were established from the origin of the Bank show that this system rested on two inherently fundamental principles, designed to ensure the equality among staff members of the Bank as an international organization, regardless of their nationality. The first is that all employees of the Bank should receive a salary free of national taxes, as was expressly stated in Article VII, Section 9(b) of the Articles of Agreement. That is why the letters of appointment from the very beginning fixed salaries in net terms, and all included the following statement: "Your salary will be at the rate of .... per annum and will be net of income taxes as presently and hereafter provided in the By-Laws and Regulations of the Bank". The second principle, a logical corollary of the first, is that those staff members of the Bank who were subject to tax by their State would have the right to be reimbursed by the Bank for the taxes which they were required to pay. This principle was set out in By-Law 14(b), by which the Board of Governors decided in 1946 that "pending necessary action taken by member governments to exempt ..." the Bank would reimburse those affected and, more particularly, the U.S. staff members "for the taxes which they are required to pay". Such are the fundamental and essential elements of the conditions of employment of staff recruited before January 1, 1980. The character of the safety-net mechanism added by the Bank to the recommendations of the Kafka Report constitutes in the circumstances of the present case an implicit recognition of the fundamental character of these elements.

76. The principle of "reimbursement for the taxes which they are required to pay" may be implemented in a variety of ways, especially as regards the deductions which are to be taken into account. Various methods of calculation are possible. It is possible, for example, to examine the individual situation of each staff member and take account of itemized deductions actually claimed; it is possible also to adopt the presumption of a standard deduction or of average deductions. A balance has to be struck among various factors (equity, simplicity, cost) which sometimes contradict one another: rigorous exactness cannot be achieved save at the price of complications; a simple solution can only be achieved at the cost of approximation. On all these questions it was by a reasoned judgment and after a balance of considerations that the competent authorities of the Bank preferred one formula to another, being conscious that none could be perfect in all respects.

77. This distinction between the principles of tax reimbursement and the method of implementation was expressed as early as in the Report of the Steering Committee of October 1946. The Memorandum addressed to the President some weeks later, on December 5, 1946, dealt at length with what it called the "Methods of Computing the amount of tax reimbursement" and recommended "that the tax reimbursement be computed on the basis of ... standard deductions" rather than on "a more exact method of computation" which would be more complex. The decision of the Executive Directors of December 10, 1946 chose the method of standard deduction "in computing the amount of such tax reimbursement". Nearly twenty years later, the reform of 1963 was presented by the President as a modification of "the Bank's calculation method" or of "the standard deduction method". The relevant paragraph of P.M.S. No. 3.05, issued in December 1973, is placed under the double heading: "IV. Procedure. A. Computation". It thus appears clearly from the relevant documents submitted to the Tribunal that if the right to a salary net of taxes and the right to be "reimbursed for the taxes they are required to pay" constituted at the time of alleged nonobservance – and in fact since 1946 – a fundamental and essential element of the terms of appointment of the four United States Applicants, the same is not true of the standard deduction, simple method of calculation or procedure of computation.

78. It may be recalled that several aspects of the method of calculation of tax reimbursement were indeed unilaterally changed by the Bank before 1979. The 1963 amendment which – in a particular situation referred to in paragraph 62 – replaced the standard deduction by an itemized deduction constitutes a significant precedent showing that the method of computation of reimbursement established in 1946 on the basis of the standard

deduction was not sacrosanct and could be modified from time to time.

79. The Applicants insist both in their written and their oral pleadings on the weight which they attached to their gross income when they decided to accept the Bank's offer of employment or to remain with the Bank rather than to seek more remunerative positions elsewhere. They maintain that the possibility of reimbursement in excess of taxes paid constituted an integral part of their gross remuneration: "The amount of reimbursement, whatever its relationship to the taxes actually paid, was an integral part of the United States staff members compensation … the standard deduction tax reimbursement formula was an established and significant part of the United States staff members' compensation package and contributed a substantial inducement for many of them to accept employment at the net salaries set forth in their letters of appointment".

80. As the Tribunal has concluded that the standard deduction method is not a fundamental element of the conditions of employment of Applicants, it follows that the determination of the gross income and the possibility of reimbursement in excess of taxes, which are but corollaries of this method, are equally non-essential elements of the conditions of employment of the Applicants. In any event, any information given to Applicants before their employment with the Bank about any approximate gross income figures must be deemed superseded by the explicit provisions referring to net salary in the letters of appointment.

81. The preceding observations are reinforced by the statements made in the brochure of the Young Professionals Program to which attention was drawn by Applicant Shapiro. The relevant text of the brochure is as follows:

> "At the present time, Young Professional salaries range between … and … dollars a year, net of income taxes. In cases where salaries are taxable, the amount paid in taxation by the staff member on his Bank salary is reimbursed by the Bank".

This is a restatement of the two fundamental principles of net salary for all and of reimbursement of taxes for the United States staff members. The brochure does not indicate any particular method of calculation, it does not speak of a standard deduction formula, and it does not mention gross income, let alone reimbursement in excess of taxes.

82. Accordingly, the Tribunal concludes that the Bank does not have the power unilaterally to abolish the tax reimbursement system or to repay a lesser amount than the taxes which each of the Applicants is required to pay (on the assumption that Bank income is his or her only income). Indeed, the Bank has not done so. The Applicants continue after the decisions of 1979/80 as before to receive a net salary in the same way as non-United States staff members. The principle of reimbursement "for the taxes they are required to pay" is fully respected by virtue of the safety net. In no case does any United States staff member receive a net salary lower than that which he would have received if he had not been subject to United States taxes. All taxes which he is "required to pay" are reimbursed by the Bank. The only change effected is in the replacement of the standard deduction method with another method. The Bank was entitled to do this even if the gross income of certain United States staff members has been reduced as a result, and even if the reimbursement in excess of taxes which they previously received is diminished or altogether disappears. All these non-essential elements in the conditions of employment were subject to unilateral amendment by the Bank.

83. Although the Bank's power to substitute one method of computation for another is discretionary, this discretion is not an unfettered one. It remains therefore for the Tribunal to ascertain whether in making the contested decisions the Bank has, or has not, committed an abuse of discretion.

84. The Tribunal notes, first, that the change in the tax reimbursement method had no retroactive effect and that no complaint of this kind has been brought forward by the Applicants.

85. Second, as the Tribunal has shown above (paragraphs 64 et seq), the ever-increasing discrepancy between the taxes which staff members were required to pay and the amount of reimbursement which they received on the basis of the standard deduction method rendered the operation of this method inequitable. The

Staff Association itself, in its Memorandum of April 11, 1979, "Staff Association Comments on Staff Compensation Matters," acknowledged that "the ability of individual U.S. staff to take advantage of the provisions of the U.S. tax code under the present system has enabled those U.S. staff members in a position to do so, to achieve net incomes above their official net pay". This Memorandum from the Staff Association further recognizes that under the standard deduction system "the objective of equal net pay for equal work on an individual basis is not achieved." Thus, the Bank could reasonably conclude that the system did not work properly and had to be changed. The Tribunal is satisfied that the objective of the Bank was not to reduce the income of a particular category of staff members by reason of their nationality but to ensure a better functioning of the institution by a more equitable personnel policy. This did not involve an abuse of discretion or a misuse of powers on the part of the Bank.

86. It is not for the Tribunal to substitute its judgment for that of the Bank in choosing the average deduction system, rather than some other system, to replace the previous system. That the average deduction system also presents some inconveniences is certain. As the Kafka Report brought them into the open, the Executive Directors were fully aware of them. As was the case in 1946, the 1979 decision represented a considered choice taking into account the various relevant factors. The Applicants concede that "it is plainly not the function of the Tribunal to determine the best compensation policy for the Bank to adopt... nor is it the Tribunal's function to decide which among the various possible tax reimbursement systems is the 'best' or 'fairest.'" The Tribunal fully shares this view.

87. Nevertheless, the Applicants express regret that once the Bank decided to change the method, it did not adopt the United Nations systems. According to them, this would have better achieved the objective of internal equity. The Applicants maintain that if the Executive Directors did not choose this system it was only because such a choice would have cost the Bank more. The choice of a particular method of tax reimbursement may properly be determined by several factors: equity, ease of administration, cost, comprehensibility, confidentiality. Thus, the cost of any particular system is one of several factors which the organization may take into account. The United Nations system presents, as do all the others, both advantages, for instance, in achieving a significant degree of internal equity, and disadvantages, particularly in the cost to the organization. The Kafka Report analyzed them as it did the other systems which it examined. It observed inter alia that, unlike organizations such as the United Nations, the Bank's Member governments do not refund to it the amount of taxes reimbursed. As a result, as the Respondent says "the costs of the tax reimbursement system are real costs to the Bank which must be deducted from its income, which is generated in large part from interest and fees paid by its borrowers in less developed countries". The Tribunal sees no abuse of discretion in the fact that the Executive Directors took into account the cost of the various systems and, after having assessed the advantages and disadvantages of each, decided to adopt the average deductions system.

88. As has been said (paragraph 47) the manner in which a change in the non-fundamental elements of the terms of appointment are prepared or applied is also to be taken into account by the Tribunal when it seeks to ascertain whether the amendment has an arbitrary or unreasonable character. The long and detailed studies which preceded the 1979 decisions show that this was not a hastily adopted reform, but a change studied at length and most carefully prepared. The establishment of the new system included measures showing moderation and concern for staff. The Executive Directors did not follow the Kafka recommendations blindly, but introduced into them two important changes: the safety net and a transitional period of five years "in order to alleviate the impact of the change."

89. The preceding considerations lead the Tribunal to conclude that in applying the decisions in Manual Circular Pers. 1/80 dated January 21, 1980 to the Applicants Lamson-Scribner, Reese, Reisman-Toof and Shapiro the Bank did not commit any non-observance of their contracts of employment or terms of appointment.

V. SALARY ADJUSTMENT

90. The six Applicants contend that their conditions of employment include a right to the protection of the real value of their salaries against erosion by inflation and that in granting increases markedly lower than the

increases in the Washington CPI the Bank has violated those conditions. The Respondent denies that the conditions of employment of the Applicants include a right to an automatic adjustment of their salaries to meet an increase in the cost of living and adds that, even if such a right had been part of the conditions of employment before 1979, the Bank retained the right, in the letters of appointment accepted by the Applicants, to change its salary policy.

91. The Tribunal first notes that no provision for periodic adjustment of salary and still less for an automatic adjustment to meet the increase in the cost of living appears in any of the letters of appointment and acceptance. The Tribunal also notes that there is no provision to this effect in the Personnel Manual. On these points, both parties agree.

92. The Applicants maintain, however, that a policy of automatic adjustment of salaries to meet increases in the CPI was recommended by the President to the Executive Directors in Report R. 68-140 dated June 30, 1968 and was adopted by the Executive Directors at their meeting of August 13, 1968. Since then, so the Applicants claim, this policy has been applied, has become a firmly established practice and has therefore become part of their conditions of employment. The Tribunal will first examine whether in 1968 a decision in this regard was made and, second, whether a practice of automatic cost-of-living adjustment was followed between 1968 and 1978.

93. Report No. R. 68-140 is entitled: “Proposed General Salary Increase.” After recalling that the Bank has not “since 1962 provided general salary increases uniformly applied to meet cost-of-living changes” the President said:

> “For these reasons I propose to modify our system and adopt a policy of periodic across-the-board salary increases for professional staff to match rises in the ‘cost-of-living’ in the area in which we work and live. We will, of course, continue our policy of granting merit raises to professional staff based on individual performance and ability in the light of personal reviews... However, these increases will be separate from adjustments to meet advances in the ‘cost-of-living.’ The basic objective will continue to be to attract and retain a highly competent international staff and to motivate and stimulate the highest level of performance by all staff members.”

The President then provided information on price increases in Washington since 1968, on the increases in salaries granted by the Fund, the Inter-American Development Bank, the United Nations and the United States Government, on comparable practices in the public service of Canada and various European countries, as well as on increases in academic salaries in the United States. He concluded with a proposal to “grant an across-the-board salary increase effective at 1 September, 1968... amounting to 8 per cent.”

94. The Executive Directors examined the problem on August 13, 1968. The Minutes of the Meeting recorded the following:

> “General Salary, Increase. The Executive Directors approved the recommendation (R 68-140) for a general salary increase, with the modification adopted at the meeting.”

The content of the discussions and of the decisions taken by the Executive Directors on the recommendation of the President is stated in an agreed summary of the meeting prepared by the parties. It appears that a decision was taken to place a ceiling on the general increase of 8% recommended by the President in such a way that the higher salaries would not benefit from the increase. Further:

> “In response to questions raised at the meeting about paragraph 4 of document R. 68-140, which stated that the President proposed to adopt a policy of periodic across-the-board salary increases for professional staff, the President explained that he proposed to follow such policy and he planned to have periodic reviews and make recommendations to the Executive Directors where it was necessary to have their approval of across-the-board increases. He considered it absolutely essential that there be a clear-cut established policy in the administration of the Bank's salaries and that was the policy that he proposed to have the salary administrative department follow. Where the application of such policy required approval of the Executive Directors, a decision would be brought to them for approval.”

The same day the staff were informed by Administrative Circular that:

> “In the face of the continued rise in the cost of living in the Washington area, a general increase in salaries has been approved for the staff of the Bank and Corporation. Present salary rates of professional staff members, because they have not reflected cost-of-living increases since September 1966, will be raised by approximately 8%...”

95. The foregoing shows that the President recommended an increase of a certain percentage effective September 1, 1968, adding, first, that he intended to make periodic recommendations to the Executive Directors for across-the-board salary increases and, second, that he would recommend to the Executive Directors to follow in their periodic decisions a clear-cut and established policy. The Report (as clarified by the explanations of the President during the meeting of the Executive Directors) thus amounted only to a statement of the President's intentions and of the policy that he recommended the Executive Directors to follow in the future. The Tribunal cannot attribute the effect of a decision creating rights and obligations as between the Bank and its staff to a statement of policy by which the President informed the Executive Directors of his intentions. The President's recommendation of June 30, 1968 cannot, therefore, be considered as having modified, and become part of, the conditions of employment of the Applicants.

96. As regards the Executive Directors' decision of August 13, 1968, it is clear from the parties' agreed summary that this decision neither repeated the President's recommendation nor stated a general policy that the Executive Directors intended to follow in the future. The Executive Directors merely decided to give the staff an increase of a fixed amount on September 1, 1968. Should the President subsequently recommend further increases, as he said he would, the Executive Directors would decide on such recommendations within the framework of their powers: “a decision would be brought to them for approval.” The Executive Directors thus retained their full freedom to approve or not in each future case any salary increase which the President might propose to them. The Circular announcing the increase to the staff did not contain any commitment to compensate automatically for future increases in the cost of living.

97. The Applicants maintain, secondly, that the implementation by the Bank of a policy to adjust the salaries of its staff to match cost-of-living increases has given rise to a consistent and established practice, which has become an integral part of their conditions of employment. The Respondent denies that such a practice was established.

98. If the practice alleged by the Applicants exists it cannot be regarded as the implementation of a decision taken in 1968, since, as the Tribunal has just shown, no decision was taken in 1968 to maintain salaries at a level intended to eliminate completely the effects of inflation. As indicated in paragraph 23, the practice of an international organization may under certain conditions be an independent source of rights and duties in the legal relationship between an organization and its staff. The Tribunal must therefore consider whether or not the practice invoked by the Applicants exists, and if it does, whether it has become a condition of employment.

99. Between 1968 and 1978 the Bank increased salaries each year and sometimes twice in a year. In conformity with the intention which he had expressed to the Executive Directors, the President submitted to them each year a recommendation to this effect. Each year the Executive Directors reached a conclusion on this recommendation and a circular was issued to inform the staff of the decision adopted. Close examination of the recommendations and circulars relating to each of the years 1969 to 1979 leads the Tribunal to several observations.

100. The first is that the rise in the cost of living was indeed mentioned in some cases as being the decisive reason for the increase. The circular of May 9, 1973, for example, said that “these increases are designed to maintain the real level of salaries in the face of rising prices...” On October 17 of the same year the President

proposed a further increase stating that "the key factor determining the need for a general salary increase is, of course, the movement in price levels in the Washington area," and the circular of November 7, 1973 explained that a new increase had been decided because of the "especially sharp rise in local price levels since February." Five years later, in 1978, the President explained that "the rise in the cost of living in the Washington area has for several years been a customary and important factor in our consideration of staff compensation."

101. But the Tribunal also notes a second point of even greater significance: several factors other than cost of living were taken into account in formulating one or another salary increase.

102. One of those most frequently mentioned was the need to maintain the competitiveness of the Bank in the recruitment of highly qualified personnel and, consequently, the necessity of maintaining Bank salaries at a level comparable at least to those of its principal competitors: the United States Government, other international organizations such as the United Nations, O.E.C.D., the European Common Market, United States financial institutions and industrial corporations, and academic institutions. The 1969 circular, for example, told the staff that there were two reasons for the increase, namely that "other employers, both public and private, have adjusted their salary structures upward, and the cost of living in the Washington area has continued to rise." In 1971 the President in his recommendation examined in detail the factors "which have further eroded our competitive margin." The recommendation of the President for 1973 spoke of "a balance between sometimes conflicting factors: (a) the erosion of the real income of the staff due to the rise in the Washington cost of living and the currency realignments... (b) the competitiveness of present Bank group compensation…" The 1977 Circular also invoked these two factors, being based on a study of the compensation of twenty-seven "analogous organizations." The "practice of analogous organizations" was invoked also in the 1975 circular. In 1979 the Kafka Report noted that "the comparison of Bank jobs with certain outside jobs has always been part of the process of determining pay..." The Applicants have recognized that the cost-of-living element was not the sole criterion governing the increases adopted during this decade: "Rather, the objective was to prevent the real value of Bank salaries from being eroded by inflation and to keep those salaries competitive".

103. Several other factors were also taken into consideration by the President and the Executive Directors. Thus the recommendation of the President for 1973 mentioned that as a consequence of a study carried out by a consulting firm "we believe that the Bank group professional salary structure should be designed to take account of: (a) the competitive situation; (b) the need to provide reasonable differentials between grades...; (c) the need to provide reasonable scope for the reward of performance." The recommendation of the President for 1974 noted that "many member governments and most other organizations do not adjust salaries solely on the basis of price level changes" and said that "salary changes may be induced as well by (a) advances in standard of living ... ; (b) changes in pay relationships with other organizations." The 1976 Circular explaining "the underlying philosophy" of the salary changes cited the following factors: cost of living, competitiveness, real income growth and staff morale. The preceding shows that, in reality, a wide range of factors were taken into account by the Bank in deciding year after year on the level of increase to grant to the staff.

104. The Tribunal observes, third, that in each of the years under consideration the President and the Executive Directors made a balanced choice among these factors according to the conditions prevailing in each year. Thus, the Memorandum of the President for 1973 said: "We have sought to achieve a balance between sometimes conflicting factors." The circular of 1976, after referring to the various factors taken into consideration, stated: "The extent of response to these qualitative aspects is very much a matter of judgement in the context of economic, financial and social considerations." It is certain that amongst the factors taken into consideration by the Bank was the evolution of the cost of living and that this was a "key factor" "or customary and important factor". But it is equally certain that this was only one amongst several, sometimes "conflicting" factors.

105. The Tribunal observes, fourth, that the exercise by the President and the Executive Directors of their judgment did not lead in the years 1969 to 1978 to systematic increases equal to those of the Washington CPI. The Chart submitted by the Applicants in their Consolidated Memorandum shows that only in 1974 and 1976 was there an exact coincidence between the rise in the CPI and the salary increase. In the other nine years there were differences, sometimes of importance, with salary increases exceeding the CPI index when the

surveys found that the pay of certain staff levels was not competitive with that of other employers. The Circular of 1973, for example, said that the increases "designed to maintain the real level of salaries in the face of rising prices" had been adopted "with adjustments of varying amounts to take into account the market conditions for the types of skills employed in the Bank Group."

106. The Applicants do not deny that sometimes there was a difference between the CPI increase and the salary increase. They assert, however, that in all these cases the salary increase was at least the equivalent of that in the cost of living and that "maintenance of the real value of Bank compensation was the minimum essential". This interpretation is contradicted by the fact that in 1969, 1970, 1971 and 1973 – according to the same Chart in the Consolidated Memorandum – the increases were tapered for the staff at higher levels, who consequently received increases below the CPI index. This practice of "tapering" – the existence of which the Applicants recognized – is by itself a sufficient basis for discarding the thesis of "the minimum essential."

107. On occasion, the President and the Executive Directors even expressly opposed a salary adjustment corresponding exactly to the increase in the CPI. In October 1974, the President informed the staff that he would not be following up the request of the Staff Association for a supplementary mid-year increase although such an increase had been given in the preceding year because of a particularly steep rise in inflation. The President recognized that there had again been a "sharp rise in price levels" in 1974, but, he added, "there has been a dramatic change in the political climate of the world," and it was practically impossible to obtain the agreement of the Executive Directors for a salary adjustment at that time. Even more pertinent is the Memorandum of the President of May 1, 1975. In this memorandum the Staff Association is described as concerned "with the perceived differences in approaches to periodic salary adjustments: in recent years both EEC and OECD have granted at least biannual adjustments which fully compensate for price level changes in net terms and at all levels, together with further periodic adjustments intended to provide real income growth." The memorandum adds that the staff is also disturbed by the differences between the Bank practices and the United Nations system. The latter "provides for automatically-triggered cost of living adjustments for professional staff which compensate in net terms for 80-90% of price level changes as they occur." The memorandum also states that "the Staff Association has pressed repeatedly and strongly for the indexation of salaries with some form of automatic triggering related either to the passage of time or to a given percentage rise in the cost of living." The President turned down this demand for an automatic adjustment of salaries to meet the rise in prices, stating:

> "There is no simple formula by which the degree of competitiveness of a compensation package can be measured with precision... There can be no substitute for the exercise of judgement in determining a compensation package at any given time in relation to all the factors involved."

108. The considerations set out above lead the Tribunal to conclude that between 1968 and 1979 there did not exist any established and consistent practice of increasing salaries across the board to a degree at least equal to the increase in the CPI. The Staff Association had, indeed, demanded such a policy but the Bank expressly refused it. Each increase was decided in the light of the circumstances of the time and having regard to various factors among which the increase in the cost of living played an important, but in no way a decisive and certainly not an exclusive, role. The increases were sometimes equal to the increase in the CPI, sometimes greater, sometimes lower. Applying by way of analogy the approach of the International Court of Justice one may note that the facts "disclose so much uncertainty and contradiction, so much fluctuation and discrepancy ... that it is not possible to discern in all this any constant and uniform usage, accepted as law..." (Asylum case, ICJ Reports 1950, p. 277).

109. The Tribunal therefore concludes that there did not exist in 1979, at the time of alleged non-observance of the contracts of employment or terms of appointment, any decision or practice to automatically increase salaries to at least equal the rise in the cost of living so as to form part of the conditions of employment. From this it follows that the Tribunal need not consider another argument advanced by the Applicants, namely, that they had agreed to enter the service of the Bank in the expectation of a guaranteed maintenance of the real value of their remuneration, and that the Bank did not have the right to disappoint this expectation. As already stated, no particular importance can be attached to such subjective considerations. In any event, there could

have been no reasonable expectation of the maintenance of a decision or practice which did not exist.

110. Accordingly the Bank was free in 1979, as it had been at any time, to choose the method which appeared to it the most appropriate for achieving the objectives of its personnel policy as defined by the Articles of Agreement. The Kafka Report recommended recourse to a "comparator" method consisting of a mixture, in equal parts, of the public and private sectors in the United States. In order to ensure that the Bank would be able to attract high quality personnel including candidates from countries with high pay levels, the Report suggested adding a premium of 10% to the levels of remuneration produced by this method. On the basis of these recommendations the Executive Directors decided on May 25, 1979 to give a 9.5% increase in net salaries effective March 1, 1979, explaining that "this is in line with average real pay increases of the U.S. private sector comparators over the past year". By a circular of March 14, 1980, the staff was informed that, pending the outcome of the survey commissioned from a consulting firm it had been decided to award an increase of 8.3%, effective March 1, 1980, which could be revised retroactively taking account of the results of the survey. This increase was granted "in the light of compensation pay movements and the continuing high rate of inflation." In taking this decision, the Circular added, "a number of factors were taken into account ... General information on pay trends in Germany and France was made available to Executive Directors. The change in the Washington CPI from February 1979 to February 1980 was also presented."

111. In holding that the conditions of employment of staff members did not in 1979 contain any rule of law relating to the method of adjustment of salaries or to the taking into consideration of certain factors in preference to others, the Tribunal is not asserting that the conditions of employment contain no rules whatsoever regarding salary adjustment. True, neither the letters of appointment and acceptance nor the Articles of Agreement, nor any written rule or regulation, include any provision requiring the Bank as a matter of law to make periodic adjustments of salaries. However, the Tribunal considers that a consistent practice of periodic adjustment has been established, and that the Bank makes these adjustments out of the conviction that it is legally obliged to do so. In his Memorandum to the Executive Directors dated April 19, 1972, the President wrote:

> "It is by now our established practice to review the staff compensation programme annually in early spring with a view to introducing whatever changes may be appropriate effective May 1."

Since then, this practice has been affirmed year by year, and the increases adopted in 1979 and 1980, as well as those decided upon since the filing of proceedings in the present case, have confirmed it. The circumstances within which certain Applicants have been recruited and, in particular, certain information provided to them at the time of their appointment further confirm the existence of this obligation.

112. The Tribunal considers in consequence that the Bank is obliged to carry out periodic reviews of salaries, taking into account various relevant factors. The Bank is under no duty to adjust salaries automatically to increases in the cost of living and it retains a measure of discretion in this regard. This does not mean that the rises in the cost of living in a period of inflation constitute a factor that can be ignored or disregarded in the exercise of that discretion. On the contrary, the established practice, and statements confirming that practice, have created a legal obligation to make periodic adjustments reflecting changes in the cost of living and other factors. In the opinion of the Tribunal such an obligation is a fundamental element in the Applicants' conditions of employment which the Bank does not have the right to change unilaterally. In this respect, the Tribunal takes particular note of the statement made in the Respondent's Joint Memorandum to the effect that:

> "It is still the intention of the Bank to adjust salaries periodically to reflect changes in various factors, including cost of living."

113. The decisions now contested before the Tribunal are fully in accordance with the obligation of the Bank. The Tribunal concludes that, in adopting the decisions which the six Applicants contest, the Bank has not failed to observe the contracts of employment or terms of appointment of the Applicants.

DECISION:

For these reasons, the Tribunal unanimously decides to reject the applications.

E. Jimenez de Arechaga

/S/ Eduardo Jimenez de Arechaga
President

B.M. de Vuyst

/S/ Bruno M. de Vuyst
Executive Secretary

At Washington, D.C., June 5, 1981