REGIONAL COURSES IN INTERNATIONAL LAW

Bangkok, Thailand
12 – 30 November 2012

STUDY MATERIALS
PART III

Codification Division of the United Nations Office of Legal Affairs

STUDY MATERIALS
PART III

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Bangkok, Thailand
15 November 2012

LAW OF TREATIES

PROFESSOR PIERRE BODEAU-LIVINEC

Codification Division of the United Nations Office of Legal Affairs

LAW OF TREATIES
PROFESSOR PIERRE BODEAU-LIVINEC

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PROFESSOR PIERRE BODEAU-LIVINEC

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COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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CONSÉQUENCES JURIDIQUES POUR LES ÉTATS DE LA PRÉSENCE CONTINUE DE L'AFRIQUE DU SUD EN NAMIBIE (SUD-OUEST AFRICAIN) NONOBSTANT LA RÉSOLUTION 276 (1970) DU CONSEIL DE SÉCURITÉ

AVIS CONSULTATIF DU 21 JUIN 1971

Official citation:

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16.

Mode officiel de citation:

Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971, p. 16.

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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

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

JUDGMENT OF 25 SEPTEMBER 1997

1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

(HONGRIE/SLOVAQUIE)

ARRÊT DU 25 SEPTEMBRE 1997

Official citation:
Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7

Mode officiel de citation:
Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997, p. 7

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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:

"*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 *(c)*, 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 Gabčíkovo-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

22

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

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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 rectification, 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 Bakasi 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 Akwayafe 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 Akwayafe 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 Akwayafe, at the intersection of the thalweg of that river and a "straight line joining Bakassi Point and King Point". From the mouth of the Akwayafe, Cameroon invokes Article XXI of the Agreement, which provides that "the boundary shall follow the centre of the navigable channel of the Akwayafe 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 co-ordinates 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 Yaoundé 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 Yaoundé 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 "manifest", 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 Akwayafe 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 delineation of the maritime boundary between the two countries from Point 12 to Point G on the Admiralty Chart No. 3433 annexed to this Declaration". 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 to Prosecute or Extradite (Belgium *v.* Senegal) Judgment of 20 July 2012 (excerpt)

20 JUILLET 2012

ARRÊT

QUESTIONS CONCERNANT L'OBLIGATION DE POURSUIVRE OU D'EXTRADER

(BELGIQUE c. SÉNÉGAL)

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM *v.* SENEGAL)

20 JULY 2012

JUDGMENT

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 dedere aut judicare* 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 Diouf* 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 it 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 judicare"* 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 that 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 acceding 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 judicare* 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.

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of *O.R., M.M. and M.S.* v. *Argentina* (Communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (UN doc. A/45/44, Ann. V, p. 112)) that

"'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 (*Guengueng 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 referral 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 fulfilment 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 that, 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

Bangkok, Thailand
15 – 16 November 2012

INTERNATIONAL ORGANIZATIONS

PROFESSOR PIERRE BODEAU-LIVINEC

Codification Division of the United Nations Office of Legal Affairs

INTERNATIONAL ORGANIZATIONS
PROFESSOR PIERRE BODEAU-LIVINEC

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PROFESSOR PIERRE BODEAU-LIVINEC

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Application of Palestine for admission to membership in the United Nations, A/66/371-S/2011/592, 23 September 2011

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Admission of new Members to the United Nations

Security Council
Sixty-sixth year

Application of Palestine for admission to membership in the United Nations

Note by the Secretary-General

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

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Annex I

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

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

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

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

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

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

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

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

Enclosure

Declaration

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

Annex II

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

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

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

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

The Palestinian leadership reaffirms the historic commitment of the Palestine Liberation Organization of 9 September 1993. Further, the Palestinian leadership stands committed to resume negotiations on all final status issues — Jerusalem, the Palestine 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

of the Security Council and rule 134 of the rules of procedure of the General Assembly. I respectfully request that this letter be conveyed to the Security Council and the General Assembly without delay.

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

Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012

Situation in Palestine

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

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

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

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

5. The issue that arises, therefore, is who defines what is a "State" for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by "all States", and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a "State", it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a "State".[3] Thus, competence for determining the term "State" within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.

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

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

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

EMBARGOED UNTIL DELIVERY 3 April 2012

[1] The declaration can be accessed at: http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf

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

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

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

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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

AVIS CONSULTATIF DU 3 MARS 1950

1950

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

ADVISORY OPINION OF MARCH 3rd, 1950

Le présent avis doit être cité comme suit :

« *Compétence de l'Assemblée pour l'admission aux Nations Unies, Avis consultatif : C. I. J. Recueil 1950, p. 4.* »

This Opinion should be cited as follows :

"*Competence of Assembly regarding admission to the United Nations, Advisory Opinion : I.C.J. Reports 1950, p. 4.*"

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INTERNATIONAL COURT OF JUSTICE

1950
March 3rd
General List:
No. 9

YEAR 1950

March 3rd, 1950

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

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

ADVISORY OPINION

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

THE COURT,

composed as above,

gives the following Advisory Opinion :

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

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

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

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

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

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

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

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

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

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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 96 of the Charter and Article 65 of the Statute, it may give an Opinion on any legal question and that there is no provision which prohibits it from exercising, in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function falling within the normal exercise of its judicial powers (I.C.J. Reports 1947-1948, p. 61).

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

[1] See p. 35.

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

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

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

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

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

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

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

Article 4, paragraph 2, is as follows :

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

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

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

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

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

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

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

The General Assembly and the Security Council are both principal organs of the United Nations. The Charter does not place the Security Council in a subordinate position. Article 24 confers upon it "primary responsibility for the maintenance of international

peace and security", and the Charter grants it for this purpose certain powers of decision. Under Articles 4, 5, and 6, the Security Council co-operates with the General Assembly in matters of admission to membership, of suspension from the exercise of the rights and privileges of membership, and of expulsion from the Organization. It has power, without the concurrence of the General Assembly, to reinstate the Member which was the object of the suspension, in its rights and privileges.

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

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

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

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

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

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

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

For these reasons,

THE COURT,

by twelve votes to two,

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

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

(*Signed*) BASDEVANT,
President.

(*Signed*) E. HAMBRO,
Registrar.

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

(*Initialled*) J. B.

(*Initialled*) E. H.

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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JUGEMENT N° 2867 DU TRIBUNAL ADMINISTRATIF DE L'ORGANISATION INTERNATIONALE DU TRAVAIL SUR REQUÊTE CONTRE LE FONDS INTERNATIONAL DE DÉVELOPPEMENT AGRICOLE

1ER FEVRIER 2012

AVIS CONSULTATIF

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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

2012
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No. 146

1 February 2012

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

Jurisdiction of the Court to give advisory opinion requested.

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

Scope of jurisdiction of the Court.

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

*

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

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

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

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

Reasons to decline to give advisory opinion not sufficiently compelling.

*

Merits.

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

Response to Question I.

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

Jurisdiction ratione personae *of ILOAT — Terms of Ms Saez García's letters of appointment and renewals of contract — The Court finds that employment relationship was established between Ms Saez García and 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, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Registrar* COUVREUR.

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

THE COURT,

composed as above,

gives the following Advisory Opinion:

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

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

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

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

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

2. The opinion given by the Court shall be binding.'[1],

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

[1] 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 García, 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 García. 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 García. 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 García.

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 García 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 García. 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 García.

9. In a letter dated 24 March 2011 addressed to the Registrar, the counsel for Ms Saez García 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. 3003 of the ILOAT, delivered on 6 July 2011, whereby the Tribunal dismissed IFAD's application for suspension of the execution of Judgment No. 2867 pending the delivery of the advisory opinion of the Court.

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

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

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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]uthorize[d] 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

its hosting of the Global Mechanism and the question of whether it employed Ms Saez García do present "legal questions" which "arise within the scope of the Fund's activities". The authorization given to IFAD by Article XIII, paragraph 2, of the Relationship Agreement excludes "questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies". That exclusion, which is included in all authorizations given by the General Assembly to specialized agencies, reflects the co-ordinating role of the Economic and Social Council under Chapter X of the Charter. That role was expressly mentioned by the General Assembly in the authorization it gave to the Council to request advisory opinions (resolution 89 (I) of 11 December 1946). The exclusion does not prevent the Court from considering the relationships between the Fund and the Global Mechanism or the COP, which are not specialized agencies, so far as these relationships are raised by the questions put to the Court by IFAD.

27. Accordingly, the Court concludes that, in terms of the relevant provisions of the Charter, the Statute of the Court and the authorization given under the Relationship Agreement, the Fund has the power to submit for an advisory opinion the question of the validity of the decision given by the ILOAT in its Judgment No. 2867 and that the Court has jurisdiction to consider the request for an advisory opinion. The scope of that jurisdiction is however subject to the effect in the present case of Article XII of the Annex to the Statute of the ILOAT, a matter to which the Court now turns.

* *

II. Scope of the Court's jurisdiction

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 the Statute of the ILOAT and Article XII, paragraph 1, of its Annex, respectively, the ILO and international organizations having made the declaration recognizing the jurisdiction of the ILOAT may nonetheless challenge the ILOAT judgment within the terms of these provisions. Under Article XII, paragraph 2, of the Statute of the ILOAT and of its Annex, the opinion of this Court given in terms of those provisions is "binding". As the Court said in the 1956 Advisory Opinion, that effect goes beyond the scope attributed by the Charter and the Statute of the Court to an advisory opinion. It does not affect the way in which the Court functions; that continues to be determined by its Statute and Rules (*I.C.J. Reports 1956*, p. 84; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 76-77, paras. 24-25).

29. The power of the Court to review a judgment of the ILOAT by reference to Article XII of the Annex to the Statute of the ILOAT at the request of the relevant specialized agency is limited to two grounds: that the Tribunal wrongly confirmed its jurisdiction or the decision is vitiated by a fundamental fault in the procedure followed. In the 1956 Advisory Opinion, the Court emphasized the limits of the first of these grounds:

> "The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal. Any mistakes which it may make with regard to its jurisdiction are capable of being corrected by the Court on a Request for an Advisory Opinion emanating from the Executive Board. Errors of fact or of law on the part of the Administrative Tribunal in its Judgments on the merits cannot give rise to that procedure. The only provision which refers to its decisions on the merits is Article VI of the Statute of the Tribunal which provides that its judgments shall be 'final and without appeal'." (*I.C.J. Reports 1956*, p. 87.)

The review, the Court said later in the same Opinion, is not in the nature of an appeal on the merits of the judgment; the challenge cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision (*ibid.*, pp. 98-99).

30. The other ground for challenge — a fundamental fault in the procedure followed — concerns the procedure and not the substance of the judgment. When the Court was asked to review a judgment of the United Nations Administrative Tribunal (hereinafter the "UNAT") in 1973, where the grounds for review included "a fundamental error in procedure which ha[d] occasioned a failure of justice", it stated that the essence of the concept,

> "in the cases before the Administrative Tribunal, may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes 'a failure of justice' when it is of such a kind as to violate the official's right to a fair hearing . . . and in that sense to deprive him of justice. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered by the words of Article 11. But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 209, para. 92.)

31. The Court observes at this stage that the procedural grounds in the two Statutes are stated differently. The ILOAT provision speaks of a decision "vitiated by a fundamental fault in the procedure followed" by the Tribunal while that in the UNAT Statute required a finding of "a fundamental error in procedure which has occasioned a failure of justice". That difference in wording, however, does not "alter the scope of this ground of challenge" (*ibid.*, p. 209, para. 91). The Court returns to this ground which is invoked in Questions II-VIII later in this Opinion (see paragraph 98 below).

32. Having determined that it has jurisdiction to answer the present request for an advisory opinion and indicated in a preliminary way the limits on the scope of its power of review in terms of Article XII of the Annex to the Statute of the ILOAT, the Court now considers whether in exercise of its discretion there is reason to refuse to answer that request.

* *

III. The Court's Discretion

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

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

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

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

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

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

38. After considering inequality before the Court, it concluded that not to respond to the request for an advisory opinion "would imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials" (*ibid*., p. 86). The Court, addressing this matter 50 years later, has two observations to make, one particular, about the use actually made of the review processes in respect of the two Tribunals — that of the United Nations and that of the ILO — and one general, about the development of the concept of equality before courts and tribunals over that period. On the review process, the critical element for the judicial protection of officials was the creation of the right of officials to challenge decisions taken against them by their employer before an independent judicial body which follows fair procedures. Next, reviews have been sought in only a handful of cases; and when the General Assembly decided in 1995 to remove the provision for review of UNAT decisions by this Court, it stated that the procedure that had existed since 1955 had "not proved to be a constructive or useful element in the

adjudication of staff disputes within the Organization" (resolution 50/54 of 11 December 1995, preamble). The Court also notes that between 1995 and 2009 the United Nations system contained no provision at all for review of, or appeal against, the judgments of the UNAT.

39. To turn to the general question of the concept of equality, the development of the principle of equality of access to courts and tribunals since 1946, when the review procedure was established, may be seen in the significant differences between the two General Comments by the Human Rights Committee on Article 14, paragraph 1, of the International Covenant on Civil and Political Rights of 1966. That provision requires that "[a]ll persons shall be equal before the courts and tribunals". The first Comment, adopted in 1984, just seven years after the Covenant came into force, did no more than repeat the terms of the provision and call on States to report more fully on steps taken to ensure equality before the courts, including equal access to the courts (*Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice)*, paras. 2-3). The later Comment, one adopted in 2007 on the basis of 30 years of experience in the application of the above-mentioned Article 14, gives detailed attention to equality before domestic courts and tribunals. According to the Committee, that right to equality guarantees equal access and equality of arms. While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds (*Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial*, paras. 8, 9, 12 and 13). In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal's decisions which favours the employer to the disadvantage of the staff member.

40. The Fund and Ms Saez García answered a question from a Member of the Court (see paragraph 16 above) about the significance, if any, of the developments relating to the equality of the parties before courts and tribunals since 1946. In her response, Ms Saez García calls attention to the relevant guarantees included in global and regional instruments over those 65 years and their further elaboration by international and national courts. She sets out how, in her view, the present proceedings illustrate the contradiction between the procedure set out in Article XII of the Annex to the Statute of the ILOAT and more modern concepts of the equality of arms. She contrasts, on the one hand, the application which the Fund made to the Tribunal for the suspension of the execution of the Judgment, an application which was rejected on the ground that the Tribunal had no power to do so (see paragraph 16 above), and, on the other hand, the power of the newly established United Nations Appeals Tribunal to order interim measures for the protection of either party. The lack of such a power, in her view, provides a compelling reason for this Court to refuse to exercise its advisory jurisdiction to review judgments of the ILOAT. Ms Saez García also refers to problems, as she sees it, in the equality of the parties in the present proceedings before the Court, considered later in this Opinion (see paragraphs 45-46). She concludes, in the light of the developments relating to the requirement of equality in the administration of justice and the abolition of the review of UNAT judgments, that "the many defects that the Court has remarked upon in the review procedure constitute a compelling reason to reject the . . . request for an advisory opinion".

41. In its reply, IFAD for its part first emphasizes that "the sole function" of Article XII of the Annex to the Statute of the ILOAT, when a specialized agency is invoking it, is to interpret the agreement between the ILO and that specialized agency; the questions submitted to the Court, it maintains, "deal exclusively with the application and the interpretation of the agreement between the ILO and IFAD in the context of Article XII". Individuals, says the Fund, stand outside the institutional relationship that forms the subject-matter of Article XII procedures. It concludes this part of its answer in the following terms:

> "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 the Fund, which accords jurisdiction to the ILOAT, it would be a mistake to consider that the inability of third parties to invoke Article 96, paragraph 2, of the UN Charter in order to apply Article XII of the ILOAT Statute constitutes a breach of the principle of equality of the parties in judicial proceedings. Accordingly, it would not be appropriate for the Court to decline to perform the function envisaged by Article 96, paragraph 2, of the UN Charter on account of a third party that stands outside the relationship that forms the subject-matter of the proceedings before the Court."

Further, IFAD states that:

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

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 García and the Fund. She brought proceedings before the Tribunal against a decision attributed to the Fund and was successful. The Fund then invoked the procedure under the Statute of the ILOAT, supported by the General Assembly's authorization given under Article 96, paragraph 2, of the Charter, to challenge that decision in her favour. In that regard, the Court cannot see that a question arises between the Fund and the ILO. The record before the Court provides no evidence of any such matter. In the second place, the Fund in any event would not be able to bring a matter about its relationship with the ILO before the Court: when the General Assembly authorized IFAD to seek advisory opinions, under Article 96, paragraph 2, of the Charter, it expressly excluded from the authorization "questions concerning the mutual relationships of the Fund and the United Nations or other specialized agencies"; a similar exclusion is to be found in all the authorizations given by the General Assembly to specialized agencies (see paragraph 26 above).

43. In replying to the question about equality of access, the Fund emphasized what it saw as a parallel with investor-State arbitration. First, it pointed out that in such arbitrations, it is only the investor that may initiate the dispute settlement process. But that process is initiated in response to the conduct of the host State, alleged to be in breach of the investor's rights, and is a first instance

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.

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

* *

IV. Merits

49. The request for an advisory opinion from the Court concerns the validity of the Judgment given by the ILOAT relating to Ms Saez García's contract of employment. The Court notes that that contract of employment, as extended, was governed by the Personnel Policies Manual (hereinafter "PPM") and the Human Resources Handbook, until 22 July 2005. From that date, the PPM and Human Resources Handbook were replaced by a document entitled "IFAD Human Resources Policy" and the Human Resources Procedures Manual (hereinafter "HRPM"), respectively. Accordingly, subsequent events, such as the facilitation process and the convening of the Joint Appeals Board referred to in paragraphs 70 and 77 below, were governed by the latter documents. The Court will refer hereinafter to the titles of the documents in force at the time of events being considered.

50. In December 2005, a decision was made not to renew Ms Saez García's contract of employment as from March 2006 on the alleged basis that her post was being abolished. She challenged that decision by filing an appeal with the Joint Appeals Board of the Fund (hereinafter the "JAB") under the HRPM. On 13 December 2007 the JAB unanimously recommended that Ms Saez García be reinstated and that she be awarded a payment of lost salaries, allowances and entitlements. On 4 April 2008 the President of the Fund rejected the recommendations. Ms Saez García then filed on 8 July 2008 a complaint with the Tribunal requesting it to "quash the decision of the President of IFAD rejecting the complainant's appeal", order her reinstatement and make various monetary awards. Following two rounds of written submissions (oral hearings were not sought), the Tribunal, in its Judgment of 3 February 2010, decided that "[t]he President's decision of 4 April 2008 is set aside" and made orders for the payment of damages and costs.

51. The Fund contends, as it did before the Tribunal, that 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 the COP.

The Court first considers the powers of, and relationships between, those various bodies. It will then turn to the documents relating specifically to Ms Saez García's employment.

52. Part III of the UNCCD, which came into force in 1996, is entitled "Action Programmes, Scientific and Technical Cooperation and Supporting Measures" and contains three sections addressed to each of those matters. The section on "Supporting Measures" imposes obligations on the State parties to the Convention relating to capacity building, financial resources and financial mechanisms (Arts. 19-21). Under Article 21, paragraph 4, a "Global Mechanism" is established "[i]n order to increase the effectiveness and efficiency of existing financial mechanisms". It is "to promote actions leading to the mobilization and channelling of substantial financial resources . . . to affected developing country Parties". It is to function under the authority and guidance of the COP and to be accountable to it. Under paragraph 5, the COP was to identify, at its first ordinary session, an organization to house the Global Mechanism. Paragraph 6 provides this elaboration: the COP was to make appropriate arrangements with the housing organization "for the administrative operations of such Mechanism, drawing to the extent possible on existing budgetary and human resources". According to paragraph 5, the COP was to agree with the organization upon modalities to ensure, among other things, that the mechanism *(a)* prepares an inventory of co-operation programmes that are available to implement the UNCCD, *(b)* provides advice, on request, to parties on innovative methods of financing and related matters, *(c)* provides interested parties and organizations with information on sources of funds and funding patterns to facilitate co-ordination between them, and *(d)* reports to the COP on its activities.

Before the Court sets out the terms of the agreement between the COP and IFAD, it refers to relevant provisions of the Convention concerning the COP and its Permanent Secretariat.

53. Part IV of the Convention, entitled "Institutions", follows immediately the provisions of Article 21 which have just been discussed. It provides for the establishment of the COP, a Permanent Secretariat (replacing an interim Secretariat established by United Nations General Assembly resolution 47/188 of 22 December 1992 and referred to in Article 35 of the UNCCD) and a Committee on Science and Technology as a subsidiary body of the COP (Arts. 22, 23 and 24). The Conference's powers include the power to establish subsidiary bodies, to approve a programme and a budget, and to make arrangements, at its first session, for a Permanent Secretariat (Art. 22, paras. 2 *(c)* and *(g)*, and Art. 23, para. 3). The Permanent Secretariat's functions include: 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, para. 2 *(e)*).

54. 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 1999 the Conference and the Fund signed a "Memorandum of Understanding . . . regarding the Modalities and Administrative Operations of the Global Mechanism" (hereinafter the "MOU"). The MOU provides, under Section II A, that "[w]hile the Global Mechanism will have a separate identity within the Fund, it will be an organic part of the structure of the Fund directly under the President of the Fund". It also provides, under Section II D, that the Managing Director of the Global Mechanism shall be nominated by the Administrator of the United Nations Development Programme and appointed by the President of the Fund and that, in discharging his or her responsibilities, the Managing Director shall report directly to the President of IFAD. Under paragraph (1) of Section III A, headed "Relationship of the Global Mechanism to the Conference", the Global Mechanism functions under the authority of the COP and is fully accountable to it. Under paragraph (2) of the same section, the chain of accountability runs directly from the Managing Director to the President of the Fund to the COP, and the Managing Director submits reports to the COP on behalf of the President of the Fund. Under Section III A, paragraph (4), the Global Mechanism's work programme and budget, including proposed staffing, are prepared by the Managing Director, reviewed and approved by the Fund's President and forwarded to the Executive Secretary of the Convention for consideration in the preparation of the budget estimates of the Convention. Under Section II B, the resources of the Global Mechanism are held by the Fund in various accounts. Under Section IV B, the Managing Director, on behalf of the President, submits reports on the Global Mechanism's activities to each ordinary session of the COP. The Fund and Convention Secretariat are to co-operate in various ways. 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 it "shall enjoy full access to all of the administrative infrastructure available to the Fund offices, including appropriate office space, as well as personnel, financial, communications and information management services". The terms of that provision reflect those of paragraph 6 of Article 21 of the UNCCD set out above (see paragraph 52 above).

55. For its Permanent Secretariat, the COP made an arrangement with the United Nations. The General Assembly approved the institutional linkage between the Secretariat of the Convention and the United Nations in accordance with the offer made by the Secretary-General and accepted by the COP (General Assembly resolution 52/198 of 18 December 1997 and COP decision

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 United Nations concluded an Agreement concerning the Headquarters of the Convention's Permanent Secretariat (*UNTS*, Vol. 2029, p. 316). Under the Agreement, the Convention Secretariat possesses, in the host country, the legal capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings (*ibid.*, Art. 4; see also Arts. 3 and 4 of the Agreement between the United Nations and the Federal Republic of Germany relating to the Headquarters of the United Nations Volunteers Programme, 10 November 1995 (*UNTS*, Vol. 1895, p. 103), which is applicable, *mutatis mutandis*, to the Permanent Secretariat).

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)*).

As the above account indicates, both have exercised those powers. By contrast, the Global Mechanism is not included in Part IV of the Convention. It is not given any express powers of contracting or entering into any agreements by the Convention nor by a headquarters agreement such as that relating to the Permanent Secretariat. Moreover, the record before the Court does not include any instances of it entering into contracts or agreements. IFAD, on 14 May 2010, during the period when the first round of written statements was being prepared, wrote to the Managing Director of the Global Mechanism seeking information on that matter in the following terms:

> "In order to help us prepare our submission to the ICJ, IFAD kindly requests that your Office supply a comprehensive list of all agreements and legal documents signed between the Global Mechanism and other entities, including international organisations and private entities. We intend to provide this list as part of our submission to the ICJ in order to show that the GM is recognized as having the capacity to enter into agreements." (United Nations document ICCD/COP(10)/INF.3 of 11 August 2011, p. 30.)

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

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.

59. The Court recalls a point made by the Fund in its response to a question put by a Member of the Court to IFAD — and through it to Ms Saez García. According to the Fund, should the Court decline to provide an advisory opinion, it would forsake the opportunity to "assist 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".

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.

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

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

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

> "It is true that the offer and extension letters in the case of the Complainant were all issued on IFAD letterhead by IFAD officials and all of them refer to an 'appointment with the International Fund for Agricultural Development'. The initial offer letter dated 1 March 2000, which was signed by the Director of the Fund's Personnel Division, also stated that the Complainant's 'employment may be terminated by IFAD' and that she 'will be required to give written notice of at least one month to IFAD' should she wish to terminate her employment during the probationary period. While the two extension letters are silent on termination and resignation, both state that '[a]ll other conditions of employment will remain unchanged'."

74. Notwithstanding the above, the Fund maintains that Ms Saez García was not an IFAD official, but a staff member of the Global Mechanism which has not recognized the jurisdiction of the Tribunal. In this connection, it refers to the fact that the 1 March 2000 contract also contained the following statement: "The position you are being offered is that of Programme Officer in the Global Mechanism of the Convention to Combat Desertification, Office of the President (OP), in which capacity you would be responsible to the Managing Director of the Global Mechanism." It also argues that throughout her employment with the Global Mechanism, Ms Saez García "was never charged with performing any of the functions of the Fund, nor had she been employed by the Fund or performed functions for the Fund prior to being employed by the Global Mechanism". Moreover, the Fund contends that IFAD and the Global Mechanism are separate legal entities, and that the Tribunal should have taken into account the consequences of this separation for its jurisdiction with respect to the complaint filed by Ms Saez García.

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

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

77. Ms Saez García's legal relationship with the Fund as a staff member is further evidenced by the facts surrounding her appeal against the decision to abolish the post of Programme Manager for the Global Mechanism's regional desk for Latin America and the Caribbean, and the consequent non-renewal of her fixed-term appointment. Her appeals were initially lodged with the internal machinery established by the Fund for handling staff grievances, namely the facilitation

process and the JAB. The record before the Court includes no evidence that the Fund objected to the use of these procedures by Ms Saez García. The facilitation process was conducted by a facilitator appointed by the IFAD administration and in accordance with Chapter 10 of the HRPM. That process was terminated in accordance with paragraph 10.21.1 *(b)* of the HRPM. Similarly, the JAB was convened under the terms of the HRPM and its report and recommendations were submitted to the President of IFAD for consideration in accordance with the procedures established by Chapter 10 (Sec. 10.38) of the HRPM. In a memorandum dated 4 April 2008, the President of IFAD rejected the recommendations of the JAB to reinstate Ms Saez García to a position in the Global Mechanism with a two-year fixed-term contract from the date of reinstatement. However, the President's memorandum does not contain any indication that Ms Saez García was not a staff member of the Fund. On the contrary, it is stated in the memorandum that "the non-renewal of your fixed-term contract was in accordance with section 1.21.1 of the IFAD HRPM". There is also nothing to suggest that, in rejecting the recommendation of the JAB, the President was acting otherwise than in his capacity as the President of IFAD.

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

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

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

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

Thirdly, the Fund argues that the Tribunal did not have jurisdiction to review the decision not to renew Ms Saez García's contract which was taken by the Managing Director of the Global Mechanism as he was not "a member of IFAD's staff in his dealings with the complainant" (*ibid.*, para. 189). According to the Fund, the Tribunal had, therefore, no jurisdiction to examine the decision of the Managing Director to abolish the post of Ms Saez García or the budgetary reasons underlying that decision.

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 that of the President of IFAD contained in a memorandum to Ms Saez García dated 4 April 2008 in which he rejected the recommendations of the JAB to reinstate Ms Saez García. The JAB unanimously found that:

> "the Managing Director's decision not to renew the Appellant's fixed-term contract was beyond his authority and contrary to the rules and spirit of the HRPM. In addition, no evidence was presented or found to support the Respondent's claim that the decision was made in consultation with IFAD's Management, specifically the President who is ultimately responsible for the GM." (JAB, Recommendations, para. 31.)

In the notice of non-renewal of Ms Saez García's contract dated 15 December 2005, the Managing Director of the Global Mechanism informed her that due to the decrease in the core budget of the Global Mechanism, it was decided to abolish the post of Programme Manager for the Global Mechanism's regional desk for Latin America and the Caribbean, which she had hitherto occupied. Ms Saez García challenged, among other things, the decision of the Managing Director, 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 Global Mechanism's programme of work independently of the COP and of the President of IFAD. The Fund objected to the Tribunal's competence to examine these allegations since they would involve the examination by the Tribunal of the decision-making process of the Global Mechanism for which it had no jurisdiction. The Tribunal rejected these objections on the ground that "decisions of the Managing Director relating to [staff in the Global Mechanism] are, in law, decisions of the Fund".

88. The Court cannot agree with the arguments of the Fund that the Tribunal did not have competence to examine the decision of the Managing Director of the Global Mechanism. First, the Managing Director of the Global Mechanism was a staff member of the Fund when the decision of non-renewal of Ms Saez García's contract was taken. The letter of appointment of the Managing Director of the Global Mechanism, which was signed by the President of the Fund on 13 January 2005, provides that the Managing Director was offered "a fixed-term appointment for a period of two years with the International Fund for Agricultural Development (IFAD)". In this capacity he was to be "directly responsible to the President of IFAD". His appointment was "governed by the general provisions of the IFAD Personnel Policies Manual . . . together with the provisions of the Human Resources Handbook". The Managing Director was appointed at the D-2 level and provided with a copy of IFAD's Information Circular IC/PE/03/11, which described the various components of salaries, allowances and other benefits "to which IFAD staff members in the professional category and above are entitled". In addition, the Managing Director was required to participate in the Fund's medical insurance schemes. Moreover, the report of the JAB concerning the appeal of Ms Saez García, while showing the Managing Director as the respondent, indicates that he acted as such on behalf of IFAD, following designation by the IFAD President. Thus, the record before the Court clearly indicates that the Managing Director of the Global Mechanism, in his capacity as an IFAD official, acted 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 allegation by Ms Saez García in her complaint to the Tribunal, according to which the non-renewal of her appointment was not based on valid reasons, or that it suffered from other substantive or procedural flaws, falls within the category of allegations of non-observance of the "terms of appointment of an official" as specified in Article II, paragraph 5, of the Statute of the Tribunal. As was emphasized by the Court in its 1956 Advisory Opinion:

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

90. Thirdly, the letters of appointment and renewal of contract of Ms Saez García clearly stipulate that her appointment was made in accordance with the general provisions of the PPM and any amendments thereto, as well as such administrative instructions as may be issued from time to time regarding the application of the Manual. The non-observance of the provisions of these instruments, or those adopted subsequently to replace them (see paragraph 49 above), could be impugned before the Tribunal in accordance with Article II, paragraph 5, of its Statute. In this connection, the Court observes that Ms Saez García alleged violations of the HRPM before the Tribunal, notably violations of Sections 1.21.1 and 11.3.9 *(b)* (Judgment No. 2867, p. 4, para. B). Moreover, the fact that the President of IFAD stated, in his memorandum rejecting the JAB recommendations, that the non-renewal of her contract "was in accordance with the Human Resources Procedures Manual (HRPM), section 1.21.1" is further evidence of the link between her complaint to the Tribunal and the staff regulations and rules of the Fund.

91. The Court, therefore, concludes that Ms Saez García's complaint to the ILOAT, following the decision of the Fund not to renew her contract, falls within the scope of allegations of non-observance of her terms of appointment and of the provisions of 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 *ratione materiae* to consider the complaint brought before it by Ms Saez García in respect of the non-renewal of her contract by IFAD.

92. With regard to the Fund's contention that the Tribunal lacked jurisdiction to examine the provisions of the MOU and 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 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 legally review the decision of the Managing Director of the Global Mechanism. In this context, the Tribunal stated that the arguments of the Parties "[went] to the powers and jurisdiction of the

Tribunal and, on that account, must be dealt with even though raised for the first time in [the] proceedings [before the Tribunal]" (Judgment No. 2867, p. 9, para. 1). The Tribunal then analysed various provisions of the MOU, in particular paragraphs 4 and 6 of Section III A, which deal with the accountability of the Global Mechanism and its Managing Director to the COP.

93. The Court accepts that these matters are not directly related to the provisions of the staff regulations and rules of IFAD, the alleged non-observance of which confers jurisdiction on the Tribunal to hear complaints from the Fund's staff members. The Court, however, recognizes their relevance for the Tribunal's determination of its own jurisdiction in a case in which the complainant's status as a staff member of the Fund was contested by the Fund itself on the basis of the arrangements made between the COP and IFAD. In this context, the Court recalls that the Fund, in its written submissions to the Tribunal in response to the complaint filed by Ms Saez García, contended that the Fund and the Global Mechanism were separate legal entities, and that the acts of the Global Mechanism or those of its Managing Director were not attributable to IFAD. Moreover, the Fund challenged the competence of the Tribunal to review alleged flaws in the decision-making of the Global Mechanism and its Managing Director, since neither the COP nor the Global Mechanism had accepted the jurisdiction of the ILOAT. In these circumstances, the Court is of the opinion that the Tribunal could not avoid determining whether it had jurisdiction to hear the complaint, and examining the legal arrangements governing the relationship between the Global Mechanism and the Fund, as well as the status and accountability of the Managing Director of the Global Mechanism.

94. In light of the above, it is not necessary for the Court to give detailed consideration to the arguments put forward by the Fund, in its submissions to the Tribunal and to the Court, that the Tribunal lacked jurisdiction to entertain the complaint because the Fund and the Global Mechanism were separate legal entities, and the latter had never accepted the jurisdiction of the Tribunal. Even if, contrary to the observation that the Court has made in paragraph 61 above, the Global Mechanism did have a separate legal personality and the capacity to conclude contracts, the conclusions arrived at above would still be warranted, essentially on the basis of the contractual documents examined and the provisions of the IFAD staff regulations and rules.

95. The Court, therefore, finds, in response to the first question put to it by IFAD, that the ILOAT was competent to hear the complaint introduced against IFAD, in accordance with Article II of its Statute, in view of the fact that Ms Saez García was a staff member of the Fund, and her appointment was governed by the provisions of the staff regulations and rules of the Fund.

*

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 García;

(b) with regard to Questions II to VIII,

Unanimously,

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

(c) with regard to Question IX,

Unanimously,

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

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

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Advisory Opinion of the Court; Judge GREENWOOD appends a declaration to the Advisory Opinion of the Court.

(Initialled) H. O.

(Initialled) Ph. C.

European Court of Human Rights

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

Nos. 71412/01 and 78166/01, 2 May 2007

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE 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. JOČIENĖ,
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

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

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

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

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

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

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

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

THE FACTS[1]

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

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

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

by Ms Anne-Françoise Tissier and by Mr Mostafa Mihraje, advisers, all of the legal directorate of the Ministry of Foreign Affairs.

The German Government were represented by Dr Hans-Jörg Behrens, Deputy Agent and Professor Dr. Christian Tomuschat, Counsel. The Norwegian Government were represented by their Agents, Mr Rolf Einar Fife and Ms Therese Steen, assisted by Mr Torfinn Rislaa Arnsten, Adviser.

I. RELEVANT BACKGROUND TO THE CASES

2. The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council ("NAC") of the North Atlantic Treaty Organisation ("NATO"), NATO announced air strikes on the territory of the then Federal Republic of Yugoslavia ("FRY") should the FRY not comply with the demands of the international community. Negotiations took place between the parties to the conflict in February and March 1999. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation. The NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes against the FRY. The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY troops agreed to withdraw from Kosovo. On 9 June 1999 "KFOR", the FRY and the Republic of Serbia signed a "Military Technical Agreement" ("MTA") by which they agreed on FRY withdrawal and the presence of an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution").

3. UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by "Member States and relevant international institutions", "under UN auspices", with "substantial NATO participation" but under "unified command and control". NATO pre-deployment to The Former Yugoslav Republic of Macedonia allowed deployment of significant forces to Kosovo by 12 June 1999 (in accordance with OPLAN 10413, NATO's operational plan for the UNSC Resolution 1244 mission called "Operation Joint Guardian"). By 20 June FRY withdrawal was complete. KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

4. UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General ("SG"), with the assistance of relevant international

organisations, to establish it and to appoint a Special Representative to the SG ("SRSG") to control its implementation. UNMIK was to coordinate closely with KFOR. UNMIK comprised four pillars corresponding to the tasks assigned to it. Each pillar was placed under the authority of the SRSG and was headed by a Deputy SRSG. Pillar I (as it was at the relevant time) concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

II THE CIRCUMSTANCES OF THE BEHRAMI CASE

5. On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured and taken to hospital in Pristina (where he later had eye surgery and was released on 4 April 2000). Medical reports submitted indicate that he underwent two further eye operations (on 7 April and 22 May 2000) in a hospital in Bern, 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; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that the detonation site had been marked out by KFOR the day after the detonation. The autopsy report confirmed Gadaf Behrami's death from multiple injuries resulting from the CBU explosion. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".

7. By letter dated 22 May 2000 the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr Behrami had the right to pursue a criminal prosecution within eight days of the date of that letter. On 25 October 2001 Agim Behrami complained to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop

Contributing Nation Claims Office (TCNCO"). By letter of 5 February 2003 that TCNCO rejected the complaint stating, *inter alia*, that the UNSC Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999.

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 MNB 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 Prishtina.

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;

...

Article 2

...

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

...

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

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

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

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

Article 25 provides:

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

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

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

The notion of a "threat to the peace" within the meaning of Article 39 has evolved to include internal conflicts which threaten to "spill over" or

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

Articles 41 and 42 read as follows:

> "41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."
>
> 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

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

25. Chapter VII continues:

> "Article 48
>
> The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations 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:

(a) Is attributable to the international organization under international law; and

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

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

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

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

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

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

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

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

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

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

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

2. Draft Articles on State Responsibility

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

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

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

E. The Vienna Convention on the Law of Treaties

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

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

F. The MTA of 9 June 1999

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

phased withdrawal of FRY forces and the deployment of international presences. Article I (entitled "General Obligations") noted that it was an agreement for the deployment in Kosovo:

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

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

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

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

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

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

G. The UNSC Resolution 1244 of 10 June 1999

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

> "Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,
>
> Recalling its [previous relevant] resolutions ...,
>
> Regretting that there has not been full compliance with the requirements of these resolutions,
>
> Determined to resolve the grave humanitarian situation in Kosovo ... and to provide for the safe and free return of all refugees and displaced persons to their homes,
>
> ...
>
> Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also

> the acceptance by the [FRY] of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the [FRY's] agreement to that paper,
>
> ...
>
> Determining that the situation in the region continues to constitute a threat to international peace and security,
>
> Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,
>
> ...
>
> 5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences;
>
> 6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;
>
> 7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to 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).

K. European Commission for Democracy through Law ("the Venice Commission"), Opinion on human rights in Kosovo: Possible establishment of review mechanisms (no. 280/2004, CDL-AD (2004) 033)

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

L. Detention and De-mining in Kosovo

1. Detention

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

2. De-mining

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

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

54. On 24 August 1999 the Concept Plan for UNMIK Mine Action Programme ("MAP") was published in a document entitled "UNMIK MACC, Office of the Deputy SRSG (Humanitarian Affairs)". It confirmed that the UN, through UNMAS, the SRSG and the Deputy SRSG of Pillar I of UNMIK retained "overall responsibility" for the MAP in terms of providing policy guidance, identifying needs and priorities, coordinating with UN and non-UN partners as well as member states, and defining the overall operational plan and structure. The MAP was an "integral component of UNMIK". As to the role of UNMIK MACC, it was

underlined that, since the UN did not intend to implement the mine action activities in Kosovo itself, it would rely on a variety of operators including UN agencies, KFOR contingents, NGOs and commercial companies. Those operators had to be accredited, supported and co-ordinated to ensure they worked in a coherent and integrated manner. Accordingly, a key factor in the execution of the MAP was the integration and coordination of all de-mining activities through an appropriately structured UNMIK MACC which would, *inter alia*, act as the "focal point and coordination mechanism for all mine activities in Kosovo". The Concept Plan went on to define the nature of the problem and the consequent phases and priorities for mine clearance.

55. Accordingly, on 24 August 1999 a memorandum was sent by the Deputy SRSG of Pillar I to the SRSG, requesting that, since the Concept Plan had been approved, it should also be forwarded to KFOR "along with an appropriate annotation that UNMIK have now assumed the responsibility for humanitarian mine action in Kosovo".

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

> "...KFOR will only clear mines/CBUs when deemed essential to the conduct of the mission and to maintain freedom of movement. KFOR does not wish to undertake de-mining, which is the responsibility of UNMACC and the NGOs. However, there is growing pressure for KFOR to dispose of NATO munitions. Therefore it has been decided that KFOR will do more to reduce the threat without amending its policy by marking the perimeter of each of the CBU footprints ... MNBs are to conduct these tasks against a priority list co-ordinated with UNMACC and UNMIK regional offices. The intent is to mark all known areas by 10 October 1999".

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

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

> "Upon entry into Kosovo and prior to establishment of UNMACC, KFOR organized a Mines Action Centre, which has since been augmented by [UN] personnel and has now become UNMACC. This is now ... charged by the [UN] with de-mining the region. It accomplishes this task using civilian contracted de-mining teams. KFOR is principally conducting mission-essential mine and unexploded ordnance clearance, including clearance of essential civilian infrastructure and public buildings."

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 subsequent monthly reports (submitted to the UNSC by the SG) noted that KFOR worked closely with UNMAS and UNMACC and emphasised that the eradication of the CBU threat was a priority for MNBs, the aim being to

mark and clear as many areas as possible before the first snow (report Nos. S/1999/868, S/1999/982, S/1999/1062, S/1999/1185 and S/1999/1266).

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

60. In 2001 UNMAS commissioned an external evaluation of its mine action programme in Kosovo for the period mid-1999–2001. The report, entitled "*An evaluation of the United Nations Mine Action Programme in Kosovo 1999-2001*", commented as follows:

> "At the beginning of August 1999, the MACC had *de facto* taken full control of the mine action programme, although formally it still fell under KFOR's responsibility. ... This was followed, on 24 August, by UNMIK's approval of the [Concept Plan]. ... [which] coincided with a Memo being sent by ... DSRSG (24 August) to ... SRSG ... [T]hat request was followed up with a letter dated 5 October 1999 from [Deputy SRSG] to General Jackson, [COMKFOR], ... Through this letter the formal handing over from the military to the civilian sector of the mine action programme for Kosovo took place, as mandated in [UNSC Resolution] 1244; although, in reality, this had already taken place towards the end of August."

COMPLAINTS

61. Agim Behami complained under Article 2, on his own behalf and on behalf of his son Gadaf Behrami, about the latter's death and Bekir Behrami complained about his serious injury. They submitted that the incident took place because of the failure of French KFOR troops to mark and/or defuse the un-detonated CBUs which those troops knew to be present on that site.

62. Mr Saramati complained under Article 5 alone, and in conjunction with Article 13 of the Convention, about his extra-judicial detention by KFOR between 13 July 2001 and 26 January 2002. He also complained under Article 6 § 1 that he did not have access to court and about a breach of the respondent States' positive obligation to guarantee the Convention rights of those residing in Kosovo.

THE LAW

63. Messrs Behrami invoked Article 2 of the Convention as regards the impugned inaction of KFOR troops. Mr Saramati relied on Articles 5, 6 and 13 as regards his detention by, and on the orders of, KFOR. The President of the Court agreed that the parties' submissions to the Grand Chamber could be limited to the admissibility of the cases.

I. WITHDRAWAL OF THE SARAMATI CASE AGAINST GERMANY

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

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

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

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

II. THE CASES AGAINST FRANCE AND NORWAY

A. The issue to be examined by the Court

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

67. The respondent and third party States disagreed.

The respondent Governments essentially contended that the applications were incompatible *ratione loci* and *personae* with the provisions of the Convention because the applicants did not fall within their jurisdiction

within the meaning of Article 1 of the Convention. They further maintained that, in accordance with the *"Monetary Gold* principle" (*Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954), this Court could not decide the merits of the case as it would be determining the rights and obligations of non-Contracting Parties to the Convention.

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

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

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

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland [GC], no. 45036/98, §§ 136 and 137, ECHR 2005-VI). 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.

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

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

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

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

77. Thirdly, neither the acts nor omissions of KFOR soldiers were attributable to the UN or NATO. KFOR was a NATO-led multinational force made up of NATO and non-NATO troops (from 10-14 States) allegedly under "unified" command and control. KFOR was not established as a UN force or organ, in contrast to other peacekeeping forces and to UNMIK and UNMACC under direct UN command. If KFOR had been such a UN force (with the prefix "UN"), it would have had a UN Commander in Chief, troops would not have accepted instructions from TCNs and all personnel would have had UN immunities. On the contrary, NATO and other States were authorised to establish the security mission in Kosovo under "unified command and control". However, this was a "term of art" (the Venice Commission, cited at paragraph 50 above): since there was no operational command link between the UNSC and NATO and since the TCNs retained such significant power, there was no unified chain of command from the UNSC so that neither the acts nor the omissions of KFOR troops could be attributed to NATO or to the UN (relying, in addition, on detailed academic publications).

As to the link between KFOR and the UNSC, the applicants referred to the Attachment to the Agreement on Russian Participation (paragraph 45 above) which described that link as one of "consultation/interaction".

As to the input of TCNs, the applicants noted that KFOR troops (including COMKFOR) were directly answerable to their national commanders and fell exclusively within the jurisdiction of their TCN: the rules of engagement were national; troops were disciplined by national command; deployment decisions were national; the troops were financed by the States; individual TCNCOs had been set up; TCNs retained disciplinary, civil and criminal jurisdiction over troops for their actions in Kosovo (UNMIK Regulation 2000/47 and HQ KFOR Main SOP, paragraphs 47-49 above) and, since a British court considered itself competent to examine a case about the actions of British KFOR in Kosovo, individual State accountability was feasible (*Bici & Anor v Ministry of Defence* [2004] EWHC 786); and it was national commanders who decided on the waiver of the immunity of KFOR troops whereas the SG so decided for UNMIK personnel. It was disingenuous to accept that KFOR troops were subject to the exclusive control of their TCN and yet deny that they fell within their jurisdiction. There was no TCN/UN agreement or a Status of Forces Agreement ("SOFA") between the UN and the FRY.

78. Fourthly, as regards Mr Saramati's case, final decisions on detention lay with COMKFOR who decided without reference to NATO high command or other TCN's and he was not accountable to, nor reliant on, NATO for those decisions. Since the ordering of detention was a separate exercise of jurisdiction by each COMKFOR, this case 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 this Court were to consider that the relevant States were executing an international (UN/NATO) mandate, this would not absolve them from their Convention responsibility for two alternative reasons. In the first place, Article 103 of the UN Charter would have applied to relieve States of their Convention responsibilities only if UNSC Resolution 1244 required them to act in a manner which breached the Convention which was not the case: there was no conflict between the demands of that Resolution and the Convention. Secondly, the Convention permitted States to transfer sovereign power to an international organisation to pursue common goals if it was necessary to comply with international legal obligations and if the organisation imposing the obligation provided substantive and procedural protection "equivalent" to that of the Convention (*Bosphorus*, cited above, § 155): neither NATO nor KFOR provided such protection.

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.

C. The submissions of the respondent States

1. The French Government

82. The Government argued that the term "jurisdiction" in Article 1 was closely linked to the notion of a State's competence *ratione personae*. In addition, and according to the ILC, the criterion by which the responsibility of an international organisation was engaged in respect of acts of agents at its disposal was the overall effective, as opposed to exclusive, control of the agent by the organisation (paragraphs 30-33 above).

83. The French contingent was placed at the disposal of KFOR which, from a security point of view, exercised effective control in Kosovo. KFOR was an international force under unified command, as could be seen from numerous constituent and applying instruments, over which the French State did not exercise any authority. The MNBs were commanded by an officer from a lead nation, the latter was commanded by COMKFOR who was in turn commanded, through the NATO chain of command, by the UNSC. Operational control of the forces was that of COMKFOR, strategic control was exercised by Supreme Allied Commander Europe of NATO ("SACEUR") and political control was exercised by the NAC of NATO and, finally, by the UNSC. Decisions and acts were therefore taken in the name of KFOR and the French contingent acted at all times according to the OPLAN devised and controlled by NATO. KFOR was therefore an application of the peace-keeping operations authorised by the UNSC whose resolutions formed the legal basis for NATO to form and command KFOR. In such circumstances, the acts of the national contingents could not be imputed to a State but rather to the UN which exercised overall effective control of the territory.

84. The lack of jurisdiction *ratione personae* of France was confirmed by the following. In the first place, reference was made to the immunities of KFOR and UNMIK and to the special remedies put in place for obtaining damages which were adapted to the particular context of the international mission of KFOR (paragraphs 46-49 above). Secondly, if the Parliamentary Assembly of the Council of Europe ("PACE") recommended (Resolution 1417 (2005) of 25 January 2005) the creation of a human rights' court in Kosovo, it could not have considered that Convention Contracting Parties already exercised Article 1 jurisdiction there. Thirdly, the Committee for the

Prevention of Torture, Inhuman and Degrading Treatment ("the CPT") concluded agreements with KFOR and UNMIK in May 2006 as it considered that Kosovo did not fall under the several jurisdiction of Contracting States. Fourthly, the Venice Commission, in its above-cited Opinion, did not consider that the jurisdiction of Convention States, or therefore of this Court, extended to Kosovo. Fifthly, any recognition of this Court's jurisdiction would involve judging the actions of non-Contracting States contrary to the *Monetary Gold* principle (judgment cited above). Sixthly, the ILC draft Articles on State Responsibility (paragraph 34 above) meant that the French contingent's acts and omissions (carried out under the authority of NATO and on behalf of KFOR) were not imputable to France.

2. The Norwegian Government

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

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

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

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

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

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

3. Joint (oral) submissions of France and Norway

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

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

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

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

95. Finally, the applicants' suggestion, that the impugned action and inaction constituted a sufficient jurisdictional link between the States and the applicants, was misconceived. The applicants had also confused the

legal personality of international structures (such as NATO and the UN) and that of their member states. Even if KFOR did not have separate legal personality, it was under the control of the UN, which did. Neither the retention of disciplinary control by TCN's nor the Venice Commission Opinion relied upon by the applicants was inconsistent with the international operational control of such an operation by NATO through KFOR.

D. The submissions of the third parties

1. The Government of Denmark

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

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

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

99. Secondly, States put personnel at the disposal of the UN in Kosovo to pursue the purposes and principles of the UN Charter. A finding of "no jurisdiction" would not leave the applicants in a human rights' vacuum, as

they suggested, given the steps being taken by those international presences to promote human rights' protection.

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

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

2. The Government of Estonia

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

3. The German Government's written submissions

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

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

105. These submissions as to the unity of the UN operation were confirmed by secondary legislation in Kosovo: if UNMIK took care to

ensure in its regulations human rights' protection and monitoring, that implied that the Convention control mechanisms did not apply. In addition, the Human Rights Committee of the UN regarded the inhabitants of Kosovo as falling under the jurisdiction of UNMIK (see paragraph 89 above).

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

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

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

4. The Greek Government

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

concluded that any action/inaction of KFOR was attributable to the UN and/or NATO and not to the respondent States.

5. The Polish Government

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

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

6. The Government of the United Kingdom

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

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

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

KFOR was a multinational and international security presence so that at no time did any respondent State exercise effective overall control over a part of Kosovo. The MNBs comprised contingents from many TCNs (including substantial contingents from States not parties to the Convention and from outside Europe) and were answerable to an overall commander ("unified command and control"). Even if a State was a "lead nation" of a MNB which controlled a particular sector, that gave that State no degree of control or authority over the inhabitants or territory of Kosovo. Neither

KFOR as a whole nor the TCNs exercised control over any part of Kosovo: UNMIK was tasked with civil administration and with human rights matters and KFOR did not control that administration in a manner comparable to the Turkish forces identified by the Court as regards Northern Cyprus (see cases cited at paragraph 68 above).

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

None of the respondent States were therefore in a position to secure the rights and freedoms defined in Article 1 of the Convention to any of the inhabitants of Kosovo. None were asserting sovereign authority but rather international authority through an international security presence mandated by the UNSC and acting pursuant to powers conferred by a binding Chapter VII decision. This conclusion was reinforced by the above-cited *Hess* case. The present case could be distinguished from the situation in *R (Al-Skeini) v. Secretary of State for Defence* ([2005] EWCA Ci 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 that responsibility was specifically vested in UNMIK.

115. The application raised fundamental questions about the relationship between the Convention (a regional treaty and "constitutional instrument of European public order") and the universal system for the maintenance of international peace in which the Council of Europe played an important part. To superimpose that regional human rights' structure upon a peace keeping force established by the universal organisation would be inappropriate as a matter of principle and run counter to the *ordre public* to which the Court frequently referred and, further, risked causing serious difficulties to Contracting States in participating in UN and other multinational peacekeeping operations outside the territories of the Convention States.

116. To avoid this result, Article 1 should be interpreted to mean that, where officials from States act together within the scope of an international operation authorised by the UN, they are not exercising sovereign jurisdiction but that of the international authority, so that their acts did not bring those affected within the jurisdiction of the States or engage the Convention responsibility of those States.

7. The Government of Portugal.

117. They adopted the observations of the UK Government.

8. The UN

118. The UN outlined the respective mandates and responsibilities of UNMIK and KFOR as set out in UNSC Resolution 1244. The mandate adopted by the UNSC was an expression of the will of the member states to grant a UN organ authority, as opposed to a duty, to act: it was not an obligation of result. In executing the mandate, the UN operation retained, unless otherwise specified, discretion to determine implementation including timing and priorities. The UN recalled the relevant provisions of UNSC Resolution 1244 which outlined the main responsibilities of the civil and security presences, noting that the general and at time "imprecise" mandate was, for the most part, left to be concretised and agreed upon in the realities of their daily operations.

In addition, it was important to understand the legal status of UNMIK and its relationship to KFOR. UNMIK was a subsidiary organ of the UN endowed with all-inclusive legislative and administrative powers in Kosovo including the administration of justice (UNMIK Regulation 1999/1, at paragraph 70 above), it was headed by a SRSG and reported directing to the UNSC *via* the SG. KFOR was established as an equal presence but with a separate mandate and control structure: it was a NATO led operation authorised by the UNSC under unified command and control. There was no formal or hierarchical relationship between the two presences nor was the military in any way accountable to the civil presence. However, both were required to co-ordinate and operate in a mutually supportive manner towards the same goals.

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 transferred to UNMIK) and paragraph 11(k) (entrusting UNMIK with ensuring the safe and unimpeded return of persons to their homes) constituted the mandate for the UNMIK MAP. On 17 June 1999 UNMACC was established as the focal point and co-ordination mechanism for all mine action activities in Kosovo (the Concept Plan, paragraph 54 above). To fulfil these functions it depended largely on close co-operation with all de-mining partners and, notably, KFOR. Responsibility for de-mining was *de facto* assumed by UNMACC in August 1999 although it was not until October 1999 that UNMIK officially informed KFOR (letter from the Deputy SRSG at paragraph 57 above). However, this did not relieve KFOR of its residual and continuous responsibility to support de-mining activities and, in particular, to identify, mark and report on the location of CBU sites. KFOR's continuing responsibilities for de-mining activities were set out in the Concept Plan and, more particularly, in the NATO OPLAN 10413 (paragraph 3 above). One of KFOR's most important tasks was information sharing and marking strike sites. Indeed, according to FRAGO300 (paragraph 56 above), KFOR had decided to increase its commitment to

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

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

E. The Court's assessment

121. The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term "attribution" in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN.

122. In so doing, the Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments: it must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (*mutatis mutandis*, *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, § 72).

It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57).

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

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

were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124. Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders.

125. As regards de-mining, the Court notes that Article 9(e) of UNSC Resolution 1244 provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by, as pointed out by the UN to the Court, Article 11(k) of the Resolution. The report of the SG to the UNSC of 12 June 1999 (paragraph 53 above) confirmed that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC pending which KFOR continued to act as the *de facto* coordination centre. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRSG of Pillar I. The UN submissions to this Court, the above-cited Evaluation Report, the Concept Plan, FRAGO 300 and the letters of the Deputy SRSG of August and October 1999 to KFOR (paragraphs 55 and 57 above) confirm, in the first place, that the mandate for supervising de-mining was *de facto* and *de jure* taken over by UNMACC, created by UNMIK, at the very latest, by October 1999 and therefore prior to the detonation date in the *Behrami* case and, secondly, that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

126. The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, NATO had dropped the CBUs or KFOR had failed to secure the site and provide information thereon to UNMIK, this would not alter the mandate of UNMIK. The reports of the SG to the UNSC (53 above) cited by the applicants may have referred to UNMACC as having been set up jointly by KFOR and the UN, but this described the provision of assistance to UNMIK by the previous *de facto* co-ordination centre (KFOR): it was therefore transitional assistance which accorded with KFOR's general obligation to support UNMIK (paragraphs 6 and 9(f) of UNSC Resolution 1244) and such assistance in the field did not change UNMIK's mandate. The report of the International Committee of the Red Cross relied upon by the applicants, indicated (at p. 23) that mine clearance in Kosovo was coordinated by UNMACC which in turn fell under the aegis of UNMIK. Finally, even if KFOR support was, as a matter of fact, essential to the continued presence of UNMIK (the applicants' submission), this did not alter the fact that the Resolution created separate and distinct presences, with different mandates and responsibilities and, importantly, without any hierarchical relationship or accountability between them (UN submissions, paragraph 118 above).

127. Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

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

(a) The Chapter VII foundation for KFOR and UNMIK

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

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

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

130. While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was

acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK (see generally and *inter alia*, White and Ulgen, "*The Security Council and the Decentralised Military Option: Constitutionality and Function*", Netherlands Law Review 44, 1997, 386; Sarooshi, "*The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers*", Oxford University (1999); Chesterman, "*Just War or Just Peace: Humanitarian Intervention and International Law*", (2002) Oxford University Press, pp. 167-169 and 172); *Zimmermann and Stahn*, cited above; De Wet, "*The Chapter VII Powers of the United Nations Security Council*", 2004, pp. 260-265; Wolfrum "*International Administration in Post-Conflict Situations by the United Nations and other International Actors*", Max Planck UNYB Vol. 9 (2005), pp. 667-672; Friedrich, "*UNMIK in Kosovo: struggling with Uncertainty*", Max Planck UNYB 9 (2005) and the references cited therein; and *Prosecutor v. Duško Tadić*, Decision of 2.10.95, Appeals Chamber of ICTY, §§ 35-36).

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

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

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

to Authorise the Use of Force by "Coalition of the Able and Willing", EJIL (2000), Vol. 11 No. 3; pp. 95-104 and *Meroni v. High Authority* Case 9/56, [1958] ECR 133).

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

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

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

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

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

135. Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR.

NATO fulfilled its command mission *via* a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

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

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

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

139. The Court is not persuaded that TCN involvement, either actual or structural, was incompatible with the effectiveness (including the unity) of NATO's operational command. The Court does not find any suggestion or evidence of any actual TCN orders concerning, or interference in, the present operational (detention) matter. Equally there is no reason to consider that the TCN structural involvement highlighted by the applicants undermined the effectiveness of NATO's operational control. Since TCN troop contributions are in law voluntary, the continued level of national deployment is equally so. That TCNs provided materially for their troops would have no relevant impact on NATO's operational control. It was not argued that any NATO rules of engagement imposed would not be respected. National command (over own troops or a sector in Kosovo) was under the direct operational authority of COMKFOR. While individual claims might potentially be treated differently depending on which TCN was the source of the alleged problem (national commanders decided on whether immunity was to be waived, TCNs had exclusive jurisdiction in (at least) disciplinary and criminal matters, certain TCNs had put in place their own TCNCOs and at least one TCN accepted civil jurisdiction (the above-cited *Bici* case)), it has not been explained how this, of itself, could undermine the effectiveness or unity of NATO command in *operational* matters. The Court does not see how the failure to conclude a SOFA

between the UN and the host FRY could affect, as the applicants suggested, NATO's operational command. That COMKFOR was charged (the applicants at paragraph 78 above) exclusively with issuing detention orders amounts to a division of labour and not a break in a unified command structure since COMKFOR acted at all times as a KFOR officer answerable to NATO through the above-described chain of command.

140. Accordingly, even if the UN itself would accept that there is room for progress in co-operation and command structures between the UNSC, TCNs and contributing international organisations (see, for example, Supplement to an Agenda for Peace: Position paper of the SG on the Occasion of the 50th Anniversary of the UN, A/50/60 - S/1995/1; the *Brahami* report, cited above; UNSC Resolutions 1327 (2000) and 1353 (2001); and Reports of the SG of 1 June and 21 December 2001 on the Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on UN Peace Operations (A/55/977, A/56/732)), the Court finds that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO.

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

(c) Can the impugned inaction be attributed to UNMIK?

142. 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 to the UN, whether the delegation of power by the UNSC to the SG and/or UNMIK also respected the role of the UNSC for which Article 24 of the Charter provided, UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC (see ILC report at paragraph 33 above). While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Article 20 of UNSC Resolution 1244).

143. Accordingly, the Court notes that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that the impugned inaction was, in principle, "attributable" to the UN in the same sense.

3. Is the Court competent ratione personae?

144. It is therefore the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (*The Reparations*

case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention.

145. In its *Bosphorus* judgment (cited above, §§152-153), the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's "jurisdiction" from scrutiny under the Convention. The Court went on, however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organisation and where the relevant organisation protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted, if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*ibid.*, §§ 155-156).

146. The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

147. The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice (see paragraph 27 above).

148. Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights

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
- UNSC: United Nations Security Council
- 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