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Implications of the *Interim Accord* Ruling of the International Court of Justice

HALIL RAHMAN BASARAN*

Abstract

The Interim Accord ruling of the International Court of Justice is a renewed challenge from an international court to international organizations. The Court pierced the veil of NATO and disregarded NATO's indispensable position. It implied that member-States could not avoid responsibility by hiding behind the corporate veil of an international organization. In the final analysis, this ruling constitutes a phase in the constructive process of international relations.

I. Introduction

The *Interim Accord* ruling of the International Court of Justice (ICJ) points to an important development in international law: the ICJ demonstrated that it was ready to pierce the corporate veil of international organizations (IOs) and remove their relevance in a legal dispute between a Member State of the IO and an outsider country.¹

IOs are founded to solve coordination problems between governments; they help create mutual understanding and cooperation. They offer a common venue for the representatives of governments in a variety of fields and help deal with global problems. Yet, IOs have one ultimate and not-openly-discussed function: the opportunity given to countries to avoid international responsibility. IOs assume and cover the individual responsibilities of States. Put in simpler terms, they become scapegoats for the individual faults, deficiencies, and actions of member countries on the international stage. An IO is an organization to refer to when governments do not want to challenge their counterparts head-on but want to provide a shelter for themselves. IOs give members leverage over non-members.

Nevertheless, the *Interim Accord* ruling of the ICJ runs contrary to that understanding. The ruling makes it clear that an IO cannot prevent the international community from

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1. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), 2011 ICJ, at ¶ 35, (Dec. 5), available at <http://www.icj-cij.org/docket/files/142/16827.pdf> [hereinafter Application of the Interim Accord].

pinpointing the wrongdoing Member State.² Member States cannot be covered under the corporate veil of an IO in order to avoid liability. The *Interim Accord* ruling makes it possible to hold a member country responsible notwithstanding the protection of the IO.³

To put the *Interim Accord* ruling in context, this article examines the rulings of three courts: the ICJ, the European Court of Human Rights (ECtHR), and the European Court of Justice (ECJ). The ICJ is an organ of the United Nations (UN) and the universal court. The ECtHR is a very active court with a high level of prestige. It embodies the pro-active stance of international courts after the Second World War, with a focus on human rights. It has been dealing with governments and IOs for a very long time. As for the ECJ, it is an interesting court in that it has an active policy of forming the European Union as a community of law and represents the judicial dimension of a *sui generis* IO, which has intricate relationships with both its Member States and other IOs. In short, these three international courts implicate three IOs—the UN, the Council of Europe, and the European Union—and help concretize the relationship between international courts, governments, and IOs.

This paper puts forward the point that the position of IOs is determined by its interaction with international courts and governments. The paper proceeds as follows: first, it provides a summary of the *Interim Accord* ruling; second, it considers the piercing of the corporate veil; third, it discusses the concept of an indispensable third party; fourth, it delves into a theoretical view of the *Interim Accord* ruling; and lastly, it concludes that the *Interim Accord* ruling constitutes a phase of the *constructive process* of international relations.

II. Summary of the Interim Accord Ruling

Greece and the Republic of Macedonia have been locked in a dispute concerning the name of the latter since Greece argued that the term “Macedonia” has irredentist connotations in respect of Greece and should be removed or qualified.⁴ The Republic of Macedonia objects, stating that no country has the right to interfere with its name choice; it is an identity issue and concerns Macedonia’s sovereign rights.⁵ This dispute started just after the Republic’s proclamation of independence in 1991 and was addressed by a 1995 Interim Accord—an international treaty—between the two countries.⁶ Under this accord, the “Republic of Macedonia” is provisionally to be referred to in all IOs as the “Former Yugoslav Republic of Macedonia” (FYRM), until the final settlement of the name issue, and Greece is not to object to the membership of the FYRM to IOs.⁷

The deal represented a compromise between the two countries and worked well until the 2008 Bucharest Summit of North Atlantic Treaty Organization (NATO). At that summit, NATO declared that the FYRM could not join unless it solved its name problem with Greece.⁸ This was a blow to the membership aspirations of the FYRM and induced

2. *Id.* ¶¶ 124–26.

3. *Id.*

4. *Id.* ¶ 16.

5. *Id.* ¶ 15.

6. *Id.* ¶¶ 15, 20.

7. *Id.* ¶ 85.

8. Press Release, North Atlantic Treaty Organization [NATO], Bucharest Summit Declaration, 049 ¶ 20 (Apr. 3, 2008), available at http://www.nato.int/cps/en/natolive/official_texts_8443.htm?mode=pressrelease

the FYRM to initiate proceedings against Greece before the ICJ.⁹ The FYRM argued that Greece breached its commitment not to object to the entry of the FYRM to an IO.¹⁰ Indeed, the ICJ found that Greece had objected to the membership of the FYRM to NATO, and this was held to be in violation of the Interim Accord.¹¹

Nevertheless, this ruling cannot be seen as a simple case of the *pacta sunt servanda* obligation of Greece. Rather, it implicates three significant questions. First, how can the ICJ pinpoint and blame Greece alone even though NATO's decision not to invite Macedonia to the organization was taken by consensus? This is the question regarding *piercing the corporate veil*. Second, isn't NATO an *indispensable third party* to the issue before the ICJ? Can the ICJ isolate the dispute between Greece and Macedonia and exclude NATO from the equation? Third, this paper considers whether a theory could be advanced to explain the *Interim Accord* ruling.

III. Piercing the Corporate Veil

The ICJ stated in the *Interim Accord* ruling that it did not target NATO.¹² The ruling was merely about the Greek objection to the Macedonian entry to NATO, not the NATO rejection of the FYRM as such.¹³ But it can be argued that NATO was subtly targeted. By sanctioning a NATO member country (Greece), NATO's consensus decision to reject Macedonia's membership was circumvented and indirectly questioned. In other words, the ICJ isolated Greece's objection to Macedonia's membership and declared it illegal. Regardless of the institutional framework provided by NATO, a NATO member State was held responsible.

Nonetheless, there have been cases of governments being held directly responsible regardless of the institutional cover provided by the IOs. Governments could be held liable even when they merely implement the decisions of the IOs of which they are members. For instance, the *Matthews* ruling of the ECtHR made it clear that the United Kingdom—withstanding the European Community (EC) Council Decision 76/787 and the 1976 Act laying out the procedure for the European Parliament elections—was liable for the breach of the right to vote for residents of Gibraltar (a province of the United King-

("We recognize the hard work and the commitment demonstrated by the former Yugoslav Republic of Macedonia to NATO values and Alliance operations. We commend them for their efforts to build a multi-ethnic society. Within the framework of the UN, many actors have worked hard to resolve the name issue, but the Alliance has noted with regret that these talks have not produced a successful outcome. Therefore we agreed that an invitation to the former Yugoslav Republic of Macedonia will be extended as soon as a mutually acceptable solution to the name issue has been reached. We encourage the negotiations to be resumed without delay and expect them to be concluded as soon as possible"). This statement was repeated in the NATO Strasbourg/Kehl Summit Declaration and in the NATO Lisbon Summit Declaration. Press Release, NATO, Strasbourg/Kehl Summit Declaration, 044 ¶ 22 (Apr. 4, 2009), available at http://www.nato.int/cps/en/nato/live/news_52837.htm?mode=pressrelease; NATO, *Lisbon Summit Declaration* (Nov. 20, 2010), available at http://www.nato.int/cps/en/natolive/official_texts_68828.htm.

9. See generally Application of the Interim Accord, *supra* note 1.

10. *Id.* ¶ 1.

11. *Id.* ¶ 164.

12. *Id.* ¶ 42.

13. *Id.* ¶ 43.

dom).¹⁴ The residents of Gibraltar were prevented from voting at all in the European Parliament elections.¹⁵ This was in violation of the right to vote—a fundamental right.¹⁶ Although the UK argued that it was merely implementing the measures as established by the EC,¹⁷ it could not avoid its responsibility under the European Convention on Human Rights (ECHR).¹⁸ Human rights (fundamental rights)¹⁹ considerations prevailed over the obligations of the United Kingdom to the EC.²⁰ Indeed, the ECtHR does not exclude the transfer of competences to IOs, provided that ECHR rights continue to be “secured”; member countries’ responsibility therefore subsists even after such a transfer.²¹

This situation was all the more endorsed by the *Bosphorus* ruling of the ECtHR.²² In that case, Ireland seized a Yugoslav airliner,²³ relying on an EC measure,²⁴ which, in turn, was based on UN Security Council Resolution 820 (1993).²⁵ The resolution provided that States should impound all aircraft in their territories “in which a majority or controlling interest is held by a person or undertaking in or operating” from the Former Republic of Yugoslavia.²⁶ Ireland’s action seemed like an encroachment on the right to property, which is a human right. Against this, an application before the ECtHR was brought by the Bosphorus Airlines, an airline company registered in Turkey, which leased the impounded Boeing aircraft from Yugoslav Airlines.²⁷ The ECtHR did not find that Ireland had breached human rights.²⁸ Yet, it stated that the possibility of finding a violation of human rights and sanctioning Ireland was, theoretically, an open possibility:

the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, 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.²⁹

14. *Matthews v. United Kingdom*, 24833/94 Eur. Ct. H.R. ¶ 33 (1999), available at <http://www.math.uni-augsburg.de/stochastik/bazi/ECHR-Matthews.pdf>.

15. *Id.* ¶ 7.

16. *Id.* ¶¶ 61, 65.

17. *Id.* ¶ 26.

18. *Id.* ¶ 65.

19. “Human rights” and “fundamental rights” are synonymous and can be used interchangeably.

20. *Matthews*, 24833/94 Eur. Ct. H. R. ¶ 32.

21. *Id.*

22. *Bosphorus Hava Yolları Turizm v. Ireland*, 45036/98 Eur. Ct. H.R. ¶ 73 (2005), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564#{“itemid”:“001-69564”}> [hereinafter *Bosphorus*].

23. *Id.* ¶¶ 16, 23.

24. Council Regulation 990/93, Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), art. 8, 1993 O.J. (L102) 14, 16.

25. *Id.* preamble.

26. *Id.* art. 1.2(b).

27. *Bosphorus*, 45036/98 Eur. Ct. H.R. ¶ 12.

28. *Id.* ¶ 167.

29. *Id.* ¶ 156.

The ECtHR affirmed that if the EC system did not ensure an adequate human rights protection level, it could intervene.³⁰

Both the *Bosphorus* and *Matthews* rulings indicate that the corporate veil of an IO (the EC) cannot be a bar to the human rights scrutiny of the acts of member countries. In doing this, the ECtHR has not directly targeted the EC measures. Actually, that was not possible because the EC was not a party to the ECHR. The EC's consent was not given before or during the examination of its measures by the ECtHR. But the ECtHR indirectly second guessed the EC measures through challenging their implementation in member countries, and this was a sufficient cause for inferring that fundamental rights do suffice the international system.

Nevertheless, the context of the *Interim Accord* ruling is different: first of all, NATO is different from the EC. It is a security organization that presents itself to the outside world as monolithic and homogenous. The prime evidence for this is the lack of formal voting and veto procedures. The North Atlantic Council—NATO's governing body—does not take a roll-call vote.³¹ This has significant implications. It demonstrates the solidarity among the NATO members. There is a complete unity of the members and the organization. They are strongly interwoven. It is impossible to identify the members from the institution. It is a compact community of legal destiny. Their liability is collective. This is all the more compatible with the motivation for creating IOs. If public international law were to create some form of residual liability for Member States, then international law would interfere with the internal activities of IOs and might even make it unattractive for States to establish or join IOs.³² In this regard, it is impossible to determine definitively whether Greece objected to the membership of the FYRM. It is inconceivable to distinguish the Greek rejection from the NATO rejection. Therefore, there is no legitimate way to target a NATO member State for its role in NATO decisions. NATO assumes full responsibility for the decisions it takes. It is the only interlocutor for the complainants who are unhappy with its decisions.

The decision-making mechanism of NATO consists purely of a political process. NATO decides what is convenient for itself. In contrast to the EC, it is not a transparent and open organization with specific voting procedures for specific issues; it is a specialized and close organization with an informal voting procedure.³³ Hence, outsiders cannot accuse it of being arbitrary. When countries coordinate with one another or cooperate, they need to establish a point of coordination.³⁴ NATO is a point of coordination for its members. It is closed to the countries outside of the North Atlantic and European areas and maintains solidarity among its members through its informal and anonymous decision-

30. *Id.* ¶ 153.

31. *The North Atlantic Council*, NORTH ATLANTIC TREATY ORGANIZATION, <http://www.nato.int/nato-welcome/index.html> (last visited July 14, 2013) [follow "North Atlantic Council" link].

32. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 288 (2nd ed. 2009); Marko Milanovic & Tatjana Papic, *As Bad as it Gets: The European Court of Human Rights' Behrami and Sarajati Decision and General International Law*, 58 INT'L & COMP. L. Q. 267, 267-96 (2009).

33. HÜSEYİN PAZARCI, INTERNATIONAL LAW 187 (2011) (Turkish) (Pazarcı makes a distinction between "closed" and "open" organizations. He argues that "open" international organizations adopt majority voting whereas "closed" organizations work on a unanimity basis).

34. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 36 (2005).

making procedure.³⁵ Likewise, there is no transparent legal criterion for being a member of NATO. One cannot legally accuse NATO of not accepting the membership application of a country. There is no legal requirement of taking in a new member. The criteria of accepting new members are not legal, but political. NATO has been, from the start, seen as a political club aiming at security and common defense of its members, not as a legalistic institution such as the EC. Thus, the veil of NATO is a strictly political and closed one.³⁶

Second, NATO is different from the other organizations of which the FYRM became a member thanks to the lifting of the veto by Greece. For instance, neither the Council of Europe nor the Organization for Security and Cooperation in Europe embodies the close relationship seen between the members of NATO. NATO is an organization that undertakes military interventions, and this requires a special relationship among its members. That is why the FYRM's membership to those other organizations did not pose a problem, but it may pose one to NATO.³⁷

Third, the EC is more committed to human rights than NATO. There are provisions in EC treaties³⁸ and ECJ jurisprudence³⁹ in the field of human rights. Moreover, these provisions and jurisprudence make specific reference to the ECHR.⁴⁰ Thus, when the ECtHR adjudged the implementation of EC measures in member countries, it was well aware that there was a parallel between the fundamental rights vision of the EC and the ECHR system.

Fourth, the identity of the courts plays an important role. The ECtHR is the court of Europe and claims to establish a "European Public Order."⁴¹ The ICJ is the universal world court, which hands down rulings for the greater international community, unlike the ECtHR, which gives rulings for a closely-knit public order. The countries in Europe share a more or less similar worldview and embody a community of nations whereas the ICJ cannot claim to adjudicate for a similar community. Hence, on a theoretical level, the intervention of the ECtHR in the affairs of the EC should be easier than the ICJ's intervention in the affairs of NATO.

Fifth, in the *Interim Accord* ruling of the ICJ, human rights are not an issue. The tension there is not between human rights concerns of individuals on the one hand and the implementation of an IO measure by the member country on the other. What concerns the ruling is the application for membership by the FYRM to NATO and whether Greece

35. *What is NATO?*, NORTH ATLANTIC TREATY ORGANIZATION, <http://www.nato.int/nato-welcome/index.html> (last visited Aug. 8, 2013).

36. *Id.*

37. *Id.*

38. See, e.g., Treaty on European Union art. 6, Mar. 3, 2010, 2010 O.J. (C 83) 13; see generally Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2009 O.J. (C 303) 1.

39. See, e.g., case 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel, 1970 E.C.R. 1125, ¶ 3; Case 4/73, Nold v. Comm'n, 1974 E.C.R. 491, ¶ 13; Case 44/79, Hauer v. Land Rheinland-Pfalz, 1979 E.C.R. 3727, ¶ 15; Case 112/00, Schmidberger v. Austria, 2003 E.C.R. I-5659, ¶ 17.

40. See, e.g., Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat Int'l Found. v. Council of the European Union and Comm'n of the European Cmty, 2008 E.R.C. ¶ 283, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> [hereinafter Kadi].

41. Loizidou v. Turkey (No. 15318/89), 310 Eur. Ct. H. R. (ser. A) ¶ 93 (1995), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695797&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

objected to this membership in contravention of its obligation not to object under Article 11 of the Interim Accord between Greece and the FYRM. Indeed, being fully aware of this, the FYRM rested its case on Article 11 of the Interim Accord—a contractual right that provides that “[Greece] agrees not to object to the application by or the membership of the Party of [FYRM] in international, multilateral and regional organizations and institutions of which [Greece] is a member.”⁴²

But this provision is to be evaluated in light of Article 22 of the Interim Accord, which protects the other obligations of Greece under different international treaties and which states that “[t]his Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral or multilateral agreements already in force that the Parties have concluded with other States or international organizations.”⁴³

Under this approach, the North Atlantic Treaty—which established NATO—is to be considered under the constraint of Article 22. Thus, Article 11 is to be limited by Article 22, and the balance between these two provisions strengthens the position of Greece. The clash is between the two articles of the Interim Accord, not between fundamental rights and a country’s implementation measures. Human rights are inherent and natural rights for all individuals. But no country has the inherent and natural right to be a member of an IO. Be that as it may, the ICJ demonstrated judicial activism by pinpointing both Greece in the whole of NATO and Article 11 in the Interim Accord. In doing this, the ICJ behaved as if a “fundamental right” of Macedonia was breached by Greece—that is, the fundamental right to join IOs.

IV. Indispensable Third Parties

The *Matthews* and *Bosphorus* rulings demonstrate that governments cannot put forward IOs as scapegoats when those countries do not fulfill their human rights duties.⁴⁴ The most important inference is that the organization is not seen as an indispensable party to cases brought against the countries concerned.⁴⁵ In effect, a measure of the organization is challenged and questioned by the ICJ.⁴⁶ But the ICJ avoids any direct confrontation whatsoever with IOs.⁴⁷ Rather, the ICJ targets the governments’ implementation of measures in violation of human rights.⁴⁸ It is not the source, but concrete measures taken by individual states that become the object of contention and the target of sanction before the ICJ.⁴⁹

42. Application of the Interim Accord, *supra* note 1, art. 11.

43. *Id.* art. 22.

44. See generally, *Matthews*, 24833/94 Eur. Ct. H. R. ¶ 33; *Bosphorus*, 45036/98 Eur. Ct. H.R.

45. *Matthews*, 24833/94 Eur. Ct. H. R. ¶ 33; *Bosphorus*, 45036/98 Eur. Ct. H.R.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

Nevertheless, international law functions through consent.⁵⁰ This is all the more true of the ICJ; it cannot deal with the legal dispute of a country without its consent.⁵¹ To be sure, a ruling by the ICJ may touch upon the legal interests of a third party. The problem is to determine the threshold where the participation of the third party in the dispute becomes indispensable. The ICJ's *Monetary Gold* judgment emphasized this point; if the legal interest of a third party, which does not have to consent to the jurisdiction of the ICJ, constitutes *the very object* of the dispute, it is not judicially proper to decide the dispute.⁵² On this rationale, the 2008 NATO decision not to invite the FYRM for membership constituted the basis of the dispute—the *very object* of the dispute.⁵³ Nevertheless, NATO was not a party to the dispute before the ICJ.⁵⁴ To be sure, the ICJ is an inter-state court.⁵⁵ IOs—such as NATO—cannot be a party to the proceedings. Still, this obstacle could be circumvented through instituting proceedings against all the NATO member countries.⁵⁶

The concept of an indispensable third party needs further clarification. For instance, the *Nauru v. Australia* ruling of the ICJ affirmed that the dispute between Nauru and Australia did not require the participation of New Zealand and the UK for its resolution.⁵⁷ The determination of the responsibility of New Zealand and the UK was not necessary to determine the responsibility of Australia.⁵⁸ Although these three governments altogether constituted an Administrative Authority for Nauru, the ICJ found Australia alone eligible to come before the ICJ for its actions as regards the administration of the national resources of Nauru.⁵⁹ The interests of New Zealand and the UK did not constitute the very subject matter of the decision to be rendered by the ICJ.⁶⁰ An explanation to this rationale would be that the Administrative Authority, as established under the 1947 Trusteeship Agreement on Nauru, did not have a legal personality.⁶¹ There was a loose cooperation between the three administrator governments, and it was easy to get at one of them. But NATO has a legal personality, and it is not possible to render Greece alone responsible.

The *Congo v. Uganda* ruling by the ICJ is similar to the *Nauru v. Australia* ruling.⁶² Uganda argued that Congo could not bring it before the ICJ without, at the same time, having Rwanda in the proceedings.⁶³ Rwanda occupied the Congolese territory at the

50. *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. of Gr. Brit. & N. Ir. & U.S.), 1954 I.C.J. 19, 32 (June 15).

51. Statute of the I.C.J. art. 36, June 26, 1945, 1 U.N.T.S. 993, available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_III.

52. *Monetary Gold Removed from Rome in 1943*, 1954 I.C.J. at 33.

53. See generally NATO Bucharest Summit Declaration, *supra* note 8.

54. Application of Interim Accord, *supra* note 1, ¶ 1.

55. See The Court, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1> (last visited Aug. 8, 2013).

56. *Id.*

57. *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), 1992 I.C.J. 240, ¶¶ 55-57 (June 26).

58. *Id.*

59. *Id.* ¶¶ 11, 55-57.

60. *Id.* ¶¶ 55-57.

61. *Id.* ¶ 47; MALCOLM N. SHAW, *INTERNATIONAL LAW* 1297 (6th ed. 2008).

62. *Armed Activities on the Territory of the Congo* (*Dem. Rep. Congo v. Uganda*), 2005 I.C.J. 168 (Dec. 19).

63. *Id.* ¶¶ 197-98.

same time as Uganda and thus, so argued Uganda, holding only Uganda responsible for the events in Congo was not possible.⁶⁴ On this approach, the ICJ should have found the claim relating to Uganda's responsibility for these events inadmissible. But the Court responded that the interests of Rwanda did not constitute the "very subject-matter" of the decision to be rendered by it and that it was not necessary for Rwanda to be a party to the case.⁶⁵ As in the *Nauru v. Australia* case, in the *Congo v. Uganda* case, there was no IO with a legal personality to which the acts of the respondent country could be attributed. Thus, it was not difficult for the ICJ to dismiss the arguments based on the collective responsibility of the third country. The loose relationship between the respondent and the third country gave the opening to the ICJ to dismiss the indispensable role of the third country.

The state of affairs changes when there is an IO (an entity with a legal personality). The joined *Behrami and Saramati* ruling of the ECtHR was the harbinger of such deference to IOs and the importance of the indispensable third party.⁶⁶ The *Behrami* case concerned the demining of Kosovo.⁶⁷ After being exposed to undetonated cluster bomb units (CBUs), Gadaf Behrami died while his brother Bekim was disfigured and lost his sight.⁶⁸ The father of the two children, Agim Behrami, instituted proceedings against France at the ECtHR.⁶⁹ He argued that the incident took place because of the failure of the French Kosovo Force troops (KFOR) to mark and/or defuse the undetonated CBUs, which those troops knew to be present on that site.⁷⁰ As for the *Saramati* case, the issue was the pre-trial detention of Mr. Saramati.⁷¹ He directed his complaint against Norway and France whose contingents in the KFOR detained him.⁷²

At the time, Kosovo was being administered by the KFOR and the United Nations Interim Administration Mission in Kosovo (UNMIK), as authorized by Security Council Resolution 1244.⁷³ Both were functioning under the authority of the United Nations. The ECtHR held that the applicants' complaints were incompatible *ratione personae* with the provisions of the ECHR Convention; the ECtHR dismissed the application as inadmissible on the grounds that the actions complained against were "directly attributable to the UN."⁷⁴ It affirmed that the impugned acts—the lack of de-mining and the arbitrary pre-trial detention—were not attributable to Norway and France.⁷⁵ Having reached this conclusion, the ECtHR stated, with regards to applying the ECHR provisions to the UN, that to subject the acts of UNMIK and KFOR to the scrutiny of the ECtHR would be "to

64. *Id.* ¶¶ 174, 176-78.

65. *Id.* ¶¶ 196-204.

66. *Behrami & Behrami v. France*, App. Nos. 71412/01 & 78166/01 Eur. Ct. H.R. (2007), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830#{"itemid":\["001-80830"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830#{).

67. *Id.* ¶¶ 51-60.

68. *Id.* ¶ 5.

69. *Id.* ¶ 1.

70. *Id.* ¶ 61.

71. *Id.* ¶ 8.

72. *Id.* ¶ 63.

73. *Id.* ¶ 4.

74. *Id.* ¶¶ 151-52.

75. *Id.* ¶ 151.

interfere with the fulfillment of the United Nation's key mission in this field including. . . with the effective conduct of its operations."⁷⁶

Hence, the UN was seen as the *indispensable party*—a distinction between France and Norway on the one hand and the UN on the other hand was not made. As additional support, the ECtHR distinguished the *Behrami and Saramati* case by underlining that the impugned acts did not take place in the territories of France or Norway whereas the impugned act in the *Bosphorus* ruling (the Irish seizure of the aircraft) took place in the territory of Ireland.⁷⁷ Moreover, the ECtHR argued that there was a close hierarchy between the UN authorities and the French and Norwegian agents on the ground in Kosovo whereas Ireland had certain autonomy in regard to the impugned act it took with regard to the applicant.⁷⁸ Thus, there was a possibility for Ireland to be individually liable in the *Bosphorus* ruling, but the French and Norwegian authorities could not be individually liable in the *Behrami and Saramati* ruling.⁷⁹

But this justification puts the *Interim Accord* ruling of the ICJ in an awkward position. First, the objection of Greece to the FYRM's application to NATO cannot be confined to the Greek territory—to the Greek jurisdiction. Second, the decision to reject the FYRM's membership application was taken by NATO's North Atlantic Council, through consensus. That is to say, Greece did not have the autonomy to determine the fate of the FYRM's application. On this reading, NATO is the indispensable third party in the dispute between Greece and the FYRM. There is a complete overlap between the distinct will of NATO, as an IO, and the will of a Member State, like Greece. NATO maintains an informal system of voting. There is no specific or formal procedure for casting a veto in NATO. Thus, the individual responsibilities of Member States for the acts of NATO disappear. Thereby, the institutional effectiveness of NATO as a monolithic organization is assured and allocating responsibility to individual countries is rendered impossible.

Nevertheless, the *Interim Accord* ruling can find some support in the *Kadi* judgment of the European Court of Justice—the judicial organ of the European Union (EU).⁸⁰ It is similar in that it demonstrates no deference to an IO—the United Nations. In this case, the anti-terrorism measures as established by the UN Security Council resolution were at issue.⁸¹ The EU transposed the Security Council measures in the shape of a Council regulation.⁸² Under this legislation, the assets of Mr. Kadi were seized by the EU, and this constituted an encroachment on the right to property—a fundamental right.⁸³ But the source of the problem was that this was done without due process and in violation of Mr. Kadi's right to information and right to defense.⁸⁴

The ECJ declared that, notwithstanding the Security Council resolution and its annex indicating Mr. Kadi as one of the individuals whose assets were to be frozen, the right to due procedure and human rights considerations (as established in the EU legal order)

76. *Id.* ¶ 149.

77. *Id.* ¶ 106.

78. *Id.* ¶ 151.

79. *Id.*

80. *Kadi*, 2008 E.R.C. ¶ 283.

81. See generally S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 16, 2002).

82. Council Regulation 881/2002, 2002 O.J. (L139/9) (EC).

83. *Kadi*, 2008 E.R.C. ¶ 40.

84. *Id.* ¶ 257.

were to be safeguarded as well.⁸⁵ The ECJ stated that it did not judge the validity of the Security Council resolution⁸⁶ (just as the ICJ argued that it did not judge the validity of the NATO rejection of the FYRM's membership bid). Rather, the ECJ solely affirmed that the EU legal order, comprising fundamental rights,⁸⁷ is to be complied with in the EU jurisdiction area, whatever the ultimate source of the measures.⁸⁸ The ECJ annulled the EU Council Regulation, breaching the EU legal order.⁸⁹ The UN—the universal IO—was not deferred to, and the autonomy of the EU legal order was emphasized. In like vein, the *Interim Accord* ruling gave the impression that Article 11 of the Interim Accord between the FYRM and Greece had certain autonomy. The right to participate in IOs was raised to the level of a fundamental right, and the ICJ acted as if it were protecting the autonomy of a value, which favored the participation of countries in IOs. But the ICJ is not the court of NATO and, most importantly, there is no such value requiring the participation of the FYRM in NATO.

V. A Theoretical View of the Interim Accord Ruling

At this point, a *constructivist* interpretation of the *Interim Accord* ruling can be made. *Constructivism* in international relations asserts that the interaction between countries and IOs changes both sets of players in the game;⁹⁰ the rules change as the governments and IOs invoke and interpret them in particular cases, and the attitude of the IOs and governments change as their decisions and, indeed, their sovereignty are redefined by the international rules.⁹¹ The actors on the international stage consider the reactions to their previous actions and act accordingly later on.

In that regard, the constructivist theory would argue that there are no unmovable international parameters where the positions and attitudes are fixed.⁹² The international system is not based on strictly defined material conditions and nature, but on ideas and interactions between actors. Interests and identities are formed by the process comprising actions and reactions of international actors—governments, IOs, international courts, etc. Human associations (a prime example of which are IOs) are determined by shared ideas, and these shared ideas are liable to change. “Structure” is not “given,” but influenced and modified by social practice—that is, signals of international actors to each other.

Arguably, there is a specific motivation for the judicial activism of an international court, which is the willingness to remain relevant on the international stage. The ICJ, in the *Interim Accord* case, was stuck between a rock and a hard place. On the one hand, it was risking handing down a ruling without effective and practical results. There was no guarantee that Greece would comply with the ICJ's ruling in the future. Besides, the ICJ risked seeming too interventionist into the affairs of IOs. On the other hand, the ICJ wanted to make its voice heard and did not want to leave the issue wholly to the political

85. *Id.* ¶ 303.

86. *Id.* ¶ 287.

87. *Id.* ¶¶ 283–85.

88. *Id.* ¶ 281.

89. *Id.* ¶ 372.

90. ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 1 (1999).

91. IAN HURD, *INTERNATIONAL ORGANIZATIONS: POLITICS, LAW, PRACTICE* 32 (2011).

92. *Id.*

process. The ICJ once made a mistake of dismissing a case because of its political nature and lack of legal interest of the applicants; this was the *South West Africa* ruling.⁹³ In that case, Ethiopia and Liberia instituted proceedings against South Africa for the improper treatment of South West Africa (Namibia), which was, at the time, under the Trusteeship administration of South Africa.⁹⁴ The two governments relied on Article 7 of the Mandate of 17 December 1920 for South West Africa, which implied *erga omnes* obligations of South Africa vis-à-vis the international community.⁹⁵ Still, this was not enough to establish their *locus standi* before the ICJ, and the ICJ rejected the status of Ethiopia and Liberia as applicants.⁹⁶ Article 22 of the League of Covenant, which established the mandate system as a system of "sacred trust of civilization," and the UN Trusteeship Agreement, which made trusteeships the interest of the whole international community under the UN Charter,⁹⁷ did not suffice.⁹⁸ The ICJ found that there was no legal interest of those two countries, but merely their moral, humanitarian, and political interests.⁹⁹ It indicated that the issue would be better decided by the UN Security Council (an IO).¹⁰⁰ The IO was favored over governments and the Court. The judicial path was closed.

The Court suffered a loss of prestige after that ruling because colonial issues were crucial, especially for African states in the 1960s. In this respect, the Court was, at first, seen by them as an important venue to frame the issue in legal terms and the language of rights. But the ICJ missed this opportunity and disappointed the international community. It was so damaging to the ICJ that, in order to compensate for its decision, the ICJ went on to establish the principle of *erga omnes* in a later case.¹⁰¹ It thereby signaled that it was interested in the most challenging problems of humanity and that it would not play the same passive role that it played in the *South West African* case. Besides, later on, the ICJ handed down an advisory opinion on South West Africa¹⁰² and tried to fill the legal vacuum on the issue. This time, the interwoven nature of the political and legal aspects of the dispute did not prevent the ICJ from looking at it through a legal lens.¹⁰³ Put differently, the political dimension of the dispute did not prevent the ICJ from qualifying the dispute as a legal one and adjudicating it. Rather than leaving the matter totally to governments and IOs, the ICJ assumed responsibility. This evolution of the ICJ is a typical example of the *constructive* process in international relations.

Similarly, although NATO's rejection of the FYRM's membership application was the political decision of NATO, the ICJ still found a legal dimension to it and adjudged the

93. *South West Africa Cases* (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase), 1966 I.C.J. 6 (July 18).

94. *Id.* at 10-11.

95. *Id.*

96. *Id.* ¶¶ 99, 100.

97. U.N. Charter art. 88. ("[t]he Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire").

98. *South West Africa Cases*, 1966 I.C.J. at ¶¶ 17, 19, 99, 100.

99. *Id.* ¶¶ 99-100.

100. *Id.* ¶ 93.

101. *The Barcelona Traction, Light and Power Company, Ltd. (Belg. v Spain)* (Second Phase), 1970 I.C.J. 3, ¶ 33 (Feb. 5).

102. *See generally* Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 12 (June 21).

103. *Id.*

dispute. That is because this could make the ICJ irrelevant as regards its position on the world stage when it comes to relations between IOs and non-member countries. The number of IOs has grown immensely, and the ICJ does not want to be a mere spectator to the developments and disputes in this dynamic field. Nevertheless, it did not want to interfere in the affairs of an IO (NATO) either. It avoided dictating a certain conduct to NATO. Therefore, the ICJ limited itself to declaring that Greece acted illegally in view of the interim accord's prohibition of objection to the membership of the FYRM to IOs. The ICJ did not order Greece or NATO to adjust their behaviors or practices in a certain way in the future but just determined the existence of this past illegality. The ICJ made its voice heard and entered the *constructivist process* in international relations; it did not repeat its mistake from the *South West Africa* ruling. Now, the ball is in the court of NATO. NATO's practice will influence the development of international law and international politics as regards the relationship between IOs, governments, and international courts.

VI. Conclusion

There is no fixed nature to the international legal order. It is not a "given," but a social construct. There is a *constructive* process; it is continually being built, modified, and rebuilt by actors—governments, international courts, and IOs. They send and receive signals as regards their positions. The knowledge and reality of IOs is constructed through the interaction between IOs, member and non-member countries, and international courts. Indeed, the international system is what the actors on the international stage make it out to be.

In that regard, on the one hand, the *Behrami and Saramati* ruling is the epitome of a court's deference to IOs. The *South West Africa* case demonstrated deference to the IOs (the Security Council and the Trusteeship Council) as well, but, later on, the ICJ became active by giving an Advisory Opinion on the issue. On the other hand, the *Matthews*, *Bosphorus*, and *Kadi* rulings demonstrate assertive actions on the part of courts vis-à-vis IOs, and the *Interim Accord* judgment is a renewed challenge from an international court to IOs. The *Interim Accord* ruling of the ICJ constitutes a phase in this *constructive* process. The ICJ *pierced the veil* of NATO and disregarded its *indispensable position*. This ruling is a signal from the ICJ that a newly independent country ought not to be excluded from IOs and the international community. In case it is excluded, the ICJ is ready to engage in the *constructive process* of attempting to secure its membership.

