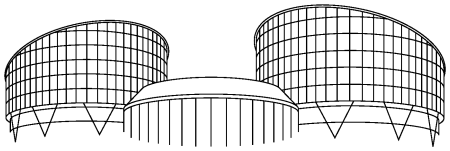

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 15521/08
Amalia PEREZ
against Germany

The European Court of Human Rights (Fifth Section), sitting on 6 January 2015 as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Vincent A. De Gaetano,
André Potocki,
Helena Jäderblom,
Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 20 March 2008,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Amalia Perez, is a Spanish national, who was born in 1950 and lives in Madrid. She was represented before the Court by Mr E.P. Flaherty, a lawyer practising in Geneva.

2. The German Government ("the Government") were represented by two of their Agents, Mr H.-J. Behrens and Mrs K. Behr, of the Federal Ministry of Justice.

3. The Government of the Kingdom of Spain, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), did not indicate that they wished to exercise that right.

A. The circumstances of the case

4. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Background to the case

5. The applicant is a former staff member of the United Nations (the "UN" or the "Organisation"). She joined the United Nations Development Programme (the "UNDP") in New York in 1970. She was promoted several times and, in 1998, moved to the United Nations Volunteer Programme (the "UNV"), Headquarters Administration, in Bonn, Germany. UNV is represented worldwide through the offices of the UNDP. The applicant served as a senior manager with UNV and resided in Germany.

6. Until 1999 the applicant's professional performance had consistently been rated by consecutive supervisors in her annual appraisal reports as exceeding or fully satisfying the requirements of her respective job. However, in 1999, as well as in 2000 and 2001, a new supervisor found that she had not met the performance expectations.

7. As a consequence of the negative appraisal reports the applicant was included in the 2002/2003 UNV reassignment exercise with a view to her redeployment. By a letter of 8 July 2002, she was informed by the UNV human resources department that she had not been selected for any post within the scope of the reassignment exercise and was given a time-limit of several months to search herself for an alternative placement in the UNDP or elsewhere in the Organisation.

8. On 17 July 2002 the applicant filed a rebuttal for an internal administrative review of the negative appraisal reports for the years 1999, 2000 and 2001 with a rebuttal panel (the "Rebuttal Panel") composed of UNDP staff members jointly selected by the staff council and management.

9. On 1 November 2002 UNDP management decided that the applicant should be placed on annual leave during the period from 1 November to 4 December 2002. As the applicant was unable to find a post within the Organisation and following fruitless attempts by UNDP to agree on possible conditions for a termination of the applicant's employment contract, she was given formal notice of termination by a letter dated 3 December 2002; her dismissal was to be effective as of 4 March 2003. The termination was reasoned with intended staff reduction and suppression of posts.

2. The proceedings regarding the applicant's dismissal

(a) Administrative review proceedings

10. On 20 January 2003 the applicant requested an administrative review of the decision to dismiss her with the UN Secretary-General (the "Secretary-General") and asked to suspend her dismissal.

11. On 31 January 2003 the Secretary-General, following the recommendation by the UN Joint Appeals Board (the "JAB") of 29 January 2003, granted the applicant's request for a suspension of her dismissal pending completion of the rebuttal process in relation to her appraisal reports, which had commenced on 22 January 2003.

12. On 10 June 2003 the Rebuttal Panel issued its report and concluded that the applicant's performance ratings be maintained for the years 1999 and 2001 but found that it was not in a position to reach a final conclusion with respect to the rating for 2000 due to management's failure to provide the relevant documentation.

13. On 29 August 2003 the Secretary-General, contrary to a recommendation by the JAB dated 27 August 2003, decided not to accept a further request by the applicant to suspend her dismissal.

14. The applicant's employment ended on 31 August 2003.

(b) The proceedings before the UN Joint Appeals Board (JAB)

15. On 7 March 2003 the applicant, represented by counsel, had lodged an appeal with the JAB challenging the decision to terminate her permanent appointment as well as the decision to place her on annual leave during the period from 1 November to 4 December 2002.

16. In its report on the merits of the applicant's appeal dated 28 February 2005, the JAB found that following the applicant's dismissal UNV management had immediately hired a staff member under a temporary assistance contract to perform the applicant's functions and that her post had thus in reality not been suppressed but in fact had been reclassified to a higher grade. The JAB noted that it had not been established that UNDP management had taken action to assist the applicant to improve her work performance from 1999 onward. It further held that while the applicant had been placed in the reassignment exercise for 2002/2003, UNDP management had failed to make sufficient efforts to actively assist her in finding alternative employment within the Organisation. As regards the decision to place the applicant on annual leave from 1 November to 4 December 2002, the JAB noted that even though the applicant's rebuttal process regarding her appraisal reports had been pending since 17 July 2002, the case had not yet been assigned to a Rebuttal Panel at the time she was placed on annual leave in November 2002. It had been only on 22 January 2003 and only after the applicant had applied for suspension of her dismissal, that the Organisation acknowledged that the rebuttal process had been delayed and started the rebuttal proceedings. In the JAB's opinion it had therefore not been in accordance with the applicable staff rules to penalise the applicant by having to use her annual leave balance in November 2002.

17. The JAB recommended that the applicant be granted monetary compensation equivalent to six months' net base salary for the delay in the

rebuttal process as well as for the failure on the part of the Organisation to make a reasonable effort to find a suitable alternative post for her. It also recommended that annual leave wrongfully charged for the period of 1 November to 4 December 2002 be credited to her leave balance.

18. On 3 August 2005 the applicant was informed of the Secretary-General's decision to credit her with her annual leave for the period from 1 November to 4 December 2002 and to grant her compensation in an amount of three months' net base salary instead of the six months recommended by the JAB.

(c) The proceedings before the UN Administrative Tribunal

19. On 5 July 2005 counsel for the applicant lodged an appeal with the United Nations Administrative Tribunal (the "UNAT") against the Secretary-General of the UN, requesting the tribunal to find, *inter alia*, that she be reinstated and awarded full compensation for losses incurred since termination of her employment on 31 August 2003, such as social security and other benefits, as well as punitive damages.

20. By a letter to the UNAT of 25 May 2007, the applicant further asked to be granted access to certain documents submitted by UNDP in the proceedings before the Rebuttal Panel and referred to by the latter in its report of 10 June 2003 but which she had allegedly never had an opportunity to examine.

21. The UNAT rendered its judgment on 28 September 2007 (No. 1345) following a written procedure. It pointed out that while the applicant's rebuttal had been filed on 17 July 2002, the internal rebuttal proceedings had only commenced on 22 January 2003 following the applicant's request of 20 January 2003 to suspend her dismissal and had ended on 10 June 2003. The proceedings had thus taken eleven months, a delay that, as acknowledged by the Organisation, was unacceptable. The UNAT further endorsed the JAB's finding that the UNDP administration had failed to make every *bona fide* effort to secure a new post for the applicant. It ordered the Organisation to pay the applicant further compensation in the amount of three months' net base salary in addition to the compensation she had already received and rejected the remainder of the applicant's pleas. The applicant's request for access to the aforementioned specific documents was not granted by the UNAT.

B. Relevant international and domestic law and practice

1. The legal status of the UN / UNV

22. The United Nations were founded in 1945 and currently have 193 Member States. Germany was admitted to membership in the United Nations on 18 September 1973. The United Nations Development

Programme (UNDP) and the United Nations Volunteers Programme (UNV) are subsidiary organs of the UN established by the Organisation's General Assembly.

23. Pursuant to Article 105 § 1 of the Charter of the United Nations the Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

24. The Convention on the Privileges and Immunities of the United Nations (the "General Convention") of 13 February 1946, to which Germany has been a party since 5 November 1980, provides:

"**Article II**

Section 2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity ...

Article VIII

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

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

25. The General Convention is complemented by the Agreement between the UN and the Federal Republic of Germany concerning the headquarters of the UNV (the "Headquarters Agreement") of 10 November 1995, which stipulates in its Article 4 that the General Convention shall apply to the UNV. In addition, it contains in its Article 9 § 1 and Article 26 § 1 (a) provisions similar to sections 2 and 29 (a) of the General Convention respectively.

2. The UN internal appeals system concerning employment-related disputes

26. Under the UN internal appeals system in force at the time of the dispute at issue, UN staff members who considered that a decision by the UN administration had violated the terms of their employment could seek an administrative review of such decision by the UN Secretary-General. If the Secretary-General did not reply within the allotted time-limit as stipulated in the relevant regulations or if his reply was unfavourable, the staff member could submit an appeal to the Joint Appeals Board (the "JAB"). The JAB, composed of three staff members, following an examination of the case, made a non-binding recommendation to the Secretary-General who took the final decision on the appeal.

27. The Secretary-General's final decisions could then be challenged before the United Nations Administrative Tribunal (the "UNAT"). The UNAT was established in 1950 by the General Assembly, for the purpose of resolving employment-related disputes between United Nations staff and the Organisation.

28. The judges of the UNAT, who had to possess judicial experience in the field of administrative law, were appointed by the General Assembly for four years and could be reappointed once. No member of the UNAT could be dismissed by the General Assembly unless the other members were of the unanimous opinion that he or she was unsuited for further service (Article 3 of the UNAT's Statute, adopted by the General Assembly by resolution 351 A (IV) on 24 November 1949 and as applicable at the time of the dispute at issue).

29. As to the proceedings before the UNAT, each written statement and additional document submitted to the UNAT at the request of its president was to be communicated to the other parties, unless at the request of one of the parties and with the consent of the other parties, the UNAT decided otherwise (see Article 10 of the Rules of the Administrative Tribunal of the United Nations adopted by the Tribunal on 7 June 1950, as amended and applicable at the time of the dispute at issue). An applicant could present his case before the Tribunal in person, in either the written or oral proceedings. He could also designate a staff member of the United Nations to represent him, or could be represented by counsel authorized to practice in any country a member of the organization concerned (Article 13 of the Rules of the UNAT). Oral proceedings were to be held if the presiding member so decided or if either party so requested and the presiding member agreed (see Article 15 § 1 of the Rules of the UNAT).

30. If the Tribunal found that an application was well-founded, it had to order the rescinding of the decision contested. At the same time, it had to fix the amount of compensation to be paid to the applicant for the injury sustained should the Secretary-General decide, in the interests of the UN, that the applicant should be compensated without further action being taken in his or her case. Such compensation should, as a rule, not exceed the equivalent of two years' net base salary of the applicant (see Article 10 § 1 of the Statute).

3. The Report of the Redesign Panel on the United Nations system of administration of justice

31. In January 2006 the UN Secretary-General established the Redesign Panel on the United Nations system of administration of justice (the "Redesign Panel") in reply to a request by the UN General Assembly expressed in its resolution 59/283 to establish a panel of external, independent experts to review and possibly redesign the system of administration of justice at the United Nations. The Redesign Panel issued its report on 28 July 2006. The relevant parts of the report read as follows:

> "**Summary**
>
> ... The Redesign Panel found that the United Nations internal justice system is outmoded, dysfunctional and ineffective and that it lacks independence ...

II. Overview

5. The Redesign Panel found that the administration of justice in the United Nations is neither professional nor independent. The system of administration of justice as it currently stands is extremely slow, underresourced, inefficient and, thus, ultimately ineffective. It fails to meet many basic standards of due process established in international human rights instruments ...

9. ... establishing a professional system of internal justice is essential if the United Nations is to avoid the double standard – which currently exists – where the standards of justice that are now generally recognized internationally and that the Organization pursues in its programmatic activities are not met within the Secretariat or the funds and programmes themselves. These international standards include the right to a competent, independent and impartial tribunal in the determination of a person's rights, the right to appeal and the right to legal representation.

10. ... Hearings, too, are a clear requirement in international standards whenever there are disputed issues of fact. ...

V. The Formal system

71. A number of the difficulties within the formal justice system stem from the Statute and the jurisprudence of UNAT. By article 10.1 of its Statute, UNAT may order specific performance. However, it is required at the same time to fix compensation (normally limited to two years' net base salary), which the Secretary-General may decide to pay as an alternative if that is considered to be in the interests of the Organization. The power of the Secretary-General to choose between specific performance and the payment of limited compensation can, and sometimes does, result in inadequate compensation, particularly in cases of wrongful termination or non-renewal of contract. A system that cannot guarantee adequate compensation or other appropriate remedy is fundamentally flawed. More significantly, a system that does not have authority to finally determine rights and appropriate remedies is inconsistent with the rule of law.

72. The decisions of UNAT are not always consistent, and its jurisprudence is not well developed. In particular, it does not have a coherent jurisprudence as to the duties of an international organization to its staff. Thus, there is a widespread view, which is largely correct, that the formal justice system affords little, if any, protection of individual rights, such as the right to a safe and secure workplace or the right to be treated fairly and without discrimination.

VI. Legal representation

100. The Panel of Counsel, which was formally established in 1984 and which has the responsibility to provide legal assistance and representation to United Nations staff members in proceedings within the internal justice system, is extremely underresourced and is not professionalized. ...

106. The Redesign Panel notes that legal assistance to the management of the Organization is undertaken not by volunteers without legal training, but by a cadre of professional lawyers in the Department of Management and the Office of Legal Affairs. This disparity in legal resources available to the management and staff members has created an egregious inequality of arms in the internal justice system."

32. In 2007, based on the recommendations of the Redesign Panel and acting on a proposal by the Secretary-General, the General Assembly decided to introduce a new system for handling internal disputes and

disciplinary matters in the United Nations. The new two-tier judicial system with a United Nations Dispute Tribunal and a United Nations Appeals Tribunal became operational on 1 July 2009.

4. Relevant case-law of the Federal Constitutional Court

(a) General principles

33. The Federal Constitutional Court has jurisdiction to deal with constitutional complaints which concern acts of a "public authority" (see Article 93 § 1 no. 4 (a) of the Basic Law). Under the Federal Constitutional Court's well-established case-law, this comprises not only acts of German public authorities, but also acts of supranational organisations which concern the beneficiaries of fundamental rights in Germany (see, for instance, Federal Constitutional Court, file no. 2 BvR 2134, 2159/92, judgment of 12 October 1993, Collection of the decisions of the Federal Constitutional Court (*BVerfGE*), vol. 89, pp. 155 ss., 174 s. (Maastricht judgment); file no. 2 BvR 1458/03, decision of 3 July 2006, § 12 (of the internet version)).

34. However, the Federal Constitutional Court only exercises its jurisdiction over supranational acts of international organisations under the condition that the complainant sufficiently substantiated that the level of protection of fundamental rights by the international organisation was generally and manifestly below the level required by the Constitution (see, for instance, Federal Constitutional Court, file no. 2 BvR 197/83, decision of 22 October 1986, BVerfGE, vol. 73, pp. 339 ss., 387 (*Solange II*); file no. 2 BvL 1/97, decision of 7 June 2000, BVerfGE, vol. 102, pp. 147 ss., 164; file no. 2 BvR 2368/99, decision of 4 April, §§ 9 ss.; file no. 2 BvR 1458/03, decision of 3 July 2006, § 21).

(b) Decision of 28 November 2005

35. The Federal Constitutional Court's decision of 28 November 2005 (file no. 2 BvR 1751/03) concerned the decision of the European Patent Office not to admit the applicant as a representative before that Office as he had not passed the ability test.

36. The Federal Constitutional Court declined to consider the applicant's constitutional complaint. It found that the complaint was directed against an act of a "public authority" as the decision at issue had a direct effect on a beneficiary of fundamental rights in the German legal order.

37. However, the level of protection of fundamental rights guaranteed by the European Patent Convention satisfied the requirements which had to be met under the Basic Law in case of a transfer of sovereign powers. The applicant had failed to substantiate sufficiently that the level of human rights protection under the European Patent Convention in respect of admissions as a representative was generally and manifestly below the level

required by the Constitution. The same applied if a duty of protection on the part of the State was assumed as the applicant would also have been obliged to demonstrate that there was a structural lack of legal protection which the Federal Government should have addressed. The Federal Constitutional Court therefore did not exercise its jurisdiction.

(c) Decision of 22 June 2006

38. The Federal Constitutional Court's decision of 22 June 2006 (file no. 2 BvR 2093/05 – the impugned decision in the case of *Klausecker v. Germany*, no. 415/07) concerned the European Patent Office's decision not to recruit the applicant.

39. The Federal Constitutional Court declined to consider the applicant's constitutional complaint against the European Patent Office's decision. It found that the complaint, in which the applicant had argued, in particular, that his constitutional right of access to court had been breached, was inadmissible. A constitutional complaint only lay against acts of a "public authority" and the applicant had failed to demonstrate that such an act was at issue in his case.

40. The Federal Constitutional Court confirmed that the European Patent Organisation had immunity from the jurisdiction of the domestic courts within the scope of its official activities under the European Patent Convention. It further reiterated that acts of a "public authority" were not only acts of German State authorities. The term also covered acts of supranational authorities, such as the European Patent Organisation and its executive organ, the European Patent Office, which had an impact on the beneficiaries of fundamental rights in Germany.

41. However, the decision of the President of the European Patent Office here at issue could not be qualified as an act which had an impact on the beneficiaries of fundamental rights in Germany because it did not have any external legal effects within the German legal order. Measures relating to the relationship between the international organisation and its staff or candidates for posts, as a rule, only concerned the internal sphere of the organisation. This conclusion was not altered by the fact that the applicant was a German national living in Germany who, had he been employed, would have worked in Germany. The court conceded that the applicant's recruitment would have been an act of a supranational nature which, changing his legal status, would have had a concrete effect within the German legal order. The refusal to employ him did not, however, have such an effect. The Federal Constitutional Court's jurisdiction did not extend to such internal measures.

42. The Federal Constitutional Court further found that in view of the inadmissibility of the applicant's constitutional complaint, it did not have to decide the question whether the level of protection in respect of staff issues within the European Patent Organisation complied with the standards set by

the Basic Law, which had to be observed in the event of a transfer of sovereign powers.

(d) Decision of 3 July 2006

43. The Federal Constitutional Court's decision of 3 July 2006 (file no. 2 BvR 1458/03) concerned the temporary denial of access of the complainants, staff members of the European Patent Office, to the internal e-mail system of that organisation.

44. The Federal Constitutional Court dismissed the complaint as inadmissible as it had not been shown that it concerned an act of a "public authority". It stressed that such acts included acts of supranational organisations to which Germany had transferred sovereign powers and which had direct legal effects within the German legal order, that is, which altered the legal position of individuals within it. However, the impugned measure did not alter the complainants' position in the German legal order. It further spoke against the existence of an act of a "public authority" that the European Patent Office enjoyed immunity from jurisdiction in respect of employment-law disputes.

45. Furthermore, as the Federal Constitutional Court had previously found (it referred to its decision of 28 November 2005, file no. 2 BvR 1751/03, see paragraphs 35-37 above), there could be a duty of protection incumbent on the State (*Schutzpflichtenansatz*) where the internal sphere of an international organisation was affected. In that sphere, legal protection could only be granted if the German legislature and the Federal Government used means that were suitable for ensuring that any conditions within the intergovernmental organisation which were contrary to fundamental rights were removed. The failure of the German State authorities to take action in connection with the final decision on the impugned act would then constitute an act of a "public authority".

46. The complainants had, however, failed to make any submissions in this respect. Just as in the sphere of an organisation's supranational powers, it was necessary for complainants to claim in a substantiated manner that there was a structural deficiency in legal protection within the organisation. The Federal Constitutional Court further noted that it had previously confirmed that the system of fundamental rights protection within the European Patent Convention and in the proceedings before the Administrative Tribunal of the International Labour Organisation generally complied with the standards of the Constitution.

COMPLAINTS

47. The applicant complained that the proceedings before the UN internal appeal bodies and the UNAT had been characterised by manifest procedural, substantive and practical shortcomings and had not met the requirements of a fair trial within the meaning of Article 6 of the Convention. Germany was to be held responsible for these deficient procedures as it had failed to ensure that there was a UN internal dispute settlement procedure protecting her fundamental rights in a manner equivalent to the Convention standards.

48. The applicant further argued that the defendant State, by granting the UN immunity from jurisdiction, had failed to guarantee her access to a fair and public hearing by an independent and impartial tribunal in the determination of her civil rights before the German courts, in breach of Article 6 of the Convention.

49. Moreover, in the applicant's submission, the defendant State had not provided her with an effective remedy in the domestic legal order to redress the said breaches of Article 6, as required by Article 13 of the Convention.

50. The applicant finally complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment by the acting senior officials of the Organisation and its sub-organisations. In particular, the said officials had repeatedly tried to intimidate her with a view to coerce her into accepting an unfavourable agreement on the termination of her employment.

THE LAW

51. The Court considers that the applicant's complaints about the deficient procedures before the UN internal appeal bodies and the UNAT, on the one hand, and about the lack of access to the German courts, on the other hand, fall to be examined under Article 6 § 1 of the Convention alone, which, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

A. Alleged violation of Article 6 § 1 of the Convention in the UN internal review proceedings

1. Germany's responsibility ratione personae

52. In so far as the applicant complained about the unfairness of the proceedings both before the UN internal appeal bodies and the UNAT, the

Court has to examine, first, whether the applicant fell within the respondent State's jurisdiction (Article 1 of the Convention) in this respect.

(a) The parties' submissions

(i) The Government

53. The Government argued that under the Court's case-law as established in the cases of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI) and *Gasparini v. Italy and Belgium* ((dec.), no. 10750/03, 12 May 2009), Member States of international organisations could only be held responsible for acts which occurred within that organisation if the organisation's internal dispute settlement mechanism was manifestly deficient in the protection of Convention rights (objective element) and if this had been perceptible for the Member States concerned at the time when they transferred sovereign rights to the organisation (subjective element). In addition, the applicant's Convention rights had to be violated in the specific dispute settlement procedure at issue.

54. As regards the existence of objective deficiencies in the UN's internal dispute settlement mechanism at the relevant time, the Government submitted, in particular, that the fact that there had not been an oral hearing at any stage of the applicant's proceedings had not contravened Article 6 § 1 of the Convention because under the Court's case-law an oral hearing was unnecessary in internal proceedings of international organisations (they referred to the case of *Gasparini*, cited above). As to the applicant's allegation that her right to equality of arms had been breached in that she had not had access to relevant documents throughout the proceedings, the Government argued that they could not comment thereupon as they had not been given any information by the UN in this respect. In any event, the Government could not have foreseen such a breach as Article 10 of the Rules of the UNAT (see paragraph 29 above) stipulated expressly that documents submitted by a party shall be communicated to the other parties.

55. As regards the applicant's complaint about the lack of independence and impartiality of the UNAT, as required by Article 6 § 1, the Government stressed that the judges of that tribunal were elected by the UN General Assembly for a four-year term, renewable once, and could only be dismissed by the latter if all other judges had taken the view that the judge concerned was unsuitable (Article 3 of the UNAT's Statute).

56. The Government argued that, in any event, the applicant failed to demonstrate that there had been any reasons for Germany to consider that, at the time when it transferred sovereign rights to the UN in 1973 (see the Court's case-law in the case of *Gasparini*, cited above), the UN's internal dispute settlement system had been manifestly deficient. It had only been the subsequent report of the UN Redesign Panel published in 2006 which

had brought to light a number of deficiencies. The German Government thereupon had immediately worked towards a change in the UN's system of legal protection.

(ii) The applicant

57. In the applicant's submission, the facts of her case arose within the jurisdiction of the respondent State, thereby engaging its responsibility under the Convention. She stressed that under the Court's case-law developed in the case of *Bosphorus* (cited above, § 155), Germany remained responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission was a consequence of the necessity to comply with international legal obligations. Furthermore, the Court, in its decision in the case of *Gasparini* (cited above), had not considered any State action necessary for a finding of Member State liability. The presence of a structural lacuna in an international organisation's internal administration of justice, rendering the system of justice manifestly deficient, was sufficient to render Member States liable under the Convention.

58. The applicant argued that the proceedings against her had not met the standards of Article 6 of the Convention in several respects. In particular, she had not had an oral hearing throughout the review proceedings despite the fact that her work performance, which had been evaluated in a different manner by a new supervisor, in contrast to her past exemplary employment record, had been at issue. Her right to equality of arms had been disregarded in that she had not had access to all documents relating to her case submitted by the UNDP and relied upon both by the Rebuttal Panel and by the UNAT.

59. As regards the UNAT in general, she complained about the lack of clear qualifications required in the selection process for UNAT judges, their lack of impartiality and independence in view of their short, renewable mandate, and the unfairness of the proceedings before the UNAT as a result of the evident lack of consistency in its case-law. Moreover, under Article 10 § 1 of its Statute (see paragraph 30 above), the UNAT could not fix an adequate compensation in cases of wrongful termination of contract as it was obliged to fix a limited compensation in addition to its order for specific performance which the Secretary-General could decide to pay as an alternative if this was considered in the interests of the UN.

(b) The Court's assessment

(i) Relevant principles

60. The Court reiterates that the sole fact that an international organisation or tribunal has its seat and premises on the territory of the respondent State is not a sufficient ground to attribute the matters

complained of to the State concerned (compare *Galić v. the Netherlands* (dec.), no. 22617/07, § 46, 9 June 2009; *Blagojević v. the Netherlands* (dec.), no. 49032/07, § 46, 9 June 2009; and *Lopez Cifuentes v. Spain* (dec.), no. 18754/06, § 25, 7 July 2009).

61. The Court recalls that it recently gave decisions in a number of applications where the impugned decision emanated from an internal body of an international organisation or an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that lay entirely within the internal legal order of an international organisation that had a legal personality separate from that of its Member States. It was decisive for the respondent States to be held responsible under the Convention in those cases whether the States concerned had intervened directly or indirectly in the dispute, and whether an act or omission of those States or their authorities could be considered to engage their responsibility under the Convention. If that was not the case, the Court considered the applicants not to have been "within the jurisdiction" of the respondent States concerned for the purposes of Article 1 of the Convention and therefore declared the applications to be incompatible *ratione personae* with the provisions of the Convention in this respect (see, *inter alia*, *Boivin v. 34 Member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008; *Connolly v. 15 Member States of the European Union* (dec.), no. 73274/01, 9 December 2008; *Beygo v. 46 Member States of the Council of Europe* (dec.), no. 36099/06, 16 June 2009; *Lopez Cifuentes*, cited above, §§ 27-30; see also, *mutatis mutandis*, *Etablissements Biret et Cie S.A. and Biret International v. 15 Member States of the European Union* (dec.), no. 13762/04, 9 December 2008; see also the references to that case-law in *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009, and *Rambus Inc. v. Germany* (dec.), no. 40382/04, 16 June 2009, in which the Court considered the respective applications as manifestly ill-founded on further, additional grounds).

62. The Court subsequently examined complaints about acts of international organisations and tribunals in labour disputes of those organisations with their staff in the light of its case-law relating to States' responsibility established in the case of *Bosphorus* (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 152-156, ECHR 2005-VI), in particular in the case of *Gasparini* (cited above). In *Gasparini*, the Court deducted from the principles developed in the *Bosphorus* case that, when transferring part of their sovereign powers to an international organisation of which they are a member, Contracting Parties to the Convention were under an obligation to monitor that the rights guaranteed by the Convention received within that organisation an "equivalent protection" to that secured by the Convention system. In fact, a Contracting Party's responsibility under the Convention could be engaged if it subsequently turned out that the protection of fundamental rights offered

by the international organisation concerned was "manifestly deficient" (see *Bosphorus*, cited above, §§ 155-156). Conversely, an alleged violation of the Convention was not attributable to a Contracting Party because of a decision or measure emanating from an organ of an international organisation of which it is a member where it has not been established nor even been alleged that the protection of fundamental rights generally offered by the said international organisation was not "equivalent" to that secured by the Convention and where the State concerned neither directly nor indirectly intervened in the commission of the impugned act (see *Boivin*, cited above).

(ii) Application of these principles to the present case

63. Having regard to the above principles (see paragraph 60), the Court considers that the fact alone that the impugned decision of the UN Secretary-General, as confirmed in the UN internal review procedure, took effect on German territory at the seat of the UNV Headquarters Administration in Bonn where the applicant was working and resided does not bring the impugned acts within Germany's jurisdiction for the purposes of Article 1 of the Convention.

64. The Court further notes that the German authorities neither directly nor indirectly intervened in the employment dispute proceedings before the internal bodies of the UN and the UNAT (see paragraph 61 – case of *Boivin* and others). However, as shown above (see paragraph 62 – case of *Gasparini*), when transferring part of their sovereign powers to an international organisation of which they are a member, Contracting States are under an obligation to monitor that the rights guaranteed by the Convention received within that organisation an "equivalent protection" to that secured by the Convention system. Therefore, the question arises whether Germany's responsibility under the Convention was engaged because the protection of fundamental rights generally offered by the UN, an international organisation, in labour disputes between the UN and its staff was not "equivalent" to that secured by the Convention and because Germany thus failed to safeguard such protection.

65. The Court takes note of the fact that the applicant forwarded a number of reasons for her allegation that the internal administration of justice within the UN in labour disputes in force at the relevant time was manifestly deficient. She alleged several shortcomings in the procedure which, if proven to be true, raise an issue under Article 6 § 1 of the Convention. She referred, *inter alia*, to the fact that she did not have an oral hearing at any stage of the proceedings regarding her dismissal, despite the fact that in her case there were issues of both credibility and contested facts. Moreover, she claimed that she had not had access to all documents submitted by the UNDP to the UNAT and relied upon by the latter, in breach of her right to equality of arms. She further notably complained that

the UNAT only had limited jurisdiction in cases concerning wrongful terminations of contracts as the Secretary-General could choose to pay a limited compensation instead of reinstating the person who had been unlawfully dismissed. The Court observes that a number of the shortcomings complained of by the applicant were indeed confirmed in the report of the Redesign Panel on the United Nations system of administration of justice of July 2006, a panel of independent external experts set up by the UN Secretary-General himself (see paragraphs 31 above).

66. The Court cannot but note, however, that, in view of the foregoing, the applicant must be considered to have complained before this Court in a substantiated manner that there had been a structural deficiency in the legal protection within the UN in respect of employment disputes at the relevant time. As shall be shown below, this issue is vital for the question whether there had been an effective remedy available to her to bring her case before the domestic courts. The Court may leave open the question whether Germany was responsible *ratione personae* under the Convention in view of the following considerations on exhaustion of domestic remedies.

2. Exhaustion of domestic remedies

(a) The parties' submissions

(i) The Government

67. The Government objected that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. If the applicant's submission was accepted that the former UN internal dispute settlement procedure had been manifestly deficient, thereby engaging Germany's responsibility therefor, it followed that the UN's immunity from jurisdiction had to be considered as restricted. However, in these circumstances, the German courts had to be afforded the opportunity to examine the applicant's complaints before she brought them before this Court.

68. The Government submitted that the Federal Constitutional Court, in its well-established case-law, had considered that it had jurisdiction to examine constitutional complaints relating to acts of international organisations, despite the fact that, as a rule, the latter enjoyed immunity from jurisdiction. That court exercised its jurisdiction if the level of protection of fundamental rights within the organisation was generally and obviously below the level of protection afforded by the Constitution. The Government referred to the Federal Constitutional Court's decisions of 28 November 2005 (file no. 2 BvR 1751/03), 22 June 2006 (file no. 2 BvR 2093/05) and 3 July 2006 (file no. 2 BvR 1458/03) (see paragraphs 35-46 above) to support their view.

69. The Government argued that the applicant failed to demonstrate that bringing proceedings before the domestic courts would have been futile. Contrary to her submission, the fact that the Federal Constitutional Court had declined to consider several constitutional complaints in the circumstances of the respective cases did not demonstrate that a constitutional complaint in her case had had no prospects of success. Other than the complainants in the decisions she had referred to, the applicant complained about a general and manifest deficiency in the fundamental rights protection in an international organisation, and thus about a subject-matter in respect of which the Federal Constitutional Court exercised its jurisdiction.

70. The Government further submitted that, contrary to the applicant's submission, obliging her to bring proceedings before the domestic courts would not have been inadequate in view of excessive costs this allegedly entailed. The proceedings before the courts competent for labour disputes would have cost several thousand euros maximum; the proceedings before the Federal Constitutional Court were exempt from costs.

(ii) The applicant

71. The applicant noted that the Government had themselves conceded, by reference to the Federal Constitutional Court's decisions of 28 November 2005 and 3 July 2006 (see paragraphs 35-37 and 43-46 above), that the Federal Constitutional Court, in principle, had jurisdiction to examine alleged breaches of fundamental rights by international organisations where the level of protection within the latter was manifestly inferior to that required under the German Constitution.

72. In the applicant's submission, in the circumstances of her case, however, she had not had any effective remedy at her disposal to complain about the impugned measures taken by the UN following the UN's internal review procedure. She had not had access to the domestic courts despite the systemic breaches of the Convention in the UN's internal justice system. Under the domestic courts' well-established case-law, her claims against the UN would have been dismissed on account of the UN's immunity from jurisdiction and would thus have been futile. She referred to the proceedings before the German courts in the cases of *Waite and Kennedy v. Germany* ([GC], no. 26083/94, ECHR 1999-I), in which those courts had upheld the immunity from jurisdiction of the European Space Agency at each stage of the proceedings, to support her view.

73. The applicant further submitted that the Federal Constitutional Court subsequently confirmed in two decisions taken on 22 June 2006 (file no. 2 BvR 2093/05) and 3 July 2006 (file no. 2 BvR 1458/03; see paragraphs 38-46 above), prior to the date on which she brought her present application before this Court, that no constitutional complaint lay against measures of international organisations in employment disputes as the ones

here at issue. The Federal Constitutional Court had considered that decisions of the European Patent Office and the Administrative Tribunal of the International Labour Organisation did not directly affect the domestic legal order in Germany. The applicant stressed that there was no example of any successful complaint having been brought against an international organisation in Germany because of the latter's immunity from jurisdiction.

74. Moreover, the applicant argued that bringing futile proceedings before the German courts would only have rendered her impecunious in view of the expenses of several tens of thousands of euros to be expected.

(b) The Court's assessment

(i) Relevant principles

75. The Court reiterates that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions (see, *inter alia*, *Civet v. France* [GC], no. 29340/95, § 41, ECHR 1999-VI; and *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010). Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V; and also *Akdivar and Others v. Turkey*, 16 September 1996, § 65, *Reports of Judgments and Decisions* 1996-IV).

76. Article 35 provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others*, cited above, § 68; and *Selmouni*, cited above, § 76). The existence of doubt as to the chances of success of a domestic remedy does not exempt an applicant from the obligation to exhaust it (see *Allaoui and Others v. Germany* (dec.), no. 44911/98, 19 January 1999).

(ii) Application of these principles to the present case

77. The Court observes that in the Government's submission, the applicant should have brought her case both before the German courts competent for labour disputes and before the Federal Constitutional Court.

78. As regards proceedings before the German courts having jurisdiction in labour disputes, the Court observes that under Article 105 § 1 of the Charter of the UN and section 2 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, ratified by Germany, the UN enjoy immunity from jurisdiction (see paragraphs 23-24 above). This was confirmed in respect of the UNV in Article 9 of the Headquarters Agreement between the UN and the Federal Republic of Germany (see paragraph 25 above).

79. It further emerges from the Federal Constitutional Court's case-law relied upon by both parties that international organisations had immunity from jurisdiction of the domestic courts competent in labour disputes (see, in particular, paragraph 40 above). Moreover, the Federal Constitutional Court did not consider in these cases that it raised an issue of exhaustion of domestic remedies that the constitutional complaints had been lodged against the impugned measures of the international organisation in question directly (see paragraphs 35-46 above). The Government did not provide the Court with any pertinent domestic court decisions which would permit the Court to come to a different conclusion.

80. In view of the foregoing, the Court considers that the Government failed to demonstrate that bringing proceedings before the German courts competent for labour disputes would have been an effective remedy which the applicant had to exhaust.

81. As regards proceedings brought directly before the Federal Constitutional Court, the Court takes note of the Government's submission that a constitutional complaint would have been an effective remedy in respect of the applicant's complaints. Just as the applicant, the Government relied on the Federal Constitutional Court's decisions of 28 November 2005 (file no. 2 BvR 1751/03), 22 June 2006 (file no. 2 BvR 2093/05), and 3 July 2006 (file no. 2 BvR 1458/03) (see paragraphs 35-46 above) to support their view.

82. The Court considers that it emerges from the said decisions of the Federal Constitutional Court that, despite the statutory immunity from jurisdiction of international organisations before the German courts, the Federal Constitutional Court, in principle, has jurisdiction to examine the compliance with the Constitution of the level of protection of fundamental rights granted in employment disputes within international organisations (see paragraphs 33 and 35 ss. above). This is indeed uncontested by the applicant.

83. However, the Federal Constitutional Court exercises this jurisdiction only under restrictive conditions. A complainant has to show that there was

an act of a "public authority" against which a constitutional complaint lay, that is, an act of a supranational nature which had a concrete effect within the German legal order. Whereas measures taken by international organisations of a purely internal nature do not meet this requirement, the Federal Constitutional Court found that a complainant's recruitment by an international organisation would have changed his legal status within the German legal order and would therefore have to be classified as an act of a "public authority" (see paragraph 41 above). A complainant's dismissal as a staff member of an international organisation, which is at issue in the present case, arguably changes the legal status of the person concerned in the German legal order in an inverted and in so far comparable manner.

84. The Court further takes note of the Federal Constitutional Court's case-law to the effect that an act of a "public authority" which may be challenged by a constitutional complaint may further lie in a failure, by the German State authorities, to comply with their duty of protection as regards the respect of fundamental rights within an international organisation (see paragraphs 37 and 45 above).

85. In addition, it would have been necessary for the applicant's constitutional complaint to be admissible that she claimed in a substantiated manner that the level of protection of fundamental rights by the UN was generally and manifestly below the level required by the Constitution (see paragraphs 34, 37 and 46 above). This condition applied irrespective of whether the act of a "public authority" lay in the applicant's dismissal by the UN or in the failure of the German State authorities to ensure that her fundamental rights were protected within the UN. The Court refers in this respect to its above finding that the applicant indeed claimed that there had been a structural deficiency in the fundamental rights protection in the employment dispute settlement procedures within the UN (see paragraph 66 above).

86. The Court is therefore satisfied that a complaint to the Federal Constitutional Court was accessible and capable of providing redress in respect of the applicant's complaints.

87. As to the prospects of success of a constitutional complaint, the Court takes note of the applicant's argument that there was no example of any successful complaint having been brought before the Federal Constitutional Court in respect of deficiencies in the protection of fundamental rights within international organisations. The Court observes that in the three decisions of the Federal Constitutional Court relied upon by both parties, that court had indeed not considered the respective complaints well-founded. However, the facts of these complaints differed from those at issue in the present case. Some complainants had not shown to complain about an act of a "public authority" (decision of 22 June 2006, see paragraph 39 above; and decision of 3 July 2006, see paragraph 44 above). Other complainants failed to demonstrate that the level of fundamental

rights protection guaranteed by the (different) international organisation in question had, in substance, been generally and manifestly below the level required by the Constitution (decision of 28 November 2005, see paragraph 37 above; and decision of 3 July 2006, see paragraph 46 above).

88. The Court does not overlook that complainants have to meet strict conditions in order for a constitutional complaint concerning employment disputes in international organisations to have prospects of success. However, the decisions relied upon by the parties show that the Federal Constitutional Court did in fact partly consider the merits of the constitutional complaints at issue. It further takes into account that a complaint to the Federal Constitutional Court was the only means for the respondent State to have knowledge of and redress the fundamental rights violations alleged by the applicant prior to her application to the Court. In these circumstances, the Court considers that the Government proved that a complaint to the Federal Constitutional Court was, in general, an effective remedy which the applicant had to exhaust.

89. The Court further takes note of the applicant's argument that she had been absolved from exhausting domestic remedies in the circumstances of her case as bringing such proceedings would render her impecunious. However, the applicant already failed to substantiate in any way that the proceedings before the Federal Constitutional Court, which were exempt from court costs, would have had such an effect.

90. It follows that, even assuming the application's compatibility with the provisions of the Convention in this respect, this part of the application must be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

B. Alleged violation of Article 6 § 1 of the Convention by the failure to grant access to the German courts

1. Germany's responsibility ratione personae

91. In the Government's view, the applicant was estopped from claiming access to the German courts by concluding an employment contract with the UN, being aware that the latter was immune from jurisdiction. She could not both claim the advantages of an employment contract with the UN including, *inter alia*, tax-free salary, and claim access to the German courts to assert her rights flowing from that contract while she did not have any relationship, such as a duty to pay tax, with her State of residence.

92. The applicant contested that she was estopped from claiming access to the German courts by concluding an employment contract with the UN. When joining the UN in 1970 she had had no reason to suspect that she was giving up basic human rights by working for an organisation promoting the protection of these rights.

93. The Court limits itself to reiterate that it would be incompatible with the purpose and object of the Convention if the Contracting States, by attributing immunities to international organisations, were absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. This applies, in particular, to the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, *inter alia*, *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I; and *Beer and Regan v. Germany* [GC], no. 28934/95, § 57, 18 February 1999). It follows that the applicant was not estopped from holding Germany responsible for its alleged failure to grant her access to the domestic courts in order to have her employment dispute with the UN determined. Therefore, her application is compatible *ratione personae* with the provisions of the Convention in this respect.

2. Exhaustion of domestic remedies

94. The Government objected that the applicant failed to exhaust domestic remedies, as required by Article 35 § 1 of the Convention, also in respect of her complaint about a lack of access to the German courts. This was contested by the applicant.

95. The Court notes that the applicant did not bring her employment dispute with the UN before the Federal Constitutional Court prior to bringing her complaint about a lack of access to the domestic courts before this Court. It refers to its above finding that a complaint to the Federal Constitutional Court was an effective remedy which the applicant had to exhaust in respect of her complaints about the deficient procedures before the UN internal appeal bodies and the UNAT (see paragraphs 81-90 above). The same applies in respect of the applicant's complaint about a lack of access to court as she could equally have complained before the Federal Constitutional Court about the alleged lack of access to any German tribunal as a result of the UN's immunity from jurisdiction (compare, for an example, paragraph 39 above). She therefore failed to afford the respondent State an opportunity to grant her redress in respect of her claim that she had not had a remedy to have her employment dispute with the UN determined by the German courts.

96. In view of the foregoing, this part of the application must equally be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

C. The remainder of the applicant's complaints

97. In so far as the applicant finally complained under Article 3 of the Convention that she had been subject to inhuman and degrading treatment by the acting senior UN officials in the course of the termination of her contract, the Court observes that the applicant did not bring that complaint

before the German courts, in particular the Federal Constitutional Court either.

98. Even assuming compatibility with the provisions of the Convention, this part of the application must therefore equally be dismissed for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 29 January 2015.

Claudia Westerdiek
Registrar

Mark Villiger
President