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1971

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARÊTS, AVIS CONSULTATIFS ET ORDONNANCES

CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L’AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

AVIS CONSULTATIF DU 21 JUIN 1971

Official citation:

Mode officiel de citation:
17. At the hearing of 5 March 1971, the representative of South Africa explained further the position of his Government with regard to the proposed plebiscite, and indicated that his Government considered it necessary to adduce considerable evidence on the factual issues which it regarded as underlying the question before the Court. At the close of the hearing, on 17 March 1971, the President made the following statement:

"The Court has considered the request submitted by the representative of South Africa in his letter of 6 February 1971 that a plebiscite should be held in the Territory of Namibia (South West Africa) under the joint supervision of the Court and the Government of the Republic of South Africa.

The Court cannot pronounce upon this request at the present stage without anticipating, or appearing to anticipate, its decision on one or more of the main issues now before it. Consequently, the Court must defer its answer to this request until a later date.

The Court has also had under consideration the desire of the Government of the Republic to supply the Court with further factual material concerning the situation in Namibia (South West Africa). However, until the Court has been able first to examine some of the legal issues which must, in any event, be dealt with, it will not be in a position to determine whether it requires additional material on the facts. The Court must accordingly defer its decision on this matter as well.

If, at any time, the Court should find itself in need of further arguments or information, on these or any other matters, it will notify the governments and organizations whose representatives have participated in the oral hearings."

18. On 14 May 1971 the President sent the following letter to the representatives of the Secretary-General, of the Organization of African Unity and of the States which had participated in the oral proceedings:

"I have the honour to refer to the statement which I made at the end of the oral hearing on the advisory proceedings relating to the Territory of Namibia (South West Africa) on 17 March last. . . . to the effect that the Court considered it appropriate to defer until a later date its decision regarding the requests of the Government of the Republic of South Africa (a) for the holding in that Territory of a plebiscite under the joint supervision of the Court and the Government of the Republic; and (b) to be allowed to supply the Court with further factual material concerning the situation there.

I now have the honour to inform you that the Court, having examined the matter, does not find itself in need of further arguments or information, and has decided to refuse both these requests."

19. Before examining the merits of the question submitted to it the Court must consider the objections that have been raised to its doing so.

20. The Government of South Africa has contended that for several reasons resolution 284 (1970) of the Security Council, which requested the advisory opinion of the Court, is invalid, and that, therefore, the Court is not competent to deliver the opinion. A resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted. However, since in this instance the objections made concern the competence of the Court, the Court will proceed to examine them.

21. The first objection is that in the voting on the resolution two permanent members of the Security Council abstained. It is contended that the resolution was consequently not adopted by an affirmative vote of nine members, including the concurring votes of the permanent members, as required by Article 27, paragraph 3, of the Charter of the United Nations.

22. However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

23. The Government of South Africa has also argued that as the question relates to a dispute between South Africa and other Members of the United Nations, South Africa, as a Member of the United Nations, not a member of the Security Council and a party to a dispute, should have been invited under Article 32 of the Charter to participate, without vote, in the discussion relating to it. It further contended that the proviso at the end of Article 27, paragraph 3, of the Charter, requiring members of the Security Council which are parties to a dispute to abstain from voting, should have been complied with.

24. The language of Article 32 of the Charter is mandatory, but the question whether the Security Council must extend an invitation in accordance with that provision depends on whether it has made a determination that the matter under its consideration is in the nature of a dispute. In the absence of such a determination Article 32 of the Charter does not apply.

25. The question of Namibia was placed on the agenda of the Security Council as a "situation" and not as a "dispute." No member State made any suggestion or proposal that the matter should be examined as a dispute, although due notice was given of the placing of the question
International Court of Justice

Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)
Judgment (excerpt)

_I.C.J. Reports 1997_
ally acceptable solution. Commission involvement would depend on each Government not taking “any steps . . . which would prejudice possible actions to be undertaken on the basis of the report’s findings”. The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee “without any preliminary conditions”; criticizing Hungary’s approach, he refused to suspend work on the provisional solution, but added, “in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States”.

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions “inappropriate”.

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia’s refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* * *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had “remained inflexible” and continued with its implementation of Variant C, “a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty”.

Slovakia, for its part, denied that a state of necessity existed on the basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary’s second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

“Article 61
Supervening Impossibility of Performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.”

Hungary declared that it could not be “obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage”. It concluded that

“By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform.”

In Hungary’s view, the “object indispensable for the execution of the treaty”, whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, “a legal situation which was the raison d’être of the rights and obligations”.

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical “disappearance or destruction” of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility “if the impossibility is the result of a breach by that party . . . of an obligation under the treaty”.

95. As to “fundamental change of circumstances”, Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

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Article 62
Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Hungary identified a number of “substantive elements” present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of “socialist integration”, for which the Treaty had originally been a “vehicle”, but which subsequently disappeared; the “single and indivisible operational system”, which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the “framework treaty” into an “immutable norm”; and, finally, the transformation of a treaty consistent with environmental protection into “a prescription for environmental disaster”.

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia’s material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

Article 60
Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.
Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as “the best possible approximate application” of the Treaty. It Furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the “precautionary principle”. On this basis, Hungary argued, its termination was “forced by the other party’s refusal to suspend work on Variant C”.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather “to the language of self-help or reprisals”.

* *

98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary’s notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty’s conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

* *

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the State of necessity ceases to exist, the duty to comply with treaty obligations revives.

* *

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary’s interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the “permanent disappearance or destruction of an object indispensable for the execution” of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term “object” in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it
would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party’s own breach of an obligation flowing from that treaty.

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project’s diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the Fisheries Jurisdiction case, it stated that

“Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances” (I.C.J. Reports 1973, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court’s view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court’s view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty’s conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105. The Court will now examine Hungary’s argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary’s argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.
The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary’s main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court’s view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary’s Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

“Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith.” (I.C.J. Reports 1980, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary’s termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

“It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.” (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

111. Finally, the Court will address Hungary’s claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the
Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” ([I.C.J. Reports 1996, p. 241, para. 29; see also paragraph 53 above].

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* * *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (e), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the “disappearance of one of the parties”. On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, “There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party” and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

“the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabcikovo-Nagymaros Project”,

Hungary sought to distinguish between, on the one hand, rights and obligations such as “continuing property rights” under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized “as the successor to the Government of the CSFR” with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-
International Court of Justice

Land and Maritime Boundary between Cameroon and Nigeria
(Cameroon v. Nigeria: Equatorial Guinea intervening)
Judgment (excerpts)

I.C.J. Reports 2002
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA FRONTIÈRE TERRESTRE
ET MARITIME ENTRE LE CAMEROUN
ET LE NIGÉRIA

(CAMEROUN c. NIGÉRIA; GUINÉE ÉQUATORIALE (intervenant))

ARRÊT DU 10 OCTOBRE 2002

2002

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE LAND AND MARITIME BOUNDARY
BETWEEN CAMEROON AND NIGERIA

(CAMEROON v. NIGERIA; EQUATORIAL GUINEA intervening)

JUDGMENT OF 10 OCTOBER 2002

Mode officiel de citation:
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“(1) as to the Bakassi Peninsula, adjudge and declare:

(a) that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria;

(b) that Nigeria’s sovereignty over Bakassi extends up to the boundary with Cameroon described in Chapter 11 of Nigeria’s Counter-Memorial”.

194. Cameroon contends that the Anglo-German Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula, placing the latter on the German side of the boundary. Hence, when Cameroon and Nigeria acceded to independence, this boundary became that between the two countries, successor States to the colonial powers and bound by the principle of uti possidetis. For its part, Nigeria argues generally that title lay in 1913 with the Kings and Chiefs of Old Calabar, and was retained by them until the territory passed to Nigeria upon independence. Great Britain was therefore unable to pass title to Bakassi because it had no title to pass (nemo dat quod non habet); as a result, the relevant provisions of the Anglo-German Agreement of 11 March 1913 must be regarded as ineffective.

Nigeria further claims that that Agreement is defective on the grounds that it is contrary to the Preamble to the General Act of the Conference of Berlin of 26 February 1885, that it was not approved by the German Parliament and that it was abrogated as a result of Article 289 of the Treaty of Versailles of 28 June 1919.

* * *

195. Before addressing the question of whether Great Britain was entitled to pass title to Bakassi through the Anglo-German Agreement of 11 March 1913, the Court will examine these three arguments of Nigeria concerning the defectiveness of that Agreement.

As regards the argument based on the General Act of the Conference of Berlin, the Court notes that, having been raised very briefly by Nigeria in its Counter-Memorial, it was not pursued either in the Rejoinder or at the hearings. It is therefore unnecessary for the Court to consider it.

196. Nigeria further contends that, under contemporary German domestic legislation, all treaties providing for cession or acquisition of colonial territory by Germany had to be approved by Parliament. It points out that the Anglo-German Agreement of 11 March 1913 was not so approved. It argues that the Agreement involved the acquisition of colonial territory, namely the Bakassi Peninsula, and accordingly ought to have been “approved by the German Parliament, at least so far as its Bakassi provisions were concerned”.

Cameroon’s position was that “the German Government took the view that in the case of Bakassi the issue was one of simple boundary rectifica-

tion, because Bakassi had already been treated previously as belonging de facto to Germany”; and thus parliamentary approval was not required.

197. The Court notes that Germany itself considered that the procedures prescribed by its domestic law had been complied with; nor did Great Britain ever raise any question in relation thereto. The Agreement had, moreover, been officially published in both countries. It is therefore irrelevant that the Anglo-German Agreement of 11 March 1913 was not approved by the German Parliament. Nigeria’s argument on this point accordingly cannot be upheld.

198. In relation to the Treaty of Versailles, Nigeria points out that Article 289 thereof provided for “the revival of pre-war bilateral treaties concluded by Germany on notification to Germany by the other party”. It contends that, since Great Britain had taken no steps under Article 289 to revive the Agreement of 11 March 1913, it was accordingly abrogated; thus Cameroon “could not have succeeded to the [Agreement] itself”.

Cameroon argues that Article 289 of the Treaty of Versailles did not have any legal effect on the Agreement of 11 March 1913, because “the scope of this Article was limited to treaties of an economic nature in the broad sense of the term” — which in Cameroon’s view was confirmed by the context of the Article, its position within the scheme of the Treaty, its drafting history and its object and purpose in light of the Treaty as a whole.

199. The Court notes that since 1916 Germany had no longer exercised any territorial authority in Cameroon. Under Articles 118 and 119 of the Versailles Treaty, Germany relinquished its title to its overseas possessions. As a result, Great Britain had no reason to include the Anglo-German Agreement of 11 March 1913 among the “bilateral treaties or conventions” which it wished to revive with Germany. Thus it follows that this argument of Nigeria must in any event be rejected.

* * *

200. The Court now turns to the question of whether Great Britain was entitled to pass title to Bakassi through the Anglo-German Agreement of 11 March 1913.

In this regard, Cameroon contends that the Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula and placed the latter on the Cameroonian side of the boundary. It relies for this purpose on Articles XVIII to XXI of the said Agreement, which provide inter alia that the boundary “follows the thalweg of the Akwayafe as far as a straight line joining Bakasi Point and King Point” (Art. XVIII) and that “[s]hould the lower course of the Akwayafe so change its mouth as to transfer it to the Rio del Rey, it is agreed that the area now known as the Bakassi Peninsula shall still remain
maritime delimitation, as well as with the submissions of Nigeria on the issue.

* * *

247. The Court turns now to Cameroon’s request for the tracing of a precise line of maritime delimitation. It will first address the sector of the maritime boundary up to point G.

248. According to Cameroon, the maritime boundary between Cameroon and Nigeria is divided into two sectors. The first, from the mouth of the Akwaya River to point G fixed by the Maroua Declaration of 1 June 1975, is said to have been delimited by valid international agreements between the Parties. In relation to this sector, Cameroon asks the Court merely to confirm that delimitation, which it says that Nigeria is now seeking to reopen. The sector beyond point G remains to be delimited, and Cameroon requests the Court to fix the limits of the Parties’ respective areas in this sector, so as to put a complete and final end to the dispute between them.

249. The delimitation of the first sector, from the mouth of the Akwaya River to point G, is said by Cameroon to be based mainly on three international legal instruments, namely the Anglo-German Agreement of 11 March 1913, the Cameroon-Nigeria Agreement of 4 April 1971, comprising the Yaoundé II Declaration and the appended Chart 3433, and the Maroua Declaration of 1 June 1975.

250. Cameroon argues that the Anglo-German Agreement of 11 March 1913 fixes the point at which the maritime boundary is anchored to the land at the mouth of the Akwaya River, at the intersection of the thalweg of that river and a “straight line joining Bakassi Point and King Point”. From the mouth of the Akwaya River, Cameroon invokes Article XXI of the Agreement, which provides that “the boundary shall follow the centre of the navigable channel of the Akwaya River as far as the 3-mile limit of territorial jurisdiction”, as well as Article XXII thereof, which states that the said limit shall be “taken as a line 3 nautical miles seaward of a line joining Sandy Point and Tom Shot Point”.

251. Cameroon points out that in 1970 a Joint Commission was established, its first task being to delimit the maritime boundary between Cameroon and Nigeria. Its initial objective was to determine the course of the boundary as far as the 3-mile limit. Its work resulted in the Yaoundé II Declaration of 4 April 1971, under which the Heads of State of the two parties adopted a “compromise line” which they jointly drew and signed on British Admiralty Chart 3433. Starting from the straight line joining Bakassi Point and King Point, the line consisted of 12 numbered points, whose precise coordinates were determined by the Commission, meeting in Lagos pursuant to the Declaration, the following June. Cameroon contends that that Declaration represented an international agreement binding on both Parties and that this fact was later confirmed by the terms of the Maroua Declaration of 1 June 1975, which was likewise a binding international agreement (see paragraphs 252 and 253 below).

252. Thereafter, according to Cameroon, between 1971 and 1975 a number of unsuccessful attempts to reach agreement on the delimitation of further parts of the maritime boundary were made. It was only at the summit meeting held in Maroua from 30 May to 1 June 1975 that an agreement could be reached on the definitive course of the maritime boundary from point 12 to point G. The Joint Communiqué issued at the end of that meeting was signed by the Heads of State. Cameroon draws particular attention to the statement in the Communiqué that the signatories “have reached full agreement on the exact course of the maritime boundary” (emphasis added by Cameroon).

253. Cameroon accordingly maintains that the Yaoundé II Declaration and the Maroua Declaration thus provide a binding definition of the boundary delimiting the respective maritime spaces of Cameroon and Nigeria.

Cameroon argues that the signing of the Maroua Agreement by the Heads of State of Nigeria and Cameroon on 1 June 1975 expresses the consent of the two States to be bound by that treaty; that the two Heads of State manifested their intention to be bound by the instrument they signed; that no reservation or condition was expressed in the text, and that the instrument was not expressed to be subject to ratification; that the publication of the Joint Communiqué signed by the Heads of State is also proof of that consent; that the validity of the Maroua Agreement was confirmed by the subsequent exchange of letters between the Heads of State of the two countries correcting a technical error in the calculation of one of the points on the newly agreed line; and that the reference to Yaoundé II in the Maroua Agreement confirms that the legal status of the former is no different from that of the latter.

Cameroon further argues that these conclusions are confirmed by the publicity given to the partial maritime boundary established by the Maroua Agreement, which was notified to the Secretariat of the United Nations and published in a whole range of publications which have widespread coverage and are well known in the field of maritime boundary delimitation. It contends that they are, moreover, confirmed by the contemporary practice of States, by the Vienna Convention on the Law of Treaties and by the fact that international law comes down unequivocally in favour of the stability and permanence of boundary agreements, whether land or maritime.

254. Nigeria for its part draws no distinction between the area up to point G and the area beyond. It denies the existence of a maritime delimitation up to that point, and maintains that the whole maritime delimitation must be undertaken de novo. Nonetheless, Nigeria does advance specific arguments regarding the area up to point G, which it is appropriate to address in this part of the Judgment.

255. In the first place, on the basis of its claim to sovereignty over the
Bakassi Peninsula, Nigeria contends that the line of the maritime boundary between itself and Cameroon will commence in the waters of the Rio del Rey and run down the median line towards the open sea. Since the Court has already found that sovereignty over the Bakassi Peninsula lies with Cameroon and not with Nigeria (see paragraph 225 above), it is unnecessary to deal any further with this argument of Nigeria.

256. Nigeria further contends that, even if Cameroon’s claim to Bakassi were valid, Cameroon’s claim to a maritime boundary should have taken into account the wells and other installations on each side of the line established by the oil practice and should not change the status quo in this respect. Thus, Cameroon would have been justified in claiming at most a maritime boundary proceeding southwards, then south-westwards to the equidistance line between East Point (Nigeria) and West Point (Bakassi), and then along the equidistance line until it reached the maritime boundary with Bioko (Equatorial Guinea), at the approximate position longitude 8° 19’ east and latitude 4° 4’ north, while leaving a zone of 500 m around the Parties’ fixed installations.

257. In relation to the Yaounde II Declaration, Nigeria contends that it was not a binding agreement, but simply represented the record of a meeting which “formed part of an ongoing programme of meetings relating to the maritime boundary”, and that the matter “was subject to further discussion at subsequent meetings”.

258. Nigeria likewise regards the Maroua Declaration as lacking legal validity, since it “was not ratified by the Supreme Military Council” after being signed by the Nigerian Head of State. It states that under the Nigerian constitution in force at the relevant time — June 1975 — executive acts were in general to be carried out by the Supreme Military Council or subject to its approval. It notes that States are normally expected to follow legislative and constitutional developments in neighbouring States which have an impact upon the inter-State relations of those States, and that few limits can be more important than those affecting the treaty-making power. It adds that on 23 August 1974, nine months before the Maroua Declaration, the then Head of State of Nigeria had written to the then Head of State of Cameroon, explaining, with reference to a meeting with the latter in August 1972 at Garoua, that “the proposals of the experts based on the documents they prepared on the 4th April 1971 were not acceptable to the Nigerian Government”, and that the views and recommendations of the joint commission “must be subject to the agreement of the two Governments”. Nigeria contends that this shows that any arrangements that might be agreed between the two Heads of State were subject to the subsequent and separate approval of the Nigerian Government.

Nigeria says that Cameroon, according to an objective test based upon the provisions of the Vienna Convention, either knew or, conducting itself in a normally prudent manner, should have known that the Head of State of Nigeria did not have the authority to make legally binding commitments without referring back to the Nigerian Government — at that time the Supreme Military Council — and that it should therefore have been “objectively evident” to Cameroon, within the meaning of Article 46, paragraph 2, of the Vienna Convention on the Law of Treaties that the Head of State of Nigeria did not have unrestricted authority. Nigeria adds that Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that Heads of State and Heads of Government “[i]n virtue of their functions and without having to produce full powers . . . are considered as representing their State”, is solely concerned with the way in which a person’s function as a State’s representative is established, but does not deal with the extent of that person’s powers when exercising that representative function.

259. Nigeria further states that since 1977, in bilateral summits between Heads of State and between boundary experts, it has confirmed that the Maroua Declaration was not ratified and was therefore not binding on Nigeria. It argues that it is clear also from minutes of meetings held in Yaounde in 1991 and 1993 that Nigeria had never accepted that it was bound by the Maroua Declaration.

260. Cameroon rejects the argument of Nigeria that the Maroua Declaration can be regarded as a nullity by Nigeria on the ground that it was not ratified by Nigeria’s Supreme Military Council. Cameroon denies that any communication was made during a 1977 meeting between the two Heads of State to the effect that the Declaration was not binding on Nigeria, and claims that it was not until 1978, some three-and-a-half years after the Declaration, that Nigeria announced its intention to challenge it. Cameroon argues that Nigeria has not shown that the constitution of Nigeria did in fact require the agreement to be ratified by the Supreme Military Council. In any event, invoking Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, Cameroon argues that as a matter of international law a Head of State is always considered as representing his or her State for the purpose of expressing the consent of the State to be bound by a treaty. Cameroon also maintains that, even if there was a violation of the internal law of Nigeria, the alleged violation was not “material”, and did not concern a rule of internal law “of fundamental importance”, within the meaning of Article 46, paragraph 1, of the Vienna Convention on the Law of Treaties.

261. The Court has already found that the Anglo-German Agreement of 11 March 1913 is valid and applicable in its entirety and that, in consequence, territorial title to the Bakassi Peninsula lies with Cameroon (see paragraph 225 above). It follows from these findings that the mari-
time boundary between Cameroon and Nigeria lies to the west of the Bakassi Peninsula and not to the east, in the Rio del Rey. It also follows from these findings that the maritime boundary between the Parties is “anchored” to the mainland at the intersection of the straight line from Bakassi Point to King Point with the centre of the navigable channel of the Akwayafie River in accordance with Articles XVIII and XXI of the said Anglo-German Agreement.

262. It is apparent from the documents provided to the Court by the Parties that, irrespective of what may have been the intentions of its original signatories, the Yaoundé II Declaration was called into question on a number of occasions by Nigeria subsequently to its signature and to the Joint Boundary Commission meeting of June 1971, in particular at a Commission meeting of May 1972, and again at a meeting of the two Heads of State at Garoua in August 1972, where the Head of State of Nigeria described it as “unacceptable”. Moreover, the Head of State of Nigeria subsequently confirmed his position in the letter of 23 August 1974 to his Cameroonian counterpart (see paragraph 258 above).

However, it is unnecessary to determine the status of the Declaration in isolation, since the line described therein is confirmed by the terms of the Maroua Declaration, which refers in its third paragraph to “Point 12 . . . situated at the end of the line of the maritime boundary adopted by the two Heads of State on April 4, 1971”. If the Maroua Declaration represents an international agreement binding on both parties, it necessarily follows that the line contained in the Yaoundé II Declaration, including the co-ordinates as agreed at the June 1971 meeting of the Joint Boundary Commission, is also binding on them.

263. The Court considers that the Maroua Declaration constitutes an international agreement concluded between States in written form and tracing a boundary; it is thus governed by international law and constitutes a treaty in the sense of the Vienna Convention on the Law of Treaties (see Art. 2, para. 1), to which Nigeria has been a party since 1969 and Cameroon since 1991, and which in any case reflects customary international law in this respect.

264. The Court cannot accept the argument that the Maroua Declaration was invalid under international law because it was signed by the Nigerian Head of State of the time but never ratified. Thus while in international practice a two-step procedure consisting of signature and ratification is frequently provided for in provisions regarding entry into force of a treaty, there are also cases where a treaty enters into force immediately upon signature. Both customary international law and the Vienna Convention on the Law of Treaties leave it completely up to States which procedure they want to follow. Under the Maroua Declaration, “the two Heads of State of Cameroon and Nigeria agreed to extend the delimitation of the maritime boundary between the two countries from Point 12 to Point G on the Admiralty Chart No. 3433 annexed to this Declara-

tion”, in the Court’s view, that Declaration entered into force immediately upon its signature.

265. The Court will now address Nigeria’s argument that its constitutional rules regarding the conclusion of treaties were not complied with. In this regard the Court recalls that Article 46, paragraph 1, of the Vienna Convention provides that “[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent”. It is true that the paragraph goes on to say “unless that violation was manifest and concerned a rule of its internal law of fundamental importance”, while paragraph 2 of Article 46 provides that “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”. The rules concerning the authority to sign treaties for a State are constitutional rules of fundamental importance. However, a limitation of a Head of State’s capacity in this respect is not manifest in the sense of Article 46, paragraph 2, unless at least properly publicized. This is particularly so because Heads of State belong to the group of persons who, in accordance with Article 7, paragraph 2, of the Convention “[i]n virtue of their functions and without having to produce full powers” are considered as representing their State.

The Court cannot accept Nigeria’s argument that Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties is solely concerned with the way in which a person’s function as a State’s representative is established, but does not deal with the extent of that person’s powers when exercising that representative function. The Court notes that the commentary of the International Law Commission on Article 7, paragraph 2, expressly states that “Heads of State . . . are considered as representing their State for the purpose of performing all acts relating to the conclusion of a treaty” (ILC Commentary, Art. 6 of what was then the draft Convention, para. 4, Yearbook of the International Law Commission, 1966, Vol. II, p. 193).

266. Nigeria further argues that Cameroon knew, or ought to have known, that the Head of State of Nigeria had no power legally to bind Nigeria without consulting the Nigerian Government. In this regard the Court notes that there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.

In this case the Head of State of Nigeria had in August 1974 stated in his letter to the Head of State of Cameroon that the views of the Joint Commission “must be subject to the agreement of the two Governments”. However, in the following paragraph of that same letter, he
further indicated: “It has always been my belief that we can, both, together re-examine the situation and reach an appropriate and acceptable decision on the matter.” Contrary to Nigeria’s contention, the Court considers that these two statements, read together, cannot be regarded as a specific warning to Cameroon that the Nigerian Government would not be bound by any commitment entered into by the Head of State. And in particular they could not be understood as relating to any commitment to be made at Maroua nine months later. The letter in question in fact concerned a meeting to be held at Kano, Nigeria, from 30 August to 1 September 1974. This letter seems to have been part of a pattern which marked the Parties’ boundary negotiations between 1970 and 1975, in which the two Heads of State took the initiative of resolving difficulties in those negotiations through person-to-person agreements, including those at Yaoundé II and Maroua.

267. The Court further observes that in July 1975 the two Parties inserted a correction in the Maroua Declaration, that in so acting they treated the Declaration as valid and applicable, and that Nigeria does not claim to have contested its validity or applicability prior to 1977.

268. In these circumstances the Maroua Declaration, as well as the Yaoundé II Declaration, have to be considered as binding and as establishing a legal obligation on Nigeria. It follows that it is unnecessary for the Court to address Nigeria’s argument regarding the oil practice in the sector up to point G (see paragraph 256 above). Thus the maritime boundary between Cameroon and Nigeria up to and including point G must be considered to have been established on a conventional basis by the Anglo-German Agreement of 11 March 1913, the Yaoundé II Declaration of 4 April 1971 and the Maroua Declaration of 1 June 1975, and takes the following course: starting from the straight line joining Bakassi Point and King Point, the line follows the “compromise line” jointly drawn at Yaoundé on 4 April 1971 by the Heads of State of Cameroon and Nigeria on British Admiralty Chart 3433 appended to the Yaoundé II Declaration of 4 April 1971, and passing through 12 numbered points, whose precise co-ordinates were determined by the two countries’ Joint Commission meeting in Lagos in June 1971; from point 12 on that compromise line the course of the boundary follows the line to point G specified in the Maroua Declaration of 1 June 1975, as corrected by the exchange of letters between the Heads of State of Cameroon and Nigeria of 12 June and 17 July 1975.

* *

269. The Court will now address the maritime boundary beyond point G, where no maritime boundary delimitation has been agreed. Cameroon states that this is a classic case of maritime delimitation between States with adjacent coasts which have been unable to reach
International Court of Justice

Questions relating to the Obligation toProsecute or Extradite
(Belgium v. Senegal)
Judgment of 20 July 2012 (excerpt)
69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.

As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal’s compliance with the relevant provisions of the Convention in the case of Mr. Habré.

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

71. In its Application instituting proceedings, Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium. In its final submissions, it requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him.

72. Belgium has pointed out during the proceedings that the obligations deriving from Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are closely linked with each other in the context of achieving the object and purpose of the Convention, which according to its Preamble is “to make more effective the struggle against torture”. Hence, incorporating the appropriate legislation into domestic law (Article 5, paragraph 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Article 6, paragraph 2), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1).

73. Senegal contests Belgium’s allegations and considers that it has not breached any provision of the Convention against Torture. In its view, the Convention breaks down the aut dixere aut iudicare obligation into a series of actions which a State should take. Senegal maintains that the measures it has taken hitherto show that it has complied with its international commitments. First, Senegal asserts that it has resolved not to extradite Mr. Habré but to organize his trial and to try him. It maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that it
has taken measures to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as measures in preparation for Mr. Habré’s trial, contemplated under the aegis of the African Union, which must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention. Senegal adds that Belgium cannot dictate precisely how it should fulfil its commitments under the Convention, given that how a State fulfils an international obligation, particularly in a case where the State must take internal measures, is to a very large extent left to the discretion of that State.

74. Although, for the reasons given above, the Court has no jurisdiction in this case over the alleged violation of Article 5, paragraph 2, of the Convention, it notes that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1). The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.

75. The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above). The Dakar Court of Appeal held that:

“the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention” (Court of Appeal (Dakar), Chambre d'accusation, Public Prosecutor’s Office and François Dioïf v. Hissène Habré, Judgment No. 135; 4 July 2000).

This judgment was subsequently upheld by the Senegalese Court of Cassation (Court of Cassation, première chambre statuant en matière pénale, Souleymane Guengueng et al. v. Hissène Habré, Judgment No. 14, 20 March 2001).

77. Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal’s implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

78. The Court, bearing in mind the link which exists between the different provisions of the Convention, will now analyse the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

79. Under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present “shall immediately make a preliminary inquiry into the facts”.

80. Belgium considers that this procedural obligation is obviously incumbent on Senegal, since the latter must have the most complete information available in order to decide whether there are grounds either to submit the matter to its prosecuting authorities or, when possible, to extradite the suspect. The State in whose territory the suspect is present should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it. Belgium takes the view that Senegal, by failing to take these measures, breached the obligation imposed on it by Article 6, paragraph 2, of the Convention. It points out that nonetheless invited Senegal to issue a letter rogatory, in order to have access to the evidence in the hands of Belgian judges (see paragraph 30 above).

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, paragraph 2, of the Convention, Belgium has pointed out that the nature of the inquiry required by Article 6, paragraph 2, depends to some extent on the legal system concerned, but also on the particular circumstances of the case. This would be the inquiry carried out before the case was transmitted to the authorities responsible for prosecution, if the State decided to exercise its jurisdiction. Lastly, Belgium recalls that paragraph 4 of this Article provides that interested States must be informed of the findings of the inquiry, so that they may, if necessary, seek the extradition of the alleged offender. According to Belgium, there is no information before the Court suggesting that a preliminary inquiry has been conducted by Senegal, and it concludes from this that Senegal has violated Article 6, paragraph 2, of the Convention.

82. Senegal, in answer to the same question, has maintained that the inquiry is aimed at establishing the facts, but that it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. Senegal takes the view that this is simply an obligation of means, which it claims to have fulfilled.
83. In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect’s possible involvement in the matter concerned. Thus the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfil its obligation to make a preliminary inquiry.

84. Moreover, the Convention specifies that, when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question. Article 7, paragraph 2, of the Convention thus stipulates:

“In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.”

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the Tribunal régional hors classe in Dakar conducted in order to establish Mr. Habré’s identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

86. While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré (see paragraph 17 above).

87. The Court observes that a further complaint against Mr. Habré was filed in Dakar in 2008 (see paragraph 32 above), after the legislative and constitutional amendments made in 2007 and 2008, respectively, which were enacted in order to comply with the requirements of Article 5, paragraph 2, of the Convention (see paragraphs 28 and 31 above). But there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following this second complaint. Indeed, in 2010 Senegal stated before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts.

88. The Court finds that the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. That point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

The Court therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention

89. Article 7, paragraph 1, of the Convention provides:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

90. As is apparent from the travaux préparatoires of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the “obligation to prosecute”) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention Against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. Belgium’s claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

1. The nature and meaning of the obligation laid down in Article 7, paragraph 1

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in
accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim "aut dedere aut iudicare" under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium’s view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that the State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by accepting to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.

98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation aut dedere aut iudicare occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

99. In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).

That prohibition is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party."

The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.

“torture’ for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention”. However, when the Committee considered Mr. Habré’s situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (Guengeng et al. v. Senegal (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal’s obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium’s right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to “the category of divisible erga omnes obligations”, in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal’s compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal’s responsibility for the latter’s conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for the purpose of prosecution. Procrastination on the latter’s part could, according to Belgium, violate both the rights of the victims and those of the accused. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings.

107. The same applies, according to Belgium, to Senegal’s refusal of the matter to the African Union in January 2006, which does not exempt it from performing its obligations under the Convention. Moreover, at its seventh session in July 2006 (see paragraph 23 above), the Assembly of Heads of State and Government of the African Union mandated Senegal “to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial” (African Union, doc. Assembly/AU/Dec. 127 (VII), para 5).

108. With regard to the legal difficulties which Senegal claims to have faced in performing its obligations under the Convention, Belgium contends that Senegal cannot rely on its domestic law in order to avoid its international responsibility. Moreover, Belgium recalls the judgment of the ECOWAS Court of Justice of 18 November 2010 (see paragraph 35 above), which considered that Senegal’s amendment to its Penal Code in 2007 might be contrary to the principle of non-retroactivity of criminal laws, and deemed that proceedings against Hissène Habré should be conducted before an ad hoc court of an international character, arguing that this judgment cannot be invoked against it. Belgium emphasizes that, if Senegal is now confronted with a situation of conflict between two international obligations as a result of that decision, that is the result of its own failings in implementing the Convention against Torture.

109. For its part, Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures to institute proceedings against Mr. Habré. Senegal contends that it only sought financial support in order to prepare the trial under favourable conditions, given its unique nature, having regard to the number of victims, the distance that witnesses would have to travel and the difficulty of gathering evidence. It claims that it has never sought, on these grounds, to justify the non-performance of its conventional obligations. Likewise, Senegal contends that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations.

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice is not a constraint of a domestic nature. While bearing in mind its duty to comply with its conventional obligation, it contends that it is nonetheless subject to the authority of that court. Thus, Senegal points out that that decision required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national level, and to mobilize effort in order to create an ad hoc tribunal of an international character, the establishment of which would be more cumbersome.

111. The Court considers that Senegal’s duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.
112. The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré. For its part, Senegal itself states that it has never sought to use the issue of financial support to justify any failure to comply with an obligation incumbent upon it. Moreover, the referral of the matter to the African Union, as recognized by Senegal itself, cannot justify the latter’s delays in complying with its obligations under the Convention. The diligence with which the authorities of the forum State must conduct the proceedings is also intended to guarantee the suspect fair treatment at all stages of the proceedings (Article 7, paragraph 3, of the Convention).

113. The Court observes that, under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law, Senegal cannot justify its breach of the obligation provided for in Article 7, paragraph 1, of the Convention against Torture by invoking provisions of its internal law, in particular by invoking the decisions as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 2, of that Convention until 2007.

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfillment of the Convention’s object and purpose, which is “to make more effective the struggle against torture” (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

116. In response to a question put by a Member of the Court concerning the date of the violation of Article 7, paragraph 1, alleged by Belgium, it replied that that date could fall in the year 2000, when a complaint against Mr. Habré was filed (see paragraph 17 above), or later, in March 2001, when the Court of Cassation confirmed the decision of the Dakar Court of Appeal, annulling the proceedings in respect of Mr. Habré on the ground that the Senegalese courts lacked jurisdiction (see paragraph 18 above).

117. The Court finds that the obligation provided for in Article 7, paragraph 1, required Senegal to take all measures necessary for its implementation as soon as possible, in particular once the first complaint had been filed against Mr. Habré in 2000. Having failed to do so, Senegal has breached and remains in breach of its obligations under Article 7, paragraph 1, of the Convention.

V. REMEDIES

118. The Court notes, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to incorporate in due time into its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against
INTERNATIONAL ORGANIZATIONS
PROFESSOR PIERRE BODEAU-LIVINEC

Codification Division of the United Nations Office of Legal Affairs
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Legal instruments and documents

1. Charter of the United Nations, 1945
   For text, see *Charter of the United Nations and Statute of the International Court of Justice*


Jurisprudence

   For text, see *Study Materials Part I, Peaceful Settlement of Disputes*, p. 110


   For text, see *Study Materials Part II, State Jurisdiction and Immunities*, p. 238

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

9. *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, Nos. 71412/01 and 78166/01, ECHR, 2 May 2007
INTERNATIONAL ORGANIZATIONS: COURSE OUTLINE
PROFESSOR PIERRE BODEAU-LIVINEC

Selected issues

1. The Legal Status of International Organizations: Elements of Unity within Diversity
   - The legal personality of international organizations
     ➢ The Bernadotte Advisory Opinion (1949)
   - Immunities of international organizations
     ➢ The Special Rapporteur Advisory Opinion (1999)

2. Constitution and Competences of International Organizations
   - Admission to international organizations
     ➢ Palestine and the United Nations: a case-study
   - Types of organizations: institutionalization, cooperation and integration

3. Responsibility of International Organizations
   - The ILC Articles on Responsibility of International Organizations (2011), a brief overview
   - Sharing the burden: issues of responsibility between States and organizations and/or between organizations
     ➢ The Behrami and Saramati case (2007)
Letter received on 23 September 2011 from the President of Palestine to the Secretary-General

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

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

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

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

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

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

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

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

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

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

On 15 November 1988, the Palestine National Council (PNC) declared the Statehood of Palestine in exercise of the Palestinian people’s inalienable right to self-determination. The Declaration of Independence of the State of Palestine was acknowledged by the United Nations General Assembly in resolution 43/177 of 15 December 1988. The right of the Palestinian people to self-determination and independence and the vision of a two-State solution to the Israeli-Palestinian conflict have been firmly established by General Assembly in numerous resolutions, including, inter alia, resolutions 181 (II) (1947), 235 (XXIX) (1974), 2649 (XXV) (1970), 2672 (XXV) (1970), 65/16 (2010) and 65/202 (2010) as well as by United Nations Security Council resolutions 42 (1967), 338 (1973) and 1397 (2002) and by the International Court of Justice Advisory Opinion of 9 July 2004 (on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory). Furthermore, the vast majority of the international community has stood in support of our inalienable rights as a people, including to statehood, by according bilateral recognition to the State of Palestine on the basis of the 4 June 1967 borders, with East Jerusalem as its capital, and the number of such recognitions continues to rise with each passing day.

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

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

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

Accordingly, I have had the honour to present to Your Excellency the application of the State of Palestine to be a full member of the United Nations as well as a declaration made pursuant to rule 58 of the provisional rules of procedure.

(Signed) Mahmoud Abbas
President of the State of Palestine
Chairman of the Executive Committee of the
Palestine Liberation Organization
Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012
The Office, in accordance with article 12(1), makes a request for information and application of article 12(1) to the Government of the Palestinian Authority and of the Government of the State of Israel. The Office, in accordance with article 12(1), makes a request for information and application of article 12(1) to the Government of the Palestinian Authority and of the Government of the State of Israel.

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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_
AVIS CONSULTATIF DU 3 MARS 1950

COMPÉTENCE DE L'ASSEMBLÉE GÉNÉRALE POUR L'ADMISSION D'UN ÉTAT AUX NATIONS UNIES

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

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

1950
INTERNATIONAL COURT OF JUSTICE

YEAR 1950

March 3rd, 1950

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


OPINION

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.

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

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

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

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

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

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

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

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

The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 24 confers upon it "primary responsibility for the maintenance of international peace and security", and the Charter grants it for this purpose certain powers of decision. Under Articles 4, 5, and 6, the Security Council co-operates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organization. It has power, without the concurrence of the General Assembly, to reinstate the Member which was the object of the suspension, in its rights and privileges.

The organs to which Article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of a recommendation of the Security Council. In particular, the Rules of Procedure of the General Assembly provide for consideration of the merits of an application and of the decision to be made upon it only "if the Security Council recommends the applicant State for membership" (Article 125). The Rules merely state that if the Security Council has not recommended the admission, the General Assembly may send back the application to the Security Council for further consideration (Article 126). This last step has been taken several times: it was taken in Resolution 296 (IV), the very one that embodies this Request for an Opinion.

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

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

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

While keeping within the limits of a Request which deals with the scope of the powers of the General Assembly, it is enough for
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.
International Court of Justice

Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development
Advisory Opinion of 1 February 2012
1 FEBRUARY 2012
ADVISORY OPINION

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

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LIST OF ACRONYMS AND ABBREVIATIONS

Agreement establishing IFAD  Agreement of 13 June 1976 establishing the International Fund for Agricultural Development

COP  Conference of the Parties of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa

Global Mechanism  Global Mechanism of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa

HRPM  Human Resources Procedures Manual of the International Fund for Agricultural Development

IFAD (or the “Fund”)  International Fund for Agricultural Development

ILO  International Labour Organization

ILOAT (or the “Tribunal”)  Administrative Tribunal of the International Labour Organization

JAB  Joint Appeals Board of the International Fund for Agricultural Development

MOU  Memorandum of Understanding between the Conference of the Parties of the Convention to Combat Desertification and the International Fund for Agricultural Development regarding the Modalities and Administrative Operations of the Global Mechanism

PPM  Personnel Policies Manual of the International Fund for Agricultural Development

Relationship Agreement  Relationship Agreement between the United Nations and the International Fund for Agricultural Development

UNAT  United Nations Administrative Tribunal

UNCCD (or the “Convention”)  United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa

Unesco  United Nations Educational, Scientific and Cultural Organization

1956 Advisory Opinion  Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 77

INTERNATIONAL COURT OF JUSTICE

YEAR 2012

1 February 2012

General List No. 146

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

Jurisdiction of the Court to give advisory opinion requested.

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

Scope of jurisdiction of the Court.

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

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

Inequality of access to the Court — Comparison with former procedure for review of judgments of the United Nations Administrative Tribunal — Relevant General Comments of the Human Rights Committee — Comparison with equality of the parties in investment disputes — Requirements of good administration of justice include access on an equal basis to available appellate or similar remedies.

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

Reasons to decline to give advisory opinion not sufficiently compelling.

* * *

Merits.

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

Response to Question I.

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

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

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

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

Response to Questions II to VIII.

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

Response to Question IX.

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

Present: President OWADA; Vice-President TOMKA; Judges KOROMA, ABRAHAM, KEITH, SEPULVEDA-AMOR, BENNOUWA, SKOTNIKOV, CANÇÃO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; Registrar COUVREUR.

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

THE COURT, composed as above,
gives the following Advisory Opinion:

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

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

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

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

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

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

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

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

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

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

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

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

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

Whereas the Executive Board of IFAD, acting within the framework of Article XII of the Annex to the Statute of the ILOAT, had decided to challenge the decision rendered by the Tribunal on 3 February 2010 in Judgment No. 2867, and to refer the question of the validity of that Judgment to the Court.

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

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

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

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

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

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

3. By an Order dated 29 April 2010, in accordance with Article 66, paragraph 2, of its Statute, the Court decided that IFAD and its member States entitled to appear before the Court, the States parties to the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (hereinafter the “UNCCD” or the “Convention”) entitled to appear before the Court and those specialized agencies of the United Nations which had made a declaration recognizing the jurisdiction of the ILOAT pursuant to Article II, paragraph 5, of the Statute of the Tribunal were likely to be able to furnish information on the questions submitted to the Court for an advisory opinion. By that same Order, the Court fixed, respectively, 29 October 2010 as the time-limit within which written statements might be presented to it on the questions, and 31 January 2011 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute of the Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

16. By letter dated 21 July 2011, on the instructions of the President, the Registrar communicated to the General Counsel of IFAD a question addressed by a Member of the Court to the Fund and, through it, to Ms Saez García. By letters dated 26 August 2011, the General Counsel of IFAD communicated to the Court the response of the Fund to that question, transmitted to the Court the response of Ms Saez García to that question and reiterated the Fund’s request that the Court hold oral proceedings in the case. Under cover of a letter also dated 26 August 2011, the General Counsel of IFAD communicated to the Court a copy of Judgment No. 3903 of the ILOAT, delivered on 6 July 2011, whereby the Tribunal dismissed IFAD’s application for suspension of the execution of Judgment No. 2867 pending the delivery of the advisory opinion of the Court.

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

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

I. The Court’s Jurisdiction

19. The resolution of the Executive Board of IFAD requesting an advisory opinion in this case quotes Article XII of the Annex to the Statute of the ILOAT and states that it “wishes to avail itself of the provisions of the said Article”. That Article is in the following terms:
1. In any case in which the Executive Board of an international organization which has made the declaration specified in article II, paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

2. The Opinion given by the Court shall be binding."

20. The Court recalls that, by a letter dated 4 October 1988, the President of IFAD informed the Director General of the International Labour Organization (hereinafter the “ILO”) that the Executive Board of IFAD had made the declaration required by article II, paragraph 5, of the Statute of the Tribunal recognizing the jurisdiction of the Tribunal. The Governing Body of the International Labour Office (the Office is the secretariat of the ILO) approved the declaration on 18 November 1988, and the Fund’s acceptance of jurisdiction took effect from 1 January 1989.

21. The Court first considers whether it has jurisdiction to reply to the request. While its jurisdiction was not challenged, the Court notes that Ms Saez García contended that some of the questions posed by IFAD in its request do not fall within the scope of Article XII of the Annex to the Statute of the ILOAT. The Court observes that the power of the Executive Board to request an advisory opinion and the jurisdiction of the Court to give the opinion are founded on the Charter of the United Nations and the Statute of the Court and not on Article XII of the Annex to the Statute of the ILOAT alone. Under Article 65, paragraph 1, of its Statute,

"[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

The General Assembly and the Security Council are authorized by Article 96, paragraph 1, of the Charter to request an advisory opinion on “any legal question”; and, under Article 96, paragraph 2,

"[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities”.

22. That is to say, the General Assembly is given a gatekeeping role. It is only in terms of its authorization, given under Article 96, paragraph 2, that requests can be made by organs other than the Assembly itself and the Security Council, as the Court has already pointed out in its Advisory Opinion of 23 October 1956 (see Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion (hereinafter the “1956 Advisory Opinion”), I.C.J. Reports 1956, pp. 83-84; see also Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21).

23. The General Assembly, by resolution 32/107 of 15 December 1977, approved the Relationship Agreement between the United Nations and the International Fund for Agricultural Development (hereinafter the “Relationship Agreement”). Under Article I of the Relationship Agreement, the United Nations recognized the Fund as a specialized agency in accordance with Articles 57 and 63 of the Charter and Article 8 of the Agreement of 13 June 1976 establishing IFAD (hereinafter the “Agreement establishing IFAD”). In Article XIII, paragraph 2, of the Relationship Agreement, the General Assembly authorized the Fund to request advisory opinions:

“The General Assembly of the United Nations authorizes the Fund to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the Fund’s activities, other than questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies. Such requests may be addressed to the Court by the Governing Council of the Fund, or by its Executive Board acting pursuant to an authorization by the Governing Council. The Fund shall inform the Economic and Social Council of any such request it addresses to the Court.”

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

24. On the following day, 16 December 1977, the Governing Council of the Fund, in exercise of the power conferred on it by Article 6, Section 2 (c), of the Agreement establishing IFAD, by resolution 77/2, “[a]uthorized the Executive Board to exercise all the powers of the Council”, with the exception of certain specified powers and those reserved by the Agreement to the Council. That delegation was amended by Council resolution 86/XVIII of 26 January 1995 with effect from 20 February 1997. The power to request advisory opinions was not excluded from the delegation. No issue arises in respect of the delegation of that power by the Council to the Board.

25. As already noted (see paragraph 19), the Executive Board of IFAD, in its resolution requesting an advisory opinion in this case, expresses its wish to avail itself of Article XII of the Annex to the Statute of the ILOAT. While the resolution does not also refer to the authorization granted by the General Assembly under Article 96, paragraph 2, of the Charter, that authorization, as the Court has already stated, is a necessary condition to the making of such a request. The Court takes the opportunity to emphasize that the ILO could not, when it adopted the Tribunal’s Statute, give its organs, or other institutions, the authority to challenge decisions of the Tribunal by way of a request for an advisory opinion.

26. The terms of Article 96, paragraph 2, of the Charter, Article 65, paragraph 1, of the Statute of the Court and the authorization given to the Fund by Article XIII, paragraph 2, of the Relationship Agreement state certain requirements which are to be met if an opinion is to be requested. In terms of those requirements, the Fund’s request for review of a judgment concerning
...to the Tribunal. This question concerns the procedure and not the substance of the judgment. When the Court was asked to determine the Fund's jurisdiction or the decision of the ILOAT in its Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1956, p. 84; see also Difference in Jurisdiction - Advisory Opinion, I.C.J. Reports 1956, p. 87.)

28. Under Article VI, paragraph 1, of the Statute of the ILOAT, the judgment of the Tribunal relating to a complaint brought by an official is final and without appeal. However, pursuant to Article XII, paragraph 1, of its Annex, the ILO and international organizations may make the decl...
32. Having determined that it has jurisdiction to answer the present request for an advisory opinion and indicated in a preliminary way the limits on the scope of its power of review in terms of Article XII of the Annex to the Statute of the ILOAT, the Court now considers whether in exercise of its discretion there is reason to refuse to answer that request.

**III. The Court’s Discretion**

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

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


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

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

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

38. After considering the inequality before the Court, it concluded that not to respond to the request for an advisory opinion “would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials” (ibid., p. 86). The Court, addressing this matter 50 years later, has two observations to make, one particular, about the use actually made of the review processes in respect of the two Tribunals — that of the United Nations and that of the ILO — and one general, about the development of the concept of equality before courts and tribunals over that period. On the review process, the critical element for the judicial protection of officials was the creation of the right of officials to challenge decisions taken against them by their employer before an independent judicial body which follows fair procedures. Next, reviews have been sought in only a handful of cases; and when the General Assembly decided in 1995 to remove the provision for review of UNAT decisions by this Court, it stated that the procedure that had existed since 1955 had “not proved to be a constructive or useful element in the
41. In its reply, IFAD for its part first emphasizes that "the sole function" of Article XII of the Annex to the Statue of the ILOAT, when a specialized agency is invoking it, is to interpret the no provision at all for review of, or appeal against, the judgments of the UNAT.

42. In the Court's Opinion, this argument faces two insurmountable hurdles. In the first place, the real dispute underlying the request for an advisory opinion was between Ms. Saez Garcia and the Fund. She brought proceedings before the Triangular Court, the UN Court of a third party that stands outside the relationship that forms the subject-matter of Article XII procedures. Further, IFAD states that:

"The Fund respectfully submits that, given that the Complainant in ILOAT Judgment No. 2867 is not a party to the agreement between the ILO and that specialized agency; the questions submitted to the Court, it maintains, "deal exclusively with the application of Article XII of the Annex to the Statute of the International Labour Court. That is why the UNAT cannot be sued in respect of those judgments as being incompatible with the ILOAT. This is a parallel with investor-State arbitration, first, it pointed out that in such arbitrations, it is only the investor that may initiate the dispute settlement process. But the process initiated in response to the request of the UNAT is not a parallel with investor-State arbitration. The Court's decision is only one of the many defects that the Court has remarked upon in the review procedure. It is a compelling reason to reject the Fund's request for an advisory opinion."
process. It is comparable to the proceeding brought in the ILOAT by the staff member against the agency. In the case of investment arbitrations brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations Treaty Series (UNTS), Vol. 575, p. 159), both parties — and not just one — are able to seek interpretation, revision or annulment of the award: it is that situation which is analogous to the present one. The Fund, secondly, refers to a number of provisions in bilateral free trade and investment treaties which enable the State parties to those treaties, by joint decision, at the request of one of them, to declare their interpretation of a provision of the treaty. That interpretation is binding on the tribunal hearing an investment dispute including those brought by the investor. That situation bears little resemblance to the present one: parties to treaties are in general free to agree on their interpretation, while in the present case the Court is concerned with the initiation of a review process to be carried out by an independent tribunal.

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

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

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

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

* *

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

* *

IV. Merits

49. The request for an advisory opinion from the Court concerns the validity of the Judgment given by the ILOAT relating to Ms Saez Garcia’s contract of employment. The Court notes that that contract of employment, as extended, was governed by the Personnel Policies Manual (hereinafter “PPM”) and the Human Resources Handbook, until 22 July 2005. From that date, the PPM and Human Resources Handbook were replaced by a document entitled “IFAD Human Resources Policy” and the Human Resources Procedures Manual (hereinafter “HRPM”), respectively. Accordingly, subsequent events, such as the facilitation process and the convening of the Joint Appeals Board referred to in paragraphs 70 and 77 below, were governed by the latter documents. The Court will refer hereinafter to the titles of the documents in force at the time of events being considered.
In December 2005, a decision was made not to renew Ms Saez García’s contract. The alleged basis for this decision was that her post was being abolished. She challenged that decision by filing an appeal with the Joint Appeals Board of the Fund (hereinafter referred to as the “JAB”). The JAB, at its first decision, held in 1999, that while the decision to terminate Ms Saez García’s employment, as from March 2006 on the alleged basis that her post was being abolished, Ms Saez García was a staff member of the Global Mechanism and not of IFAD and that her employment status has to be assessed in the context of the arrangement for the housing of the Global Mechanism made between the Fund and COP. The JAB, at its second decision of 4 April 2008, set aside this decision and made orders for the payment of damages and costs.

So far as the arrangement for the housing of the Global Mechanism is concerned, the COP, at its first session, held in 1997, decided to select IFAD for that purpose. In 1998, the Conference and the Fund signed a “Memorandum of Understanding” (hereinafter referred to as the “MOU”). The MOU provides, under Section II A, that “the Fund, in accordance with the advice of the Global Mechanism, shall provide operational and financial support for the establishment of a permanent secretariat for the Global Mechanism”. The MOU also provides, under Section II B, that “the resources of the Global Mechanism are held by the Fund in various accounts...” The final substantive provision of the MOU, Section VI, entitled “Administrative Infrastructure”, provides that the Global Mechanism shall be located at the headquarters of the Fund in Rome, where the full-time employment services of its staff shall be based. The MOU contains the following provisions:...
No. 3/COP.1). Under the arrangement, the Secretariat functions under the authority of the Secretary-General as chief administrative officer of the organization (United Nations document A/52/549 of 11 November 1997, para. 25). While institutionally linked to the United Nations, the Secretariat is not fully integrated in the work programme and management structure of any particular department or programme (ibid., para. 26; COP decision No. 3/COP.1 and General Assembly resolution 52/198 of 18 December 1997, eighth preambular paragraph).

56. The General Assembly also noted that the COP had decided to accept the offer of the Government of Germany to host the Convention Secretariat in Bonn (General Assembly resolution 52/198 of 18 December 1997, para. 3). In 1998, the Secretariat of the Convention, the Government of the Federal Republic of Germany and the International Community by clarifying how the rules concerning the ILOAT’s jurisdiction should operate in respect of entities hosted by international organizations”. The Fund contends that this phenomenon of “hosting” arrangements is “one of the most significant developments since the adoption of Article XII of the ILOAT Statute in 1946”.

57. The Court observes that, under Part IV of the Convention entitled “Institutions”, the COP and the Permanent Secretariat are expressly established as such. These institutions are given the following powers: in the case of the COP, it is given the power to “make appropriate arrangements” to house the Global Mechanism, to “undertake necessary arrangements” for the financing of its subsidiary bodies and to “make arrangements” for the functioning of the Permanent Secretariat (Arts. 21 (6), 22 (2) (g) and 23 (3), respectively); in the case of the Permanent Secretariat, it is given the general power “to enter, under the guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions” (Art. 23 (2) (e)).

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

61. By contrast, with regard to the Global Mechanism, the Court notes that the Convention directs the COP to identify an organization to house it and to make appropriate arrangements with such an organization for its administrative operations. It was for this reason that a Memorandum of Understanding was concluded between the COP and IFAD in 1999 as described in paragraph 54 above. Neither the Convention nor the MOU expressly confer legal personality on the Global Mechanism or otherwise endow it with the capacity to enter into legal arrangements. Further, in light of the different instruments setting up IFAD, the COP, the Global Mechanism and the Permanent Secretariat, and of the practice included in the record before the Court, the Global Mechanism had no power and has not purported to exercise any power to enter into contracts, agreements or “arrangements”, internationally or nationally.

The written statement of IFAD submitted five months later includes no such list.

58. The position of the Global Mechanism may also be contrasted with that of IFAD, its housing body. The Agreement establishing IFAD expressly provides that “[t]he Fund shall possess international legal personality” (Art. 10, Sec. 1). Its privileges and immunities are defined by reference to the Convention on the Privileges and the Immunities of the Specialized Agencies of 21 November 1947 (Art. 10, Sec. 2, of the Agreement establishing IFAD). Under Article II, Section 3, of that Convention, specialized agencies subject to it, which include IFAD, are given the express capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings in those States, including Italy, which are parties to the Convention.
A. Response to Question I

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

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

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

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

"[t]he Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex" to the Statute of the ILOAT and having made a declaration recognizing the jurisdiction of the Tribunal.

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

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

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

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

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

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

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

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

Following this analysis, the Tribunal concluded as follows:

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

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

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

1. Factual background

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

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

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

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

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

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

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

“It is true that the offer and extension letters in the case of the Complainant were all issued on IFAD letterhead by IFAD officials and all of them refer to an ‘appointment with the International Fund for Agricultural Development’. The initial offer letter dated 1 March 2000, which was signed by the Director of the Fund’s Personnel Division, also stated that the Complainant’s ‘employment may be terminated by IFAD’ and that she ‘will be required to give written notice of at least one month to IFAD’ should she wish to terminate her employment during the probationary period. While the two extension letters are silent on termination and resignation, both state that ‘all other conditions of employment will remain unchanged.’”
74. Notwithstanding the above, the Fund maintains that Ms Saez García was not an IFAD official, but a staff member of the Global Mechanism which has not recognized the jurisdiction of the Tribunal. In this connection, it refers to the fact that the 1 March 2000 contract also contained the following stipulation, which, according to the Fund, was meant "to reframe and clarify the legal position of the Global Mechanism." The Global Mechanism has not recognized the jurisdiction of the Tribunal. Therefore, the argument that Ms Saez García was a staff member of the Global Mechanism is unfounded.

75. Ms Saez García submits that she was a staff member of the Fund and that the staff regulations and rules of the Fund applied to her. She further contends that the Managing Director of the Fund, in the context of his decision of 21 January 2004 not to renew Ms Saez García's contract, acknowledged the relationship with the Fund and that the staff regulations and rules of the Fund applied to her.

76. The Court observes that a contract of employment entered into between an individual and an international organization is a source of rights and duties for the parties to it. In this context, the Court notes that the offer of appointment accepted by Ms Saez García on 17 March 2000 was made by the Director of the Global Mechanism in his capacity as the representative of IFAD. The contract of employment was therefore entered into between Ms Saez García and the Global Mechanism and not the Fund. The fact that she was assigned to perform functions related to the mandate of the Global Mechanism does not mean that she could not be a staff member of the Fund. The one does not exclude the other. In this context, reference may also be made to the fact that IFAD included Ms Saez García's name on the list of IFAD officials for whom the Organization claimed the privileges and immunities in the host country in accordance with the Convention on the Privileges and Immunities of the Specialized Agencies.

77. Ms Saez García's legal relationship with the Fund as a staff member is further evidenced by the fact that she was assigned as Program Coordinator for Latin America and the Caribbean, and the consequent non-renewal of her fixed-term appointment. Her appeals were initially lodged with the internal machinery established by the Fund for handling staff grievances, namely the facilitation process and the JAB. The record before the Court includes no evidence that the Fund objected to the use of these procedures by Ms Saez García. The facilitation process was conducted in accordance with Chapter 10 of the HRPM. Similarly, the JAB referred to the HRPM and its rules in its decision of 21 January 2004 not to renew Ms Saez García's contract which was taken by the Managing Director of the Global Mechanism as he was not "a member of IFAD's staff in his dealings with the complainant." According to the Fund, the Tribunal had, therefore, no jurisdiction to examine the decision of the Managing Director to abolish the post of Programme Manager.
79. The Court first notes that staff members of the Global Mechanism are not eligible, under the terms of the IFAD President’s Bulletin mentioned above, for career appointments under the staff regulations and rules of the Fund. This does not however put them outside the purview of such provisions, nor deprive them of the possibility of being appointed on the basis of renewable fixed-term contracts. In this connection, the Court recalls that the complaint filed by Ms Saez García with the ILOAT was not about the alleged failure of IFAD to grant her a career contract, but about the non-renewal of her fixed-term contract. The Court also recalls that paragraph 10 of the same Bulletin provides that:

“As a matter of principle and where there is an absence of a specific provision to the contrary, as specified below, the Global Mechanism shall be subject to all provisions of IFAD’s Personnel Policies Manual (PPM) and Human Resources Handbook (HRH), as they may be amended.”

It is the Court’s view that the provisions of the IFAD President’s Bulletin constitute further evidence of the applicability of the staff regulations and rules of IFAD to the fixed-term contracts of Ms Saez García, and provide additional indication of the existence of an employment relationship between her and the Fund.

80. The Court next takes note of the fact that, as underlined by the Fund and based on the record before it, neither the COP nor the Global Mechanism has accepted the jurisdiction of the ILOAT. The Tribunal did not however base its jurisdiction with respect to the complaint filed by Ms Saez García on such acceptance. The judgment rendered by the Tribunal shows that it decided to exercise its jurisdiction after having concluded that Ms Saez García and other staff members of the Global Mechanism were staff members of the Fund and, as such, were entitled to submit complaints to the Tribunal in the same way and on the same grounds as other staff members of the Fund.

81. Finally, with respect to the Fund’s contention that the Managing Director of the Global Mechanism was not a staff member of IFAD, the Court considers that the status of the Managing Director has no relevance to the Tribunal’s jurisdiction ratione personae, which depends solely on the status of Ms Saez García. The Court will examine the status of the Managing Director, rather, in its treatment of the Tribunal’s jurisdiction ratione materiae below.

82. In light of the above, the Court concludes that the Tribunal was competent ratione personae to consider the complaint brought by Ms Saez García against IFAD on 8 July 2008.

3. Jurisdiction ratione materiae of the Tribunal

83. As a staff member of the Fund, Ms Saez García had the right to submit her complaint to the ILOAT. The HRPM provides in Section 10.40.1 as follows:

“Staff members have the right to appeal to the ILOAT, under the procedures prescribed in its Statute and Rules, against: (a) final decisions taken by the President; and (b) after the expiration of the period prescribed in para. 10.39.2 above, the failure of the President to take a final decision.”

84. The Fund, however, argues that, even if it were to be assumed that the Tribunal had jurisdiction ratione personae over the complainant because of her being a staff member of the Fund, the Tribunal would still not have jurisdiction ratione materiae over the complaint. The Fund emphasizes that, under the terms of Article II, paragraph 5, of the Statute of the ILOAT, there are only two classes of complaints that the Tribunal is competent to hear, namely: (1) complaints alleging “non-observance, in substance or form, of the terms of appointment of officials”; and (2) complaints alleging non-observance “of provisions of the Staff Regulations”. The Fund argues that, based on the text of the complainant’s pleadings submitted to the Tribunal, it is clearly not possible to fit her complaints under the two classes of complaints set forth in Article II, paragraph 5, of the Tribunal’s Statute. It asserts that the complainant’s case was placed entirely on a different basis, namely, paragraphs 4 and 6 of Section III A of the MOU, which the complainant used to argue, first, that the Managing Director exceeded his authority in deciding not to renew her contract and, secondly, that the “core budget” approved by the Conference did not require the abolition of her post. The reliance by the complainant on these provisions of the MOU was acknowledged and described by the Tribunal in paragraph 4 of its Judgment (p. 10). The Fund further argues that the Tribunal lacked jurisdiction to entertain these submissions, which did not contain allegations of non-observance of IFAD staff regulations and rules, and erred by nonetheless proceeding to adjudicate the complainant’s claims on this basis.

85. The Fund also contends that the Tribunal was not competent to entertain the complainant’s arguments as derived from the MOU, the UNCCD or the COP’s decisions, as these are outside the scope of Article II, paragraph 5, of the Tribunal’s Statute. According to the Fund, the Tribunal, in reaching its conclusions, examined the internal decision-making process established by the Convention, even though neither the COP nor any other organ or agent of the Convention is subject to the Tribunal’s jurisdiction. Thus, for the Fund, the Tribunal treated the dispute as one concerning the interpretation and application of the MOU and the COP’s decisions, instead of as a dispute concerning the interpretation and application of the staff regulations and rules of the defendant Organization. In IFAD’s view, given that the Tribunal chose this treatment, it was not justified in confirming its jurisdiction and therefore its decision is invalid.

86. Ms Saez García asserts that the large number of jurisdictional questions raised by the Fund in its request for an advisory opinion suggest that it is indeed going beyond the rulings on jurisdiction made by the Tribunal, to question either the manner in which the Tribunal has exercised its jurisdiction or the breadth of its considerations in hearing the complaint.
87. The Court reiterates that the decision impugned before the Administrative Tribunal was the final decision of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008, in which he rejected the recommendations of the JAB to reinstate Ms Saez García. The JAB unanimously found that the President of IFAD clearly stipulated that her appointment was made in accordance with the general provisions of the PPM and that the decision was made in consultation with IFAD’s Management, specifically the President who is ultimately responsible for the GM. Moreover, the fact that the President of IFAD stated, in his memorandum rejecting the JAB recommendations, that the non-renewal of her contract “was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund” was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Court is of the view that the Tribunal was competent to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

88. The Court cannot agree with the arguments of the Fund that the Tribunal did not have competence to examine the decision of the Global Mechanism’s regional desk for Latin America and the Caribbean, which she had hitherto occupied in her complaint to the Tribunal and alleged that it was tainted with abuse of authority and that he was not entitled to determine the Tribunal. The Fund objected to the Tribunal’s competence to examine these allegations since they would involve the examination of the decision-making process of the COP in reaching its key decisions, as those matters are outside the scope of Article II, paragraph 5, of its Statute. The Court notes in this context that the Tribunal first examined the MOU, as a preliminary question regarding its jurisdiction in the context of the arguments of the parties, and in connection with the extent to which it could lawfully review the decision of the Managing Director of the Global Mechanism. In this context, the Tribunal was entitled to determine the jurisdictional issues and the extent to which it could lawfully review the decision of the Managing Director of the Global Mechanism, in his capacity as an IFAD official, acting on behalf of IFAD at the time the decision was taken not to renew the fixed-term contract of Ms Saez García.

89. Secondly, the allegations by Ms Saez García that Ms. López Macías, in his capacity as an IFAD official, mistakenly granted her appointment in the professional category and above are entitled. In addition, the Managing Director was required to participate in the appeal of the Fund’s medical insurance schemes. Moreover, the report of the JAB was considered by the Managing Director, as the respondents, to be of little relevance to the allegations brought by Ms Saez García. The Court notes that this does not mean that the decision of the Managing Director of the Global Mechanism, which was signed “in accordance with the General Provisions” of the PPM, was not entitled to determine the Tribunal. The Fund objected to the Tribunal’s competence to examine these allegations since they would involve the examination of the COP in reaching its key decisions, as these matters are outside the scope of Article II, paragraph 5, of its Statute. The Court notes in this context that the Tribunal first examined the MOU, as a preliminary question regarding its jurisdiction in the context of the arguments of the parties, and in connection with the extent to which it could lawfully review the decision of the Managing Director of the Global Mechanism. Consequently, the Court is of the view that the Tribunal was competent to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

90. Thirdly, the allegations by Ms Saez García that the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008, in which he rejected the recommendations of the JAB to reinstate Ms Saez García. The JAB unanimously found that the President of IFAD clearly stipulated that her appointment was made in accordance with the general provisions of the PPM and that the decision was made in consultation with IFAD’s Management, specifically the President who is ultimately responsible for the GM. Moreover, the fact that the President of IFAD stated, in his memorandum rejecting the JAB recommendations, that the non-renewal of her contract “was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund” was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Court is of the view that the Tribunal was competent to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

91. The Court, therefore, concludes that Ms Saez García’s complaint to the ILOAT, following the decision of the Fund not to renew her contract, falls within the scope of allegations of non-observance of the “terms of appointment” of Ms Saez García. In this context, the Court emphasizes that the non-renewal of Ms Saez García’s contract, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal, is further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund.

92. With regard to the Fund’s contention that the Tribunal lacked jurisdiction to examine the decision of the Fund not to renew Ms Saez García’s contract, the Court notes in this context that the Tribunal first examined the MOU, as a preliminary question regarding its jurisdiction in the context of the arguments of the parties, and in connection with the extent to which it could lawfully review the decision of the Managing Director of the Global Mechanism. Consequently, the Court is of the view that the Tribunal was competent to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD. The Court reiterates that the decision impugned before the Administrative Tribunal was the final decision of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008, in which he rejected the recommendations of the JAB to reinstate Ms Saez García. The JAB unanimously found that the President of IFAD clearly stipulated that her appointment was made in accordance with the general provisions of the PPM and that the decision was made in consultation with IFAD’s Management, specifically the President who is ultimately responsible for the GM. Moreover, the fact that the President of IFAD stated, in his memorandum rejecting the JAB recommendations, that the non-renewal of her contract “was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund” was further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund, as prescribed by Article II, paragraph 5, of the Statute of the Tribunal. Consequently, the Court is of the view that the Tribunal was competent to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.
B. Response to Questions II to VIII

96. The Court, having decided to give an affirmative answer to the first question, and having concluded that the Tribunal was justified in confirming its jurisdiction, is of the view that its answer to the first question put to it by the Fund covers also all the issues on jurisdiction raised by the Fund in Questions II to VIII of its request for an advisory opinion from the Court. In addition to the issues of jurisdiction, two sets of other issues are raised in these questions. First, Questions II to VIII are framed in such a manner as to seek the opinion of the Court on the reasoning underlying the conclusions reached by the Tribunal either on its jurisdiction or on the merits of the complaint brought before it. Secondly, they contain references to the possible existence of a fundamental fault in the procedure followed by the Tribunal. The Court will briefly address these two sets of issues.

97. The Court reiterates that, under the terms of Article XII of the Annex to the Statute of the ILOAT, a request for an advisory opinion seeking review of a judgment of the Tribunal is limited to cases where a decision of the Tribunal confirming its jurisdiction is challenged or where a fundamental fault in the procedure is alleged (see paragraph 29 above). The Court has already addressed the IFAD Executive Board’s challenge to the decision of the Tribunal confirming its jurisdiction. Not having a power of review with regard to the reasoning of the Tribunal or the merits of its judgments under Article XII of the Annex to the Statute of the ILOAT, the Court cannot give its opinion on those matters. As the Court observed in its 1956 Advisory Opinion, “the reasons given by the Tribunal for its decision on the merits, after it confirmed its jurisdiction, cannot properly form the basis of a challenge to the jurisdiction of the Tribunal” (I.C.J. Reports 1956, p. 99).

98. Regarding the “fundamental fault in the procedure followed”, the Court recalls that this concept was explained by the Court in its Advisory Opinion of 1973 on the Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal as set out in paragraphs 30 to 31 above. Questions II to VIII of IFAD do not identify any fundamental fault in the procedure which may have been committed by the Tribunal in its consideration of the complaint against the Fund. Neither the information made available to the Court by the Fund, nor an analysis of the judgment of the Tribunal, demonstrate a fundamental fault in its procedure. Thus, in the view of the Court, these questions constitute either a repetition of the question on jurisdiction, which the Court has already answered, or have an object which concerns wider issues falling outside the scope of Article XII of the Annex to the Statute of the ILOAT which was invoked by the Fund as the basis of its request for an advisory opinion.

C. Response to Question IX

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

* *

100. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) Unanimously,

Decides to comply with the request for an advisory opinion;

(3) Is of the opinion:

(a) with regard to Question I,

Unanimously,

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

(b) with regard to Questions II to VIII,

Unanimously,

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

(c) with regard to Question IX,

Unanimously,

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

Behrami and Behrami v. France and
Saramati v. France, Germany and Norway

Nos. 71412/01 and 78166/01, 2 May 2007
COUNCIL OF EUROPE

COUROUPEÉNNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71412/01
by Agim BEHRAMI and Bekir BEHRAMI
against France
and
Application no. 78166/01
by Ruzhdi SARAMATI
against France, Germany and Norway

The European Court of Human Rights, sitting on 2 May 2007 as a Grand
Chamber composed of:

Mr. C.L. ROZAKIS, President,
Mr. J.-P. COSTA,
Sir Nicolas BRATZA,
Mr. B.M. ZUPANČIČ,
Mr. P. LORENZEN,
Mr. I. CABRAL BARRETO,
Mr. M. PELLONPÄÄ,
Mr. A.B. BAKA,
Mr. K. TRAJA,
Mrs. S. BOTOUCHAROVA,
Mr. M. UGREKHELIDZE,
Mrs. A. MULARONI,
Mrs. E. FURA-SANDSTRÖM,
Mrs. A. GYULUMYAN,
Mr. E. MYJER,
Ms. D. JOČIÈNE,
Mr. D. POPOVIĆ, judges,
and Mr. M. O'BOYLE, Deputy Registrar,

Having regard to the above applications lodged on 28 September 2000
and 28 September 2001, respectively

1 The abbreviations used are explained in the text but also listed in alphabetical order in the
Appendix to this decision.

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

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

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

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

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

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

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

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

THE FACTS

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

The French Government were represented by their Agents, Mr R.
Abraham, Mr J.-L. Florent and, subsequently, Ms Edwige Belliard, assisted
I. RELEVANT BACKGROUND TO THE CASES

The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council ("NAC") of the North Atlantic Treaty Organisation ("NATO"), NATO announced air strikes on the territory of the former Federal Republic of Yugoslavia ("FRY") not complying with the demands of the international community. Negotiations took place between the parties to the conflict in February and March 1999. The resulting proposal was signed by the FRY and the Kosovo Albanian delegation. The北约 announced air strikes on the territory of the Federal Republic of Yugoslavia on 24 March 1999. The FRY and the Kosovo Albanian delegation agreed to withdraw from Kosovo on 9 June 1999. The NATO and FRY agreed to withdraw from Kosovo on 23 March 1999 and ended the conflict. On 9 June 1999, FRY and Kosovo Albanian delegation signed a "Militär Technische Abkommen" (MTA) by which they agreed on FRG withdrawal and the presence of an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution"").

II. THE CIRCUMSTANCES OF THE BEHRAMI CASE

5. On 11 March 2000, eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. Around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombing by NATO in 1999. On 4 April 2000, the boys stumbled upon a CBU in the air and ran away. On 22 May 1999, the children were playing with the CBU units, and several of the boys were injured. Bekim Behrami was subsequently hospitalized in a hospital in Switzerland. It is not disputed that Bekim Behrami was disfigured and is now blind.

6. UNMIK police investigated. They took witness statements from, inter alia, the boys involved in the incident and completed an initial report. Further investigation reports dated 11, 12 and 13 March 2000 indicated, inter alia, that UNMIK police could not access the site without KFOR agreement; that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months; and, that UNMIK police were not aware that KFOR officers had been killed. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".

7. By letter dated 22 May 2000, the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU had been an accident, that criminal charges would not be pursued, and that the matter would be referred to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop Representative in Kosovo ("KRO"), who did not respond. The KCO then submitted the case to the KCO, which concluded that the CBUs had been detonated by KFOR, and that the incident had been an accident.
III. THE CIRCUMSTANCES OF THE SARAMATI CASE

8. On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered his pre-trial detention and an investigation into those and additional charges. On 23 May 2001 a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001 the Supreme Court allowed Mr Saramati’s appeal and he was released.

9. In early July 2001 UNMIK police informed him by telephone that he had to report to the police station to collect his money and belongings. The station was located in Prizren in the sector assigned to NOR Southeast, of which the lead nation was Germany. On 13 July 2001 he so reported and was arrested by UNMIK police officers by order of the Commander of KFOR (“COMKFOR”), who was a Norwegian officer at the time.

10. On 14 July 2001 detention was extended by COMKFOR for 30 days.

11. On 26 July 2001, and in response to a letter from Mr Saramati’s representatives taking issue with the legality of his detention, KFOR Legal Adviser advised that KFOR had the authority to detain under the UNSC Resolution 1244 as it was necessary “to maintain a safe and secure environment” and to protect KFOR troops. KFOR had information concerning Mr Saramati’s alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia and was satisfied that Mr Saramati represented a threat to the security of KFOR and to those residing in Kosovo.

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

13. On 11 August 2001 Mr Saramati’s detention was again extended by order of COMKFOR. On 6 September 2001 his case was transferred to the District Court for trial, the indictment retaining charges of, inter alia, attempted murder and the illegal possession of weapons and explosives. By letter dated 20 September 2001, the decision of COMKFOR to prolong his detention was communicated to his representatives.

14. During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati’s representatives requested his release and the trial court responded that, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

15. On 3 October 2001 a French General was appointed to the position of COMKFOR.

16. On 23 January 2002 Mr Saramati was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo in conjunction with Article 19 of the Criminal Code of the FRY. He was acquitted on certain charges and certain charges were either rejected or dropped. Mr Saramati was transferred by KFOR to the UNMIK detention facilities in Pristina.

17. On 9 October 2002 the Supreme Court of Kosovo quashed Mr Saramati’s conviction and his case was sent for re-trial. His release from detention was ordered. A re-trial has yet to be fixed.

IV. RELEVANT LAW AND PRACTICE

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

18. The prohibition on the unilateral use of force by States, together with its counterpart principle of collective security, mark the dividing line between the classic concept of international law, characterised by the right to have recourse to war (ius ad bellum) as an indivisible part of State sovereignty, and modern international law which recognises the prohibition on the use of force as a fundamental legal norm (ius contra bellum).

19. More particularly, the ius contra bellum era of public international law is accepted to have begun (at the latest, having regard, inter alia, to the Kellog-Briand Pact signed in 1928) with the end of the First World War and with the constitution of the League of Nations. The aim of this organisation of universal vocation was maintaining peace through an obligation not to resort to war (First recital and Article 11 of the Covenant of the League of Nations) as well as through universal systems of peaceful settlement of disputes (Articles 12-15 of the Covenant) and of collective security (Article 16 of the Covenant). It is argued by commentators that, by that stage, customary international law prohibited unilateral recourse to the use of force unless in self-defence or as a collective security measure (for example, R. Kolb, “Ius Contra Bellum – Le Droit international relatif au maintien de la paix”, Helbing and Lichtenhahn, Bruylant, 2003, pp. 60-68).

20. The UN succeeded the League of Nations in 1946. The primary objective of the UN was to maintain international peace and security (First recital and Article 1 § 1 of the Charter) and this was to be achieved through two complimentary actions. The first, often described as “positive peace” (the Preamble to the Charter as well as Article 2 § 3, Chapter VI, Chapter IX-X and certain measures under Article 41 of Chapter VII), aimed at the suppression of the causes of dispute and the building of sustainable peace.
The second type of action, “negative peace”, was founded on the Preamble, Article 2 § 4 and most of the Chapter VII measures and amounted to the prohibition of the unilateral use of force (Article 2 § 4) in favour of collective security implemented by a central UN organ (the UNSC) with the monopoly on the right to use force in conflicts identified as threatening peace. Two matters were essential to this peace and security mechanism: its “collective” nature (States had to act together against an aggressor identified by the UNSC) as well as its “universality” (competing alliances were considered to undermine the mechanism so that coercive action by regional organisations was subjected to the universal system by Article 53 of the Charter).

B. The Charter of the UN, 1945

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

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

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

Article 1

The Purposes of the United Nations are:

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

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

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

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

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

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

Article 25 provides:

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

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

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

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

Articles 41 and 42 read as follows:

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

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

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

25. Chapter VII continues:

“Article 48

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

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

Article 49

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

C. Article 103 of the Charter

26. This Article reads as follows:

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

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

D. The International Law Commission (“ILC”)

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

1. Draft Articles on the Responsibility of International Organisations

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

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

2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
What has been held with regard to joint operations ... should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the [UN] and the [TCN]. While it is understandable that, for the sake of efficiency of military operations, the [UN] insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also be based on a factual criterion.

30. Article 5 of the draft Articles adopted in 2004 during the 56th session of the ILC is entitled "Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation" and reads as follows (see the Report of the ILC, General Assembly Official Records, 56th session, Supplement No. 10 (A/56/10)):

"When an organ of a State is placed at the disposal of an international organisation, the organ may be fully seconded to that organisation. In this case the organ's conduct would clearly be attributable only to the receiving organization. In certain cases, the organ may be only partially seconded, in which case the organ's conduct would be shared by the two States, the international organisation and the State from which the organ was seconded. This situation may arise in the context of peacekeeping operations. In this situation, the organ's conduct may be attributed to the receiving organisation or the contributing State...."

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

"When an organ of a State is placed at the disposal of an international organisation, the conduct of the organ placed at the disposal of the international organisation is in principle attributable to the organisation, unless the organ is..."

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

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

33. As regards UN peacekeeping forces (namely, those directly commanded by the UN), the conduct of UN peacekeeping forces (namely, those directly commanded by the UN) is in principle attributable to the UN, in accordance with the position taken by the ILC in its Report quoted the UN's legal counsel as stating that the acts of such subsidiary organs were in principle attributable to the organisation and, in the event of a breach of international obligations, the liability of the organisation should be incurred. This according to the Report, summed up the UN practice in respect of several UN peacekeeping missions referenced in the Report.

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

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

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

36. Following the agreement by the FRY that its troops would withdraw from Kosovo and the consequent suspension of air operations against the FRY, the MTA was signed between "Kfor" and the Governments of the FRY and the Republic of Serbia on 9 June 1999 which provided for the

E. The Vienna Convention on the Law of Treaties

F. The MTA of 9 June 1999
phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled “General Obligations”) noted that it was an agreement for the deployment in Kosovo:

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

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

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

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

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

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

G. The UNSC Resolution 1244 of 10 June 1999

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

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

Recalling its [previous relevant] resolutions ... 

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

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

...

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

...

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

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

...

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

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

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

...

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

...

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

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

(g) Conducting border monitoring duties as required;

...

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

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

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

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

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

...  

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

(j) Protecting and promoting human rights;

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

...  

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

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

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

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

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

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

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

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

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

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

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

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

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

KFOR personnel were to be immune from jurisdiction before the courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo and such personnel were to be “subject to the exclusive jurisdiction of their respective sending States” (section 2 of the Regulation). UNMIK personnel were also to be immune from legal process in respect of words spoken and all acts performed by them in their official capacity (section 3). The SG could waive the immunity of UNMIK personnel and requests to waive jurisdiction over KFOR personnel were to be referred to the relevant national commander (section 6).
J. NATO/KFOR (unclassified) HQ KFOR Main Standing Operating Procedures (“SOP”), March 2003

47. Referring to UNSC Resolution 1244 and UNMIK Regulation No. 2000/47, the SOP was intended as a guide. The KCO would adjudicate claims relating to the overall administration of military operations in Kosovo by KFOR in accordance with Annex A to the SOP. It would also determine whether the matter was against a TCN, in which case the claim would be forwarded to that TCN.

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

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


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

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

L. Detention and De-mining in Kosovo

1. Detention

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

2. De-mining

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

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

54. On 24 August 1999 the Concept Plan for UNMIK Mine Action Programme (“MAP”) was published in a document entitled “UNMIK MACC, Office of the Deputy SRSG (Humanitarian Affairs)”. It confirmed that the UN, through UNMAS, the SRSG and the Deputy SRSG of Pillar I of UNMIK retained “overall responsibility” for the MAP in terms of providing policy guidance, identifying needs and priorities, coordinating with UN and non-UN partners as well as member states, and defining the overall operational plan and structure. The MAP was an “integral component of UNMIK”: As to the role of UNMIK MACC, it was
underlined that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators including UN agencies, KFOR contingents, NGOs and commercial companies. These operators had to be accredited, supported and coordinated in order to ensure they worked in a coherent and integrated manner. Accordingly, a key factor was the level of commitment achieved by the UNMIK MACC which was responsible for the regulation of UN agencies in Kosovo.

55. Accordingly, on 24 August 1999 the Deputy SRSG, KFOR Directive on CBM Marking (KFOR/OPS/FRAGO 300) was adopted, providing for the signature of the Concept Plan, and confirming that "not only are the requirements of the Convention to be respected" but also that "any decision to clear mines and unexploded ordnance in Kosovo will be made in accordance with the Concept Plan, and that the execution of the Plan will be supervised and coordinated by the UNMIK Regional Office of Kosovo and the UNMACC.

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

57. KFOR's report for August 1999 (submitted to the UNSC by the SG's letter of 15 September 1999) confirmed that KFOR worked closely with UNMACC which had been set up jointly by KFOR and the UN. KFOR's report for August 1999, submitted to the UNSC by the SG, noted that KFOR had been working closely with UNMACC, which had been set up jointly by the UN and KFOR, and that the UN had been working closely with KFOR on the clearance of mines and unexploded ordnance in Kosovo.

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

"The intent is to mark all known areas by 10 October 1999."

59. The report of KFOR for August 1999 (submitted to the UNSC by the SG's letter of 15 September 1999) confirmed that KFOR had been working closely with UNMACC which had been set up jointly by the UN and KFOR, and that the UN had been working closely with KFOR on the clearance of mines and unexploded ordnance in Kosovo.

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

61. Agim Behrami complained under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter's death and Bekir Behrami complained about his serious injury. They alleged that KFOR was responsible for the death of Gadaf Behrami and for the serious injury sustained by Bekir Behrami, and that KFOR had not conducted an investigation into the circumstances surrounding the deaths and injuries. They also alleged that KFOR had failed to take all necessary measures to prevent the deaths and serious injury, and that KFOR had failed to report the deaths and injuries to the appropriate authorities.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He alleged that KFOR had detained him without any legal basis and that his detention had been arbitrary.

63. The Grand Chamber found that KFOR had not provided adequate reasons for detaining Mr Saramati and that his detention had been arbitrary. The Grand Chamber also found that KFOR had failed to take all necessary measures to prevent the deaths and serious injury of Mr Behrami and his son and that KFOR had failed to report the deaths and injuries to the appropriate authorities. The Grand Chamber concluded that KFOR was responsible for the deaths and serious injury and that KFOR had violated Articles 2 and 5 of the Convention.
I. WITHDRAWAL OF THE SARAMATI CASE AGAINST GERMANY

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

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

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

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

II. THE CASES AGAINST FRANCE AND NORWAY

A. The issue to be examined by the Court

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

67. The respondent and third party States disagreed.

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

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

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

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

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

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

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

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

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

**B. The applicants’ submissions**

73. The applicants maintained that KFOR (as opposed to the UN or UNMIK) was the relevant responsible organisation in both cases.
As to the link between KFOR and the UNSC, the applicants referred to the Attachment to the Agreement on Russian Participation (paragraph 45 above) which described that link as one of “consultation/interaction”.

As to the input of TCNs, the applicants noted that KFOR troops (including COMKFOR) were directly answerable to their national commanders and fell exclusively within the jurisdiction of their states. The case about the actions of British KFOR troops decided by the ECHR was distinguishable from the present case about the actions of French KFOR troops. The French contingent was placed at the disposal of KFOR which, from a security point of view, exercised effective control of the area of implementation. The UNMIK was under the overall control of the UNSC and, finally, by the UNSC, Decisions and acts were therefore taken in the name of the UN. Resolution 1244, which provided for the legal basis for the deployment of KFOR forces, was the basis for the capture of the person accused of the crimes.

78. Fourthly, as regards Mr. Saramati’s case, final decisions on detention lay with COMKFOR which was not accountable to NATO for those decisions. Since the ordering of detention was distinguishable from the case of Hess v. the United Kingdom (28 May 1975, Decisions and Reports no. 2, p. 72).

79. Fifthly, and alternatively, KFOR did not have a separate legal personality and could not be a subject of international law or bear international responsibility for the acts or omissions of its personnel.

80. Even if the Court were to consider that the relevant States were executing an international (UN/NATO) mandate, they would not be absolved from their Convention responsibility for two alternative reasons. First, the two alternative reasons related to the fact that KFOR was not the subject of the Convention.

81. Finally, and as to the respondent States’ arguments, their submissions on the Monetary Gold principle were fundamentally misconceived. In addition, it would be inconsistent with the object and purpose of the Convention to accept that States should be deterred from participating in peacekeeping missions by the recognition of this Court’s jurisdiction in the present cases.
Prevention of Torture, Inhuman and Degrading Treatment (“the CPT”) concluded agreements with KFOR and UNMIK in May 2006 as it did not consider that the jurisdiction of the so-called “Monotonic Gold” principle (judgment cited above).

They also explained the necessarily evolved nature of modern peacekeeping missions, developed in response to the so-called “Bosphorus” judgment, that the CPT had found that neither of the respondent States exercised sovereignty in Kosovo and none had handed over sovereign powers over Kosovo to an international organisation.

There were important sub-issues in the case including liability for involvement in a UN peacekeeping mission and the link between a regional instrument and international peacekeeping missions. In this context, the Court underlined the serious repercussions which the recognition of the CPT as a body of universal vocation could have in deterring TCN participation in such peacekeeping missions and undermining the coherence and effectiveness of such peacekeeping missions.

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

D. The submissions of the third parties

1. The Government of Denmark

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

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

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

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

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

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

2. The Government of Estonia

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

3. The German Government’s written submissions

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

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

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

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

107. Even if the respondent States were found to have "jurisdiction", the impugned act could not be imputed to those States and, in this respect, the actual command structure was clearly that of UNMIK/KFOR (cited at paragraph 67 above).

108. Finally, the difficulties to which post-conflict situations gave rise had to be recalled, notably the fact that UN peacekeeping forces acting within their mandate would be attributable to the UN.

109. The legal basis for the civil and military presence in Kosovo was the UNSC Resolution 1244. KFOR formed part, and acted in Kosovo under the direction of a multinational framework formed by the UN and NATO. Even assuming that KFOR (along with UNMIK) exercised effective control in Kosovo, that presence was under the control of the UN and/or NATO. Even if a State was a "lead nation" of a "unified command and control" (cited at paragraph 50 above), the Government did not consider the UNMIK/KFOR presence to be under its control or authority over the inhabitants or territory of Kosovo.
118. Accordingly, the effect of UNSC Resolution 1244 was that, at the relevant time, the UNSC exercised the powers of government in Kosovo through an international administration supported by an international security presence to which the respondent States and other non-Contracting States had provided troops. None of the respondent States were therefore in a position to secure the rights and freedoms defined in Article 1 of the Convention to any of the inhabitants of Kosovo. None were asserting responsibility for the conduct of official operations or otherwise exercising jurisdiction over war crimes against the civilian population of Kosovo.

119. As to de-mining in particular, paragraph 9(e) of UNSC Resolution 1244 (according responsibility for de-mining to KFOR but expressly leaving for determination by the two presences how that task would be carried out), paragraph 116 of UNSC Resolution 1244 (constituting the mandate of KFOR as the focal point and co-ordination mechanism for de-mining, co-ordinating and collaborating with all the entities involved) and paragraph 57 of the UNMACC Report of 17 June 1999 (UNMACC Report) were established as the mandate for de-mining in Kosovo (the “UNMACC Plan”, paragraph 54 above). To facilitate these functions, UNMACC was entrusted with the task of de-mining in Kosovo. Responsibility for de-mining was transferred to UNMACC in August 1999 (letter from the Deputy SG of the UNMACC to the UN, August 1999). UNMACC was responsible for de-mining in Kosovo.

120. The present case could be distinguished from the situation in the case of Al-Skeini v. Secretary of State for Defence ([2005] EWCA Civ 1609) where a contingent in an international operation had exclusive control of a place of detention. In addition, while the duty under Article 1 was indivisible (Banković and Others, at § 75), the respondent States had neither the power nor the responsibility to secure the rights and freedoms defined in Article 1 since the legal and practical impossibility of doing so. The present case involved fundamental questions about the relationship between the Convention and the international operations supported by the respondent States. The Court had previously emphasised the importance of the relationship between the Convention and the operations of the international organisations and the UN in Kosovo (see cases cited at paragraphs 68 and 69 above).
were international structures established, by and accountable to, the UNSC.

The applicants maintained that KFOR had the mandate to both detain and de-mine unarmored CBUs, and that UNMIK lacked the authority to detain CBUs. UNMIK was unaware of the location of the unarmored CBUs relevant to the present case, and therefore did not take action to de-mine.

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

E. The Court's assessment

121. The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had the mandate to detain (the Saramati case) and to de-mine (the Behrami case) since both KFOR and UNMIK are international structures established by, and accountable to, the UNSC.

122. In so doing, the Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Convention on the Law of Treaties (1969), or any other international instrument, but only to examine whether any such action or omission is attributable to the UN.

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

123. The respondent and third party States argued that it made no difference whether KFOR or UNMIK had the mandate to detain CBUs or de-mine. The applicants maintained that KFOR had the mandate to detain and de-mine because of the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124. Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution), and later UNMACC, it is evident that KFOR retained responsibility for detaining CBUs while UNMIK had responsibility for de-mining. The Court considers it evident that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRSG of Pillar I. The UN submissions to this Court confirm that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

125. The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, the CBUs were dropped by NATO or KFOR had failed to secure the site and provide information on the location of the CBUs, this would not change the fact that the impugned action or omission was not attributable to the UN.

126. The Court's decision was confirmed in the report of the UN Commissioner for Human Rights, and the reports of the UN fact-finding mission. The Court considers it evident that KFOR's security mandate included issuing detention orders, while UNMACC was unaware of the location of the unarmored CBUs relevant to the present case, and therefore did not take action to de-mine.
Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK’s mandate.

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

(a) The Chapter VII foundation for KFOR and UNMIK

128. As the first step in the application of Chapter VII, the UNSC Resolution 1244 referred expressly to Chapter VII and made the necessary identification of a “threat to international peace and security” within the meaning of Article 39 of the Charter (paragraph 23 above). The UNSC Resolution 1244, inter alia, recalled the UNSC’s “primary responsibility” for the “maintenance of international peace and security”. Being “determined to resolve the grave humanitarian situation in Kosovo” and to “provide for the safe and free return of all refugees and displaced persons to their homes”, it determined that “the situation in the region continues to constitute a threat to international peace and security” (Article 11). Having expressly found that it was acting under Chapter VII, it went on to set out the solutions needed to address the identified threat to peace and security.

129. The solution adopted by UNSC Resolution 1244 in this identified threat was the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK). In particular, that Resolution authorised “Member States and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution, with all necessary means to fully deploy its responsibilities in Kosovo” (Article 11, Point 4 of Annex 2). The SG was thereby delegating to the Security Council the power to establish an international security presence as well as its operational command. The SG also stated that the mandate of UNMIK would be carried out by a UN subsidiary organ, to be established by the SG, the mandate being to establish and oversee the development of provisional self-government.


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

132. While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security functions strictly necessary to achieve the Charter’s purposes. For the application of the Charter, the term “primary responsibility” must be interpreted in accordance with the relevant International Law for the maintenance of international peace and security, the Resolution being adopted on the basis of Article 41 under which the UNSC had primary responsibility for the “maintenance of international peace and security”.

133. Whether or not the FRY was a UN member state at the relevant time, the FRY had agreed in the MTA to become a member of the SFOR, and, as the Resolution was adopted the following day, on the MTA and to international forces being deployed until the Resolution was adopted.
Those limits strike a balance between the central security role of the UN Security Council (UNSC) and the practical implementation of its resolutions. In the first place, the absence of Article 43 agreements means that the UNSC relies on States (notably its permanent members) and groups of States to implement its resolutions. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command.

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

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

In the first place, and as noted above, Chapter VII allowed the Council to delegate to “Member States and relevant international organisations”. Secondly, the relevant power was a delegable power. "To派驻" exercise its overall authority and control (consistent, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the Secretary-General present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

While the text of Article 19 of UNSC Resolution 1244 required the Secretary-General to report to the UNSC on KFOR’s activities, the Court does not consider this factor alone sufficient to conclude that the UNSC did not retain ultimate authority and control.

135. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control, as to allow the SG to exercise its overall authority and control as to ensure the consistent and proper implementation of the resolutions. The SG was to report to the UNSC on KFOR’s activities and to ensure that the relevant provisions of the resolutions were observed. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or affecting, military operations. The Court does not see how the failure to conclude a SOFA agreement would undermine the effectiveness or unity of NATO’s operational command in these matters. The Court does not see how the failure to conclude a SOFA agreement would undermine the effectiveness or unity of NATO’s operational command in these matters.
between the UN and the host FRY could affect, as the applicants suggested, NATO's operational command. That COMKFOR was charged (the applicants at paragraph 78 above) exclusively with issuing detention orders was not however, to hold that such action was taken in compliance with an international legal obligation in a manner which could be considered as a jurisdiction from scrutiny. It was not a function of the Court to determine, even if the UN itself would accept that there was room for progress in cooperation and command structures, whether or not such progress was achieved within the framework of the UN Charter.

140. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. Whether it was a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate from the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also provided, UNMIK was a subsidiary organ of the UN, under the authority of the SG of the UN (Article 20 of the UN Charter). In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action had been “attributed” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

141. In such circumstances, the Court notes that the SG of the UN, the UNSC, the Special Committee on Peacekeeping Operations (SC/COMOP) and the Panel of Experts on the Implementation of the Resolutions of the Special Committee on Peacekeeping Operations (S/2001/108), were exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle “attributable” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.

3. Is the Court competent ratione personae?

142. In contrast to KFOR, UNMIK was a subsidiary organ of the UN. It was not a subsidiary organ of the SG or of the UNSC, whether it had a legal personality separate from the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also provided, UNMIK was a subsidiary organ of the UN, under the authority of the SG of the UN (Article 20 of the UN Charter). In such circumstances, the Court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action had been “attributed” to the UN within the meaning of the word outlined at paragraphs 29 and 121 above.
represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force (see paragraphs 18-20 above).

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

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

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

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

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

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

4. Remaining admissibility issues

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

For these reasons, the Court

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

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

Christos ROZAKIS
President

Michael O'BOYLE
Deputy Registrar
APPENDIX

List of Abbreviations

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