046 SCSL-2003-08-PT-046 (765-857) 765

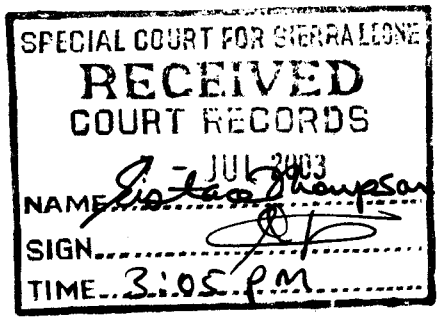
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr Robin Vincent

Date filed: 7 July 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO THE FIRST DEFENCE PRELIMINARY MOTION (LAWFULNESS OF THE COURT'S ESTABLISHMENT)

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I. INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Motion Based on Lack of Jurisdiction: Lawfulness of the Court's Establishment" (the "**First Preliminary Motion**"), filed on behalf of Sam Hinga Norman (the "**Accused**") on 26 June 2003.[1]

2. The First Preliminary Motion argues essentially that the Government of Sierra Leone acted in contravention of the Constitution of Sierra Leone when it entered into the Special Court Agreement with the United Nations,[2] and that this renders the Special Court "illegal and therefore lacking lawful Jurisdiction over anyone brought before it".[3]

3. For the reasons given below, the First Preliminary Motion should be dismissed in its entirety.

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[1] Registry Page ("RP") 327-410.
[2] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 (the "**Special Court Agreement**").
[3] First Preliminary Motion, para. 27.

II. ARGUMENT

A. THE SPECIAL COURT IS LAWFULLY ESTABLISHED

4. Paragraphs 8 to 20 of the First Preliminary Motion set out at some length various provisions of the Constitution of Sierra Leone. The essence of the Defence argument is that under the Constitution of Sierra Leone, the only courts empowered to order deprivation of liberty or to try criminal offences are those envisaged by section 30(1) of that Constitution, and that the Special Court is not such a court. It is further argued that Article 8 of the Statute of the Special Court, which provides that the Special Court and the national courts of Sierra Leone have concurrent jurisdiction and that the Special Court has primacy, is inconsistent with sections 122 and 125 of the Constitution of Sierra Leone, which provide that the Supreme Court of Sierra Leone is the final court of appeal and has supervisory jurisdiction over all other courts in Sierra Leone.

5. However, the Constitution of Sierra Leone is only capable of regulating, and only purports to regulate, the judicial power *of the Republic of Sierra Leone* within the sphere of the municipal law of Sierra Leone. Section 120(1) of that Constitution, which is the first provision in Chapter VII dealing with the judiciary, provides that "The judicial power *of Sierra Leone* shall be vested in the Judiciary of which the Chief Justice shall be the Head".[4]

6. However, as is expressly stated in section 11(2) of the Special Court Agreement, 2002 (Ratification) Act 2002 (the "**Implementing Legislation**"), the Special Court does "not form part of the Judiciary of Sierra Leone". Indeed, it does not exist or operate at all within the sphere of the municipal law of Sierra Leone. It is not a national court and the Defence are in error in conceiving it to be part of the architecture of the Sierra Leonean court structure. On the contrary, the Special Court was established by the Special Court Agreement, concluded by the United Nations and the Government of Sierra Leone by representatives of the United Nations and Sierra Leone possessing full powers to conclude the treaty. It was the treaty that brought about the existence of the Special Court and **not** the Special Court Agreement (Ratification) Act 2000 as

[4] Emphasis added.

incorrectly asserted by the Defence at paragraph 9 of the Defence Motion. The Special Court Agreement is a treaty under international law[5] and is binding on both parties. The Special Court was established, not under the municipal law of Sierra Leone, but under *international law*. It exists and functions in the sphere of international law. The judicial power that it exercises is not the judicial power of the Republic of Sierra Leone.

B. TREATY AS A VALID BASIS FOR CREATING INTERNATIONAL COURTS

7. It has never been questioned that a treaty is a valid basis for the creation of an international criminal court. Indeed, the creation of the Special Court can be likened to the creation of the International Criminal Court ("ICC"), another treaty-based international criminal court, the Statute of which Sierra Leone signed on 17 October 1998 and ratified on 15 September 2000. Insofar as violations of international criminal law are concerned, the subject-matter jurisdiction of both of these treaty-based international courts is similar. In the selfsame way that the ICC is not perceived to violate the constitutional or other municipal law of Sierra Leone, nor does the Special Court. As an institution created by international law, and operating within the sphere of international law, the Special Court is not subject to the municipal law or constitution of any State, any more than the ICC would be. Therefore any attempt to seek to make the existence of the Special Court subject to the provisions of the Constitution of Sierra Leone and then go on to seek to argue its inconsistency with the Constitution is wholly misconceived. The Prosecution is not saying by this that the Special Court does not have the power to review the lawfulness of its creation. Indeed it is because the Special Court would have jurisdiction to determine its own jurisdiction that it is important that the Special Court determines how its constitutive instrument may limit some of its jurisdictional powers. The Special Court exists in international law, and exercises its jurisdiction within the sphere of international law, regardless of whether its existence or jurisdiction has been recognised in the national law of any State.

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[5] See the Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915 (the "**Report of the Secretary-General**"), para. 9, indicating that the Special Court is "treaty-based".

8. A treaty is valid in international law even if it is in conflict with domestic law (which the Prosecution does not accept in this case).[6] The only circumstance in which the validity of a treaty may be affected by a breach of national constitutional law is in the circumstance referred to in Article 46 of the 1969 Vienna Convention on the Law of Treaties, which provides:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Materially identical provision is made in Article 46(1) and (3) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

9. In the present case, even if it assumed for the sake of argument that the conclusion of the Special Court Agreement by the Government of Sierra Leone was in breach of the Constitution of Sierra Leone (and this is in no way conceded by the Prosecution), any such breach would not be "manifest" within the meaning of Article 46 of the two Vienna Conventions. If the argument of the Defence were correct, it would mean that the Government of Sierra Leone also "manifestly" violated the Constitution when Sierra Leone became a party to the ICC Statute,[7] since this similarly involved conferring on the ICC, which is not a court envisaged by section 30(1) of the Sierra

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[6] See 1969 Vienna Convention on the Law of Treaties, Article 27; 1986 Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Article 27(1) and (3). Although Sierra Leone is not a party to either of the two treaties, these provisions of these treaties reflect customary international law: see Aust, *Modern Treaty Law and Practice* (2000), p. 10-11; Brownlie, *Principles of Public International Law* (5th edn, 1998) ("**Brownlie**"), p. 608 (noting that while the 1969 Vienna Convention is not as a whole declaratory of general international law, "a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law") and p. 618 (noting the International Law Commission's view that "the decisions of international tribunals and State practice, if they are not conclusive, appear to support" the solution adopted in Article 46 of the 1969 Vienna Convention).

[7] Sierra Leone ratified on 15 September 2000, becoming the 20th State Party: see the ICC website at http://www.icc-cpi.int/php/statesparties/country.php?id=17.

Leone Constitution, and which is not subject to the supervision of the Supreme Court of Sierra Leone, the power to order deprivation of liberty or to try criminal offences. However, other States which have similar constitutional provisions have become parties to the ICC Statute without first amending their constitutions. For instance, in Australia it is well established that it is unconstitutional for any part of the federal judicial power to be conferred on a body other than a court established under Chapter III of the Australian Constitution. Nevertheless, Australia ratified the ICC Statute, and enacted legislation to implement the ICC Statute into municipal law,[8] after a committee of the Australian Parliament had found that:

> "The most complete argument presented [for the view that ratification of the ICC Statute would be unconstitutional] is that ratification of the ICC Statute would be inconsistent with Chapter III of the Constitution, which provides that [the] ... judicial power [of the Commonwealth of Australia] shall be vested in the High Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission ... that the ICC will not exercise the judicial power of the Commonwealth [of Australia], even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia."[9]

United States commentators have similarly concluded that there is no constitutional objection to ratification of the ICC Statute by the United States, on the ground that the ICC would not be exercising the governmental authority of the United States but the authority of the international community.[10] A further example that could be cited is South Africa, which has enacted legislation implementing the ICC Statute,[11] even though section 165(1) of the Constitution of South Africa provides that the judicial authority of South Africa is vested in certain courts specifically identified in section 166 thereof, of which the ICC is not one. For the purposes of Article 46 of the two

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8 Australia: International Criminal Court Act 2002 (Commonwealth).

9 Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002) (the "**Australian Parliament Report**"), para. 3.46. The issue is considered in paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49.

10 See *ibid.*, para. 2.50, referring to Professor Louis Henkin, *Foreign Affairs and the United States Constitution* (2nd edn, 1996), p. 269.

11 South Africa: Implementation of the Rome Statute of the International Criminal Court Act (No. 27 of 2002), available at: http://www.gov.za/acts/2002/a27-02/index.html. See the ICC's website, at http://www.icc-cpi.int/php/statesparties/country.php?id=18.

Vienna Conventions, it therefore cannot be said that it is "*manifest*" that the position under the Constitution of Sierra Leone would be any different to the position under the Constitutions of Australia, the United States of America, or South Africa.

C. THE SPECIAL COURT IS NOT PART OF THE JUDICIARY OF SIERRA LEONE

10. Indeed, the First Preliminary Motion itself accepts[12] that the Implementing Legislation states that the Special Court Agreement was, for the part of the Government of Sierra Leone, signed pursuant to section 40(4) of the Constitution. The First Preliminary Motion itself further accepts[13] that it is contended by the Government of Sierra Leone that the Implementing Legislation amounts to ratification of the Special Court Agreement by the Parliament for the purpose of section 40(4) of the Constitution. Thus, *prima facie* the constitutional requirements for the conclusion of the Special Court Agreement have been satisfied. As stated above,[14] Chapter VII of the Constitution of Sierra Leone is concerned with the judiciary *of Sierra Leone*, and the Special Court does not form part of the judiciary of Sierra Leone. Thus, *prima facie* there is no inconsistency between the Special Court Agreement and the Constitution of Sierra Leone. Because there has been no *manifest* violation of the Constitution of Sierra Leone, it is immaterial to the validity of the Special Court Agreement, and to Sierra Leone's obligations under that agreement, whether the conclusion of the agreement by the Government of Sierra Leone was or was not in fact in conformity with the Constitution of Sierra Leone.

11. The First Preliminary Motion relies[15] on the statement in the Report of the Secretary-General to the effect that the "implementation at the national level [of the Special Court Agreement] would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements".[16] However, this passage was not intended to mean that the legality of the creation of the Special Court

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12 At para. 19.
13 At para. 20.
14 At para. 5-6.
15 At para. 4.
16 First Preliminary Motion, para.4, quoting Report of the Secretary-General, para. 9.

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depended on whether or not the Special Court Agreement and the Implementing Legislation were consistent with the Constitution of Sierra Leone. Rather, it was a mere acknowledgement of the fact that under the national constitutional law of Sierra Leone, as under that of most Commonwealth States, treaties are only part of national law if enabling legislation has been enacted.[17] If Sierra Leone had failed to enact the Implementing Legislation, or if it emerged that the Implementing Legislation was inconsistent with the constitutional law of Sierra Leone, this might potentially place Sierra Leone in breach of its obligations under international law under the Special Court Agreement. However, it would not affect the validity of the Special Court Agreement, or the existence of the Special Court and the exercise of its jurisdiction, in the sphere of international law.

12. It is therefore unnecessary for the Special Court to decide whether there has in fact been any violation of the Constitution of Sierra Leone, or of any other law of Sierra Leone. Indeed, the Special Court has no *jurisdiction* to decide this question. The question is one which could only be determined by the national courts of Sierra Leone. However, even if a national court of Sierra Leone were hypothetically to find that there has been a breach of the Constitution, this would not affect the validity of the Special Court Agreement and the Special Court's Statute under international law, nor would it affect Sierra Leone's obligations in international law under the Special Court Agreement.

D. LEGALITY OF THE AGREEMENT –EFFECTIVE CONTROL

13. The First Preliminary Motion raises a further argument[18] that the Special Court Agreement is somehow invalid because at the time of concluding this treaty, the Government of Sierra Leone was not in control of over two thirds of the territory of Sierra Leone and therefore "did not enjoy the obedience of the majority of the people of the country". This argument has no basis in international law. The First Preliminary Motion refers to the criteria of statehood in the Montevideo Convention of 1933. However, this Convention is concerned with determining the *existence* of a

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17 See also Brownlie, pp. 46-47.

18 At para. 21-24.

State,[19] and not with determining who is the *legitimate government* of a State. There is no doubt that Sierra Leone was a State under international law at all material times. It was admitted to membership in the United Nations on 27 September 1961, and has been a member ever since.[20] Where it is established that a State exists, it is not necessary that its legitimate government be in control of the whole or the majority of its territory, and indeed, in some cases, the recognised government of a State may not be in control of any part of the State's territory at all (for example, in the case of certain governments-in-exile during the Second World War).[21] The United Nations at all material times recognised the Government of Sierra Leone as the legitimate government of that State— quite apart from anything else, this is attested to by the fact that it negotiated and concluded the Special Court Agreement with the Government of Sierra Leone.[22]

III. MISCELLANEOUS MATTERS

14. Paragraph 29 of the First Preliminary Motion states that counsel for the Accused have not had adequate time and facilities with which to consult with the Accused on the preliminary motions, and that Defence counsel "reserve the rights to amend [their] argument after further consultation ... and to fully associate with the arguments ... of other defence counsel [in other cases]".[23] The Prosecution submits that the assertion of this "right" is inconsistent with the Rules, which require a party to put all arguments in support of a motion in the motion itself, to enable the other party to address all of those arguments in its response. A reply should only address new matters arising out of the response, and should not contain new arguments unrelated to the response, or arguments which could reasonably be expected to have been included in the original motion. Where new arguments are raised by a party outside

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[19] See Dixon, *Textbook on International Law* (4th edn, 2000) ("**Dixon**"), pp. 106-114; *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997) ("**Akehurst**"), pp. 75-81.

[20] See Dixon, p. 106 ("... membership of the UN will now entail a presumption of statehood which it would be very difficult to dislodge").

[21] See Dixon, p. 109 ("While it is clear that the criterion of effective government must be satisfied *before* a territory can become a state, this does not mean that an established state loses its statehood when it ceases to have an effective government"); Akehurst, pp. 77-78.

[22] See also, e.g., *Sierra Leone Telecommunications Co Ltd v. Barclays Bank plc,* [1998] 2 All ER 821 (United Kingdom: Queen's Bench Division (Commercial Court)).

[23] See also First Preliminary Motion, para. 3.

of the prescribed time-limits, the other party must be given the opportunity to respond to them, which will result in delays and in additional pleadings beyond those contemplated in Rule 7(3) of the Rules (i.e., motion, response and reply). Therefore, the raising of new arguments outside the prescribed limits is only permissible with the leave of the Chamber.[24] Should the Defence file a motion at any future time seeking leave to raise new arguments at a late stage, the Prosecution would respond to that motion at the appropriate time. The Prosecution merely notes at this stage that the preliminary motions alleging lack of jurisdiction raise issues of law only, on which the need for extensive consultation between Accused and Defence counsel is not evident.

15. The Defence filed four separate preliminary motions challenging jurisdiction on 26 June 2003, totalling some 27 pages. The Prosecution submits that it is the effect of Article 8.3(C) of the *Practice Direction on Filing Documents before the Special Court for Sierra Leone*, signed by the Registrar and entered into force on 27 February 2003 (the "**Practice Direction**"), which limits the length of motions to 10 pages, that all of the Defence's arguments on lack of jurisdiction should have been included in a single motion, and that the Defence should have applied for an extension of page limits under Article 8.5 of the Practice Direction if it considered this necessary. If this were not so, a party advancing 10 different arguments in support of an allegation of lack of jurisdiction could, without requiring any authorisation from the Chamber, file 100 pages of pleadings by the expedient device of making each argument the subject of a separate motion. However, in the interests of avoiding delay in this matter, the Prosecution has not taken objection on this occasion, and is filing responses to each of the four preliminary motions.

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[24] See, e.g., *Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply*, IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002.

CONCLUSION

The Court should therefore dismiss the First Preliminary Motion in its entirety.

Freetown, 7 July 2003.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

Luc Côté
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Appellate Counsel

PROSECUTION INDEX OF AUTHORITIES

1. 1969 Vienna Convention on the Law of Treaties, Articles 27 and 46[1]

2. 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Articles 27 and 46[2]

3. Aust, *Modern Treaty Law and Practice* (2000), p. 9 -12

4. Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 46-47, 607, 608, 617, 618

5. Dixon, *Textbook on International Law* (4th edn, 2000), pp. 106-114

6. *Akehurst's Modern Introduction to International Law* (7th edn, Malanczuk (ed.), 1997), pp. 75-81

International Criminal Court: Extracts from website www.icc-cpi.int

7. Details of Australia's ratification[3]
8. Details of Sierra Leone's ratification[4]
9. Details of South Africa's ratification[5]

10. Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002), para. 2.35, 2.41 to 2.55, and 3.40 to 3.49[6]

11. Constitution of South Africa, sections 165 and 166[7]

12. *Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply*, Case No. IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002

13. *Sierra Leone Telecommunications Co Ltd v. Barclays Bank plc,* [1998] 2 All ER 821 (United Kingdom: Queen's Bench Division (Commercial Court))

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1 Full text available at: http://www.un.org/law/ilc/texts/treaties.htm
2 Full text available at: http://www.un.org/law/ilc/texts/trbtstat.htm
3 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=42.
4 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=17.
5 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=18.
6 Full text available at: http://www.aph.gov.au/house/committee/jsct/icc/report.htm.
7 Obtained from: http://www.polity.org.za/html/govdocs/constitution/saconst08.html?rebookmark
=1. Full text available at: http://www.polity.org.za/govdocs/constitution/saconst.html.

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ANNEX 1.

1969 Vienna Convention on the Law of Treaties, Articles 27 and 46[8]

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8 Full text available at: http://www.un.org/law/ilc/texts/treaties.htm

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Vienna Convention on the Law of Treaties

Source: http://www.un.org/law/ilc/texts/treaties.htm

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

Article 46
Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the *United Nations Conference on the Law of Treaties*. The Conference was convened pursuant to General Assembly resolutions 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna, the first session from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. By unanimous decision of the Conference, the original of the Final Act was deposited in the archives of the Federal Ministry for Foreign Affairs of Austria.

Entry into force on 27 January 1980, in accordance with article 84(1).

Text: United Nations, *Treaty Series*, vol. 1155, p.331.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 2.

1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Articles 27 and 46[9]

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9 Full text available at: http://www.un.org/law/ilc/texts/trbtstat.htm

Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations

Source: http://www.un.org/law/ilc/texts/trbtstat.htm

Article 27
Internal law of States, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

Article 46
Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

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ANNEX 3.

Aust, *Modern Treaty Law and Practice* (2000), p. 9-12

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MODERN TREATY LAW AND PRACTICE

ANTHONY AUST

CAMBRIDGE
UNIVERSITY PRESS

International organisations

Since the constituent instrument (i.e., the constitution) of an international organisation and a treaty adopted *within* the organisation are made by states, the Convention applies to such instruments, but this is without prejudice to any relevant rules of the organisation (Article 5). Those rules may, for example, govern the procedure by which treaties are adopted within the organisation, how they are to be amended and the making of reservations.[11]

State succession, state responsibility and the outbreak of hostilities

For the avoidance of doubt, Article 73 confirms that the Convention does not prejudge any question that may arise in regard to a treaty from a succession of states,[12] from the international responsibility of a state (for breach of a treaty),[13] or from the outbreak of hostilities.[14] The Convention does not deal with these matters, which are largely governed by customary international law, and are discussed here in later chapters.

Bilateral and multilateral treaties

The term 'bilateral' describes a treaty between two states, and 'multilateral' a treaty between three or more states. There are, however, bilateral treaties where two or more states form one party, and another state or states the other party.[15] For the most part the Convention does not distinguish between bilateral and multilateral treaties. Article 60(1) is the only provision limited to bilateral treaties. Articles 40, 41, 58 and 60 refer expressly to multilateral treaties, and the provisions on reservations and the depositary are relevant only to such treaties.

The Convention and customary international law

The various provisions mentioned above, and the preamble to the Convention, confirm that the rules of customary international law continue

[11] See, for example, p. 109 below on the rules for reservations to ILO Conventions.
[12] See pp. 305–31 below.
[13] See pp. 300–4 below, and the *Gabcikovo* judgment, para. 47 (ILM (1998), p. 162).
[14] See pp. 243 below. [15] See p. 19 below.

to govern questions not regulated by the Convention. Treaties and custom are the main sources of international law. Customary law is made up of two elements: (1) a general convergence in the practice of states from which one can extract a norm (standard of conduct), and (2) *opinio juris* – the belief by states that the norm is legally binding on them.[16] Some multilateral treaties largely codify customary law. But if a norm which is created by a treaty is followed in the practice of non-parties, it can, provided there is *opinio juris*, lead to the evolution of a customary rule which will be applicable between states which are not party to the treaty and between parties and non-parties. This can happen even before the treaty has entered into force.[17] Although many provisions of the UN Convention on the Law of the Sea 1982 (UNCLOS) went beyond mere codification of customary rules, the negotiations proceeded on the basis of consensus, even though the final text was put to the vote. It was therefore that much easier during the twelve years before UNCLOS entered into force in 1994 for most of its provisions to become accepted as representing customary law.[18] This was important since even by the end of 1998 UNCLOS still had only 127 parties.

An accumulation of bilateral treaties on the same subject, such as investment promotion and protection, may in certain circumstances be evidence of a customary rule.[19]

To what extent does the Convention express rules of customary international law?[20]

A detailed consideration of this question is beyond the scope of this book, but it is, with certain exceptions,[21] not of great concern to the foreign ministry lawyer in his day-to-day work. When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the Convention, the rules set forth in the Convention are invariably relied upon even when the states are not parties to it. The writer can recall at least three bilateral treaty negotiations when he had to respond

[16] See M. Shaw, *International Law* (4th edn, 1998), pp. 54–77.

[17] See H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1990), p. 87.

[18] See T. Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer', *Hague Recueil* (1990), IV, vol. 223, pp. 25–60; and H. Caminos and M. Molitor, 'Progressive Development of International Law and the Package Deal', AJIL (1985), pp. 871–90.

[19] See Thirlway, 'Law and Procedure', at p. 86. [20] See Sinclair, pp. 10–24.

[21] See p. 127 below about the time limit for notifying objections to reservations.

to arguments of the other side which relied heavily on specific articles of the Convention, even though the other side had not ratified it. When this happens the justification for invoking the Convention is rarely made clear.

Whether a particular rule in the Convention represents customary international law is only likely to be an issue if the matter is litigated, and even then the court or tribunal will take the Convention as its starting – and normally also its finishing – point. This is certainly the approach taken by the International Court of Justice, as well as other courts and tribunals, international and national.[22] In its 1997 *Gabcikovo* judgment (in which the principal treaty at issue predated the entry into force of the Convention for the parties to the case) the Court brushed aside the question of the possible non-applicability of the Convention's rules to questions of termination and suspension of treaties, and applied Articles 60–62 as reflecting customary law, even though they had been considered rather controversial.[23] Given previous similar pronouncements by the Court, and mentioned in the judgment, it is reasonable to assume that the Court will take the same approach in respect of virtually all of the substantive provisions of the Convention. There has been as yet no case where the Court has found that the Convention does not reflect customary law.[24] But this is not so surprising. Despite what some critics of the Convention may say, as with any codification of the law the Convention inevitably reduces the scope for judicial law-making. For most practical purposes treaty questions are resolved by applying the rules of the Convention. To attempt to determine whether a particular provision of the Convention represents customary international law is now usually a rather futile task. As Sir Arthur Watts has said in the foreword to this book, the modern law of treaties is now authoritatively set out in the Convention.

Effect of emerging customary law on prior treaty rights and obligations

Most treaties are bilateral, and most multilateral treaties are also contractual in nature in that they do not purport to lay down rules of general

[22] Numerous examples, particularly concerning Articles 31 and 32 (Interpretation) are to be found in *International Law Reports* (see the lengthy entry in the ILR Consolidated Table of Cases and Treaties, vols. 1–80 (1991), pp. 799–801).

[23] At paras. 42–6 and 99 (*ICJ Reports* (1997), p.7; ILM (1998), p. 162).

[24] M. Mendelson in Lowe and Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996), at p. 66, and E. Vierdag (note 8 above) at pp. 145–6. See also H. Thirlway, 'The Law and Procedure of the International Court of Justice', BYIL (1991), p. 3.

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ANNEX 4.

Brownlie, *Principles of Public International Law* (5th edn, 1998), pp. 46-47, 607, 608, 617, 618

PRINCIPLES OF PUBLIC INTERNATIONAL LAW

BY

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rights and obligations'. Giving the opinion of the Privy Council in *Chung Chi Cheung* v. *The King*,[89] Lord Atkin stated that:

> so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

This statement harks back to the problem of evidence of the relevant rules and is by no means incompatible with the principle of incorporation.[90] In the litigation concerning the debts of the International Tin Council the Courts have adopted the practical approach, which is to find the relevant rule on the basis of all the available evidence and not to be disconcerted by the general issue of 'incorporation': see, in this respect, the Court of Appeal decision in the *International Tin Council Appeals*.[91]

The authorities, taken as a whole, support the doctrine of incorporation, and the less favourable dicta are equivocal to say the least. Commonwealth decisions reflect the English accent on incorporation.[92]

(*b*) *Treaties*.[93] In England, and also it seems in most Commonwealth countries, the conclusion and ratification of treaties are within the prerogative of the Crown (or its equivalent), and if a transformation doctrine were not applied, the Crown could legislate for the subject without parliamentary consent. As a consequence treaties are only part of English law if an enabling Act of Parliament has been passed. This rule applies to treaties which affect private rights or lia-

[89] [1939] AC 160, 167–8. Quoted: *Reference on Powers of City of Ottawa to Levy Rates on Foreign Legations* [1943] SCR 208; *Ann. Digest*, 10 (1941–2), no. 106; the *Rose Mary* [1953] 1 WLR 246; *Fraser-Brace* v. *Saint John County*, ILR 23 (1956), 217.

[90] Significantly, writers draw conflicting conclusions from the dictum. See Oppenheim, i. 39 n. 5; Brierly, p. 88. See further the dicta of Lords Macmillan and Wright in the *Cristina* [1938] AC 485 at 497 (quoting Lord Dunedin in *Mortensen* v. *Peters*) and 502 respectively, which also have these ambiguous aspects. But cf. *In re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107, especially the dictum of Warrington, LJ, at 137.

[91] [1988] 3 AER 257; and see, in particular, pp. 324–6 per Nourse, LJ; and the decision of the House of Lords [1989] 3 WLR 969.

[92] See *The Ship 'North'* v. *The King* [1906] 37 SCR 385 (Canada); *Wright* v. *Cantrell* [1943] 44 SR (NSW), 45; *Ann. Digest*, 12 (1943–5), no. 37; *Chow Hung Ching* v. *The King* (1948), 77 CLR 449 (Australia); *Virendra Singh* v. *State of Uttar Pradesh*, ILR 22 (1955), 131 (India); *Qureshi* v. *USSR*, ILR 64, 585 at 600 (Pakistan).

[93] See McNair, *The Law of Treaties*, pp. 81–97; Mann, 44 *Grot. Soc.* (1958–9), 29–62; Fawcett, *The British Commonwealth in International Law*, pp. 56–72; Doeker, *The Treaty-Making Power in the Commonwealth of Australia* (1966); Gotlieb, *Canadian Treaty-Making* (1968).

bilities, result in a charge on public funds, or require modification of the common law or statute for their enforcement in the courts.[94] The rule does not apply to treaties relating to the conduct of war or treaties of cession. In any case, the words of a subsequent Act of Parliament will prevail over the provisions of a prior treaty in case of inconsistency between the two.[95]

9. *Treaties and the Interpretation of Statutes in the United Kingdom*[96]

The rule, stated in the previous section, is that in case of conflict statute prevails over treaty: this is a principle of constitutional law and not a rule of construction. There is, however, a well-established rule of construction which is normally stated thus: where domestic legislation is passed to give effect to an international convention, there is a presumption that Parliament intended to fulfil its international obligations.[97] The question then arises: what means should the courts use to discover the intention of Parliament in this connection?

Legislation to give effect in domestic law to the provisions may take various forms.[98] A statute may directly enact the provisions of the international instrument, which will be set out as a schedule to the Act. Alternatively, the statute may employ its own substantive provisions to give effect to a treaty, the text of which is not directly enacted. In the latter situation, the international convention may be referred to in the long and short titles of the Act and also in the preamble and schedule. In *Ellerman Lines* v. *Murray*[99] their lordships adopted the

[94] See *The Parlement Belge* [1880] 5 PD 197; *In re Californian Fig Syrup Co.* (1888), LR 40 Ch. D. 620 (Stirling, J., *obiter*); *Walker* v. *Baird* [1892] AC 491; *A.-G. for Canada* v. *A.-G. for Ontario* [1937] AC 326, 347, per Lord Atkin; *Theophile* v. *Solicitor-General* [1950] AC 186, 195–6; *Republic of Italy* v. *Hambro's Bank* [1950] 1 AER 430; *Cheney* v. *Conn* [1968] 1 WLR 242; ILR 41, 421; *International Tin Council Appeals* [1988] 3 AER 257, CA, at 291 per Kerr, LJ; at 335–6 per Nourse, LJ; at 349 per Ralph Gibson, LJ; [1989] 3 WLR 969, HL. See also *Ashby* v. *Minister of Immigration*, *ILR.* 85, 203 (New Zealand, C.A.).

[95] *I.R.C.* v. *Collco Dealings Ltd.* [1962] AC 1; ILR 33, 1 (see Bowett, 37 *BY* (1961), 548); *Woodend Rubber Company* v. *Commissioner of Inland Revenue* [1971] AC 321.

[96] See Sinclair, 12 *ICLQ* (1963), 508–51; Mann, *Foreign Affairs in English Courts* (1986), 97–112; annual notes on judicial decisions in *BY*; *Dicey and Morris on the Conflict of Laws* (12th edn., 1993), 8–15.

[97] *Salomon* v. *Commissioners of Customs and Excise* [1967], 2 QB 116, CA, at 141 (per Lord Denning, MR), 143 (per Diplock, LJ); ILR 41, 1; *Post Office* v. *Estuary Radio* [1967] 1 WLR 1396, CA, at 1404; [1968] 2 QB 740 at 757 (Diplock, LJ, delivering the judgment of the Court). *Corocraft Ltd.* v. *Pan American Airways Inc.* [1969] 1 QB 616; [1968] 3 WLR 1273, CA at 1281 per Lord Denning; ILR 41, 426.

[98] See Sinclair, 12 *ICLQ* (1963), 528–34; *British Practice* (1964), ii. 232–3.

[99] [1931] AC 126, at 147 per Lord Tomlin. See also *Barras* v. *Aberdeen Steam Trawling Co. Ltd.* [1933] AC 402; *Burns Philp & Co. Ltd.* v. *Nelson and Robertson Proprietaries Ltd.* (1957–8), 98 CLR 495, HC of A.

PART X

INTERNATIONAL TRANSACTIONS

CHAPTER XXVI

THE LAW OF TREATIES

1. *Introductory*[1]

A GREAT many international disputes are concerned with the validity and interpretation of international agreements, and the practical content of state relations is embodied in agreements. The great international organizations, including the United Nations, have their legal basis in multilateral agreements. Since it began its work the International Law Commission has concerned itself with the law of treaties, and in 1966 it adopted a set of seventy-five draft articles.[2]

These draft articles formed the basis for the Vienna Conference which in two sessions (1968 and 1969) completed work on the Vienna

[1] The principal items are: the Vienna Conv. on the Law of Treaties (see n. 3); the commentary of the International Law Commission on the Final Draft Articles, *Yrbk. ILC* (1966), ii. 172 at 187–274; Whiteman, xiv. 1–510; Rousseau, i. 61–305; Guggenheim, i. 113–273; McNair, *Law of Treaties* (1961); Harvard Research, 29 *AJ* (1935), Suppl.; O'Connell, i. 195–280; Sørensen, pp. 175–246; Jennings, 121 Hague *Recueil* (1967, II), 527–81; *Répertoire suisse*, i. 5–209; Nguyen Quoc Dinh, Daillier, and Pellet, *Droit international public* 117–309; Reuter, *Introduction au droit des traités* (2nd edn. 1985); id., *Introduction to the Law of Treaties* (1989). See further: Rousseau, *Principes généraux du droit international public*, i (1944); Basdevant, 15 Hague *Recueil* (1926, V), 539–642; Detter, *Essays on the Law of Treaties* (1967); Gotlieb, *Canadian Treaty-Making* (1968); various authors, 27 *Z.a.ö.R.u.V.* (1967), 408–561; ibid. 29 (1969), 1–70, 536–42, 654–710; Verzijl, *International Law in Historical Perspective*, vi (1973), 112–612; Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984); Thirlway, 62 *BY* (1991), 2–75; id., 63 *BY* (1992), 1–96; Oppenheim, i. 1197–1333.

[2] The principal items are as follows: International Law Commission, Reports by Brierly, *Yrbk.* (1950), ii; (1951), ii; (1952), ii; Reports by Lauterpacht, *Yrbk.* (1953), ii; (1954), ii; Reports by Fitzmaurice, *Yrbk.* (1956), ii; (1957), ii; (1958), ii; (1960), ii; Reports by Waldock, *Yrbk.* (1962), ii; (1963), ii; (1964), ii; (1965), ii; (1966), ii; Draft articles adopted by the Commission, I, Conclusion, Entry into Force and Registration of Treaties, *Yrbk.* (1962), ii. 159; 57 *AJ* (1963), 190; *Yrbk.* (1965), ii. 159; 60 *AJ* (1966), 164; Draft Articles, II, Invalidity and Termination of Treaties, *Yrbk.* (1963), ii. 189; 58 *AJ* (1964), 241; Draft Articles, III, Application, Effects, Modification and Interpretation of Treaties, *Yrbk.* (1964), ii; 59 *AJ* (1965), 203, 434; Final Report and Draft, *Yrbk.* (1966), ii. 172; 61 *AJ* (1967), 263.

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Convention on the Law of Treaties, consisting of eighty-five articles and an Annex. The Convention[3] entered into force on 27 January 1980 and not less than eighty-one states have become parties.[4]

The Convention is not as a whole declaratory of general international law: it does not express itself so to be (see the preamble). Various provisions clearly involve progressive development of the law; and the preamble affirms that questions not regulated by its provisions will continue to be governed by the rules of customary international law. Nonetheless, a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law.[5] The provisions of the Convention are normally regarded as a primary source: as, for example, in the oral proceedings before the International Court in the *Namibia* case. In its Advisory Opinion in that case the Court observed:[6] 'The rules laid down by the Vienna Convention . . . concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject'.

The Convention was adopted by a very substantial majority at the Conference[7] and constitutes a comprehensive code of the main areas of the law of treaties. However, it does not deal with (*a*) treaties between states and organizations, or between two or more organizations;[8] (*b*) questions of state succession;[9] (*c*) the effect of war on treaties.[10] The Convention is not retroactive in effect.[11]

A provisional draft of the International Law Commission[12] defined a 'treaty' as:

> any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act,

[3] Text: 63 *AJ* (1969), 875; 8 *ILM* (1969), 679; Brownlie, *Documents*, p. 388. For the preparatory materials see: items in n. 2; *United Nations Conference on the Law of Treaties, First Session, Official Records*, A/CONF. 39/11; *Second Session*, A/CONF. 39/11; Add. 1; Rosenne, *The Law of Treaties* (1970). For comment see Reuter, *La Convention de Vienne sur le droit des traités* (1970); Elias, *The Modern Law of Treaties* (1974); Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn. 1984); Kearney and Dalton, 64 *AJ* (1970), 495–561; Jennings, 121 Hague *Recueil* (1967, II), 527–81; Deleau, *Ann. français* (1969), 7–23; Nahlik, ibid. 24–53; Frankowska, 3 *Polish Yrbk.* (1970), 227–55.

[4] Art. 84.

[5] Cf. *North Sea Continental Shelf Cases*, *supra*, p. 12.

[6] ICJ Reports (1971), 16 at 47. See also *Appeal relating to Jurisdiction of ICAO Council*, ICJ Reports (1972), 46 at 67; *Fisheries Jurisdiction Case*, ICJ Reports (1973), 3 at 18; *Iran–United States, Case No. A/18*; ILR 75, 176 at 187–8; *Lithagow*, ibid. 439 at 483–4; *Restrictions on the Death Penalty* (Adv. Op. of Inter-American Ct. of HR, 8 Sept. 1983), ILR 70, 449 at 465–71; and Briggs, 68 *AJ* (1974), 51–68.

[7] 79 votes in favour; 1 against; 19 abstentions.

[8] *Infra*, p. 678.

[9] *Infra*, p. 661.

[10] See *infra*, p. 621.

[11] See McDade, 35 *ICLQ* (1986), 499–511.

[12] *Yrbk. ILC* (1962), ii. 161.

ulations governing the article provides for *ex officio* registration. This involves initiatives by the Secretariat and extends to agreements to which the United Nations is a party, trusteeship agreements, and multilateral agreements of which the United Nations is a depositary. It is not yet clear in every respect how wide the phrase 'every international engagement' is, but it seems to have a very wide scope. Technical intergovernmental agreements, declarations accepting the optional clause in the Statute of the International Court, agreements between organizations and states, agreements between organizations, and unilateral engagements of an international character[50] are included.[51] Paragraph 2 is a sanction for the obligation in paragraph 1, and registration is not a condition precedent for the validity of instruments to which the article applies, although these may not be relied upon in proceedings before United Nations organs.[52] In relation to the similar provision in the Covenant of the League the view has been expressed that an agreement may be invoked, though not registered, if other appropriate means of publicity have been employed.[53]

5. *Invalidity of Treaties*[54]

(*a*) *Provisions of internal law.*[55] The extent to which constitutional limitations on the treaty-making power can be invoked on the international plane is a matter of controversy, and no single view can claim to be definitive. Three main views have received support from writers. According to the first, constitutional limitations determine validity on the international plane.[56] Criticism of this view emphasizes the insecurity in treaty-making that it would entail. The second view varies

[50] McNair, *Law of Treaties*, p. 186, and see *infra*, p. 642.

[51] If an agreement is between international legal persons it is registrable even if it be governed by a particular municipal law; but cf. Higgins, *Development*, p. 329. It is not clear whether special agreements (*compromis*) referring disputes to the International Court are required to be registered.

[52] If the instrument is a part of the *jus cogens* (*supra*, p. 514), should non-registration have this effect?

[53] *South West Africa* cases (Prelim. Objections), ICJ Reports (1962), 319 at 359–60 (sep. op. of Judge Bustamante) and 420–2 (sep. op. of Judge Jessup). But cf. joint diss. op. of Judges Spender and Fitzmaurice, ibid. 503.

[54] See also *infra*, p. 630, on conflict with prior treaties. As to capacity of parties, *supra*, p. 608. See generally: Elias, 134 Hague *Recueil* (1971, III), 335–416.

[55] See *Yrbk. ILC* (1963), ii. 190–3; Waldock, ibid. 41–6; *ILC*, Final Report, *Yrbk. ILC* (1966), ii. 240–2; McNair, *Law of Treaties*, ch. III; Blix, *Treaty-Making Power* (1960); Lauterpacht, *Yrbk. ILC* (1953), ii. 141–6; P. de Visscher, *De la conclusion des traités internationaux* (1943), 219–87; id., 136 Hague *Recueil* (1972, II), 94–8; Geck, 27 *Z.a.ö.R.u.V.* (1967), 429–50; *Digest of US Practice* (1974), 195–8; Meron, 49 *BY* (1978), 175–99.

[56] This was the position of the International Law Commission in 1951; *Yrbk.* (1951), ii. 73.

from the first in that only 'notorious' constitutional limitations are effective on the international plane. The third view is that a state is bound irrespective of internal limitations by consent given by an agent properly authorized according to international law. Some advocates of this view qualify the rule in cases where the other state is aware of the failure to comply with internal law or where the irregularity is manifest. This position, which involves a presumption of competence and excepts manifest irregularity, was approved by the International Law Commission, in its draft Article 43, in 1966. The Commission stated that 'the decisions of international tribunals and State practice, if they are not conclusive, appear to support' this type of solution.[57]

At the Vienna Conference the draft provision was strengthened and the result appears in the Convention, Article 46:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

(*b*) *Representative's lack of authority.*[58] The Vienna Convention provides that if the authority of a representative to express the consent of his state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe the restriction may not be invoked as a ground of invalidity unless the restriction was previously notified to the other negotiating states.

(*c*) *Corruption of a state representative.* The International Law Commission decided that corruption of representatives was not adequately dealt with as a case of fraud[59] and an appropriate provision appears in the Vienna Convention, Article 50.

(*d*) *Error.*[60] The Vienna Convention, Article 48,[61] contains two principal provisions which probably reproduce the existing law and are as follows:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was

[57] *Yrbk. ILC* (1966), ii. 240–2.

[58] ILC draft, Art. 32; *Yrbk. ILC* (1963), ii. 193; Waldock, ibid. 46–7; Final Draft, Art. 44; *Yrbk. ILC* (1966), ii. 242; Vienna Conv., Art. 47.

[59] *Yrbk. ILC* (1966), ii. 245.

[60] See Lauterpacht, *Yrbk. ILC* (1953), ii. 153; Fitzmaurice, 2 *ILCQ* (1953), 25, 35–7; Waldock, *Yrbk. ILC* (1963), ii. 48–50; Oraison, *L'Erreur dans les traités* (1972); Thirlway, 63 *BY* (1992), 22–8.

[61] See also *Yrbk. ILC* (1966), ii. 243–4.

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ANNEX 5.

Dixon, *Textbook on International Law* (4th edn, 2000), pp. 106-114

TEXTBOOK ON

INTERNATIONAL LAW

Fourth Edition

Martin Dixon MA

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interests whose promotion those states entrust to them'. This explains clearly the concept of derived personality, and as such equally is applicable to other 'subjects' such as individuals. Note, however, that personality, once given, may be more difficult to take away. While an international organisation may be dissolved (and its derived personality with it), can the enforceable human rights of individuals be so easily subtracted?

Personality, then, is a relative concept. Generally, it denotes the ability to act within the system of international law as distinct from national law. However, the fact that the degree of personality accorded by international law can vary with each 'subject' means that one must be careful in drawing broad categories. It is equally valid to classify the subjects of international law by reference to what they may do, rather than what they are called. This should be remembered in the following discussion.

5.2 THE SUBJECTS OF INTERNATIONAL LAW

5.2.1 States

International law was conceived originally as a system of rules governing the relations of states *inter se*. Consequently, states are the most important and most powerful of the subjects of international law. They have all of the capacities referred to above and it is with their rights and duties that the greater part of international law is concerned. It is vital, therefore, to know when an entity qualifies as a state. Or, to put it another way, when is an entity entitled to all of the rights and subject to all of the duties assigned by international law to 'states'?

To produce a satisfactory definition of statehood is not easy. The answer does not necessarily lie in a roll call of the United Nations or any other international organisation. At present, there are 188 members of the UN, but this does not include Switzerland. In fact, at one time, it was not even correct to say that membership of the UN was a sure mark of statehood; thus, the Ukraine and Byelorussia have been members of the UN since 1945, although both were undeniably part of the Soviet Union until 1991. Necessarily, membership of the United Nations depends on political considerations as well as legal facts, although in general terms membership of the UN appears to have taken on a much more important role since the end of the cold war and in this context reference must be made to the discussion of 'recognition' below. So, it now seems that the admittance of 'new' states to the UN is to be treated as a sign that they have achieved statehood in international law. This is certainly true, for example, in the cases of North and South Korea, the former republics of the Soviet Union, the 'former Yugoslavian Republic of Macedonia' and Estonia, Latvia and Lithuania. On the other hand, the admittance of Liechtenstein and San Marino was simply an example of existing states joining the UN. Perhaps the best way to look at it is that membership of the UN will now entail a presumption of statehood which it would be very difficult to dislodge. Certainly this is the UK view for it is clear that the admission of North and South Korea constituted for the UK an acceptance of their statehood in international law. Conversely, it remains true

that non-membership of the UN does not of itself constitute a denial of statehood, for there may be many reasons why a state chooses or is forced to stay outside the UN system. An example of the former is Switzerland and of the latter, Taiwan. In respect of other international organisations, multilateral conference or treaty regime, each will have its own rules concerning membership or participation and these may not even pretend to be limited to states. Lastly, what of other entities such as the Turkish Republic of Northern Cyprus that claim to be sovereign states but are ignored by most of the international community? Are these states under international law?

In fact, if we were to conduct a straw poll of every government (assuming we could agree on how many there were), we would find that opinions as to the number of states varied considerably. This is not surprising in the political world of international law, but it does reveal that it is difficult to identify criteria for statehood that are universally accepted, even in principle. Moreover, even if this were possible, each state's application of those criteria to the facts of any given case would vary considerably. This would, in turn, affect the scope of the disputed entity's rights in international law. If, for example, the UK considered Taiwan to be an independent state then, in its relations with the UK, Taiwan would have the rights and duties of a state. If, however, the People's Republic of China took the opposite view then Taiwan would not have the full capacities of statehood in its relations with China. This is the reciprocal and bilateral nature of international law and it can give rise to several different degrees of personality for the same territory in respect of its relations with different states.

These are factors which must be borne in mind in the following discussion of the definition of statehood. They do not mean that questions of statehood are purely subjective which each established state may answer for itself when a new candidate is presented. What they do reveal is that states may pick and choose whether to have *full* relations with any other subject of international law. If a territory qualifies as a state according to the criteria discussed below, we can say that it has the legal ability to exercise all of the rights and duties of a state under international law. It will be subject to all the general obligations and have all the general rights of states in international law. On the other hand, whether the new state actually exercises all of its capacities on an individual level with every other state will depend on whether, in the estimation of those existing states, it has satisfied the criteria.

The starting point for a discussion of the criteria of statehood is Art. 1 of the Montevideo Convention on Rights and Duties of States 1933. This stipulates that the 'state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states'.

5.2.1.1 Permanent population It is not entirely clear what is meant by a permanent population. Obviously, it does not mean that there can be no migration of peoples across territorial boundaries, nor does it mean that a territory must have a fixed number of inhabitants. Rather, it seems to suggest that there must be some population linked to a specific piece of territory on

a more or less permanent basis and who can be regarded in general parlance as its inhabitants. The territory of the Western Sahara, for example, is populated by nomadic tribes who roam freely across the desert without regard to land boundaries, yet their link with the territory is such that they may be regarded generally as its 'population' (*Western Sahara Case* 1975 ICJ Rep 12). It is also unclear whether the population has to be indigenous in the sense of originating in the territory. For example, the Falkland Islands are populated primarily by the descendants of UK nationals who arrived as a consequence of colonisation in the mid-nineteenth century. Is this sufficient to constitute a 'population' for our criteria? The question becomes of great significance if the Islands are to be regarded as candidates for self-determination, for generally that concept has been applied to indigenous peoples gaining liberty from 'foreign' masters.

5.2.1.2 Defined territory It would seem to be essential that for a 'state' to exist there should be a defined territory. A state must have some definite physical existence that marks it out clearly from its neighbours. This does not mean that there must be complete certainty over the extent of territory. Even today there are innumerable border disputes between states over the precise line of the frontier, but this says nothing about their status as states. For example, the dispute between India and Pakistan over Jammu-Kashmir has continued since both states gained independence from the UK, but this has not affected their statehood. Similarly, a refusal to define the extent of the state precisely is not fatal to statehood. Israel has traditionally refused to put maximum limits on her claims to territory in 'Palestine' and this might be thought to come close to having no defined territory at all. In practice, however, there is no doubt that Israel is a state for there is a certain core of territory which undoubtedly is 'Israel'. Similarly, the fact that an existing or emerging state's territory is under threat or even factually subsumed by an aggressive neighbour does not destroy or prevent the existence of statehood. Kuwait was no less a state for its occupation by Iraq, and Bosnia-Herzegovina is in law no less a state despite the fractures in its territorial integrity caused by internal and external forces.

5.2.1.3 Government In order for a state to function as a member of the international community it must have a practical identity. This is the government, which is primarily responsible for the international rights and duties of the state. It is not surprising, therefore, that one criterion of statehood should be that a territory have an effective government. These executive authorities must be effective within the defined territory and exercise control over the permanent population. This does not mean that the 'government' must be entirely dominant within the territory, so long as it is capable of controlling the affairs of the 'state' in the international community. In addition, some commentators have argued that there is a further requirement that the government is likely to become permanent, although there is little support for this in the practice of states, and even less agreement about how it would be assessed.

While it is clear that the criterion of effective government must be satisfied *before* a territory can become a state, this does not mean that an established state loses its statehood when it ceases to have an effective government. There are examples too numerous to mention where a government does not have complete or even substantial control over the territory but its statehood on the international plane is not in issue. Civil war may mean that there is no effective government, but the state *per se* continues to exist as a subject of international law with all of its capacities intact, as with Lebanon in the 1980s, Liberia in the 1990s and Somalia at the turn of the century. Indeed, during a civil war it may be that a state has two 'governments', each of which is recognised by (different) other states as being entitled to represent it. In these circumstances, the conduct of international relations on behalf of the state becomes complicated and in practical terms may disintegrate into a pattern of bilateral arrangements between the competing governments and their respective supporters.

5.2.1.4 Capacity to enter into legal relations This is a requirement that often causes great difficulty, at least as a matter of theory. It has been suggested that it denotes 'independence', so that a territory cannot be regarded as a state so long as it is under the control, direct or indirect, of another state. Yet, if this is what this criterion means, it is quite unrealistic, for there is scarcely a state that does not depend to some degree on the goodwill, financial aid or political support of others. Are we to say that the territories of Central America are not states because of the influence of their powerful neighbour, or that the former Soviet republics are not states because of their close links with Russia? It is unlikely that this is what is meant by 'capacity to enter into relations'. The better view is that this criterion means 'legal independence', not factual autonomy. Thus, a 'state' will exist if the territory is not under the lawful sovereign authority of another state. Hong Kong is under the legal authority of China and, whatever else it is (it has a territory, population and 'government'), it is not a state. On the other hand, Slovakia and the Czech Republic are no longer legally united and, despite being heavily dependent on each other, both are regarded as sovereign states. In this sense, states with legal independence have the legal capacity to enter relations with other states on their own behalf as a matter of right. Whether they are able to exercise that legal capacity in practice is not relevant.

5.2.1.5 Manner of attainment of capacity to enter into legal relations One of the more interesting questions in this regard is whether it matters how a state gains its separate existence. In other words, is the legal independence which is sufficient to justify statehood to be presumed from factual independence or are other criteria applicable? If, for example, Hong Kong declared its own independence and China was unable to reassert its authority, would this be sufficient to raise the presumption of legal capacity thus leading to statehood? Likewise, how is the international community to assess the claims of independence of the Turkish Republic of Northern Cyprus? This is a problem which in recent years has come to the fore, not least because of the break up of the

former federal states of Yugoslavia and the Soviet Union. The vital question is whether factual 'independence', however achieved, will give rise to a presumption of legal independence (legal capacity), or whether any illegality in the attainment of factual independence necessarily prevents such legal capacity arising? At the outset, it must be appreciated that this is a many-sided issue and that rules of international law are just one of a number of factors that may influence a final decision about the 'statehood' of an aspirant territory. Politics and economics are just two of the other relevant considerations.

(a) If the territory declaring factual independence is able to claim the right of self-determination, then it seems that this is sufficient to attain legal independence and (subject to the other criteria) 'statehood'. A former colonial territory has the right to achieve independence by virtue of this principle and it seems not to matter whether this is done voluntarily with the assent of the former colonial power or against its wishes. A recent example is the emergence of the Federated State of Micronesia, arising out of the old Pacific Trust Territory which had been administered by the US following the defeat of Japan in World War II. As ever, however, matters are not cut and dried and many international lawyers would argue that the right of self-determination is available in circumstances far beyond the 'old colonial' situation. Thus, if self-determination is now to be regarded as a right of 'peoples', any ethnic group qualifying as a 'people' could claim self-determination and, if desired, independence and statehood. The natural consequence of this is the acceptance of a right of secession, whereby defined groups in an existing state declare independence under self-determination and claim statehood in international law. Effectively, this is the position in respect of the former federal republics of the Soviet Union and Yugoslavia, whose constituent territories have seceded and obtained independence in their own right, and, in a non-federal context, with the secession of an independent Eritrea from Ethiopia. In this respect, the opinions of the EC Arbitration Commission on Yugoslavia (which deals with matters arising from the dissolution of the federal state) are instructive. Contrary to what many international lawyers would argue, the Commission has adopted a relatively narrow view of self-determination, secession and statehood. Thus, while accepting that former territories of federal states which fulfil the other traditional requirements of statehood (the Montevideo conditions) enjoyed the right of self-determination, leading to statehood if desired, the Commission rejected the idea that ethnic groups and minorities as such enjoyed a right of self-determination. Simply put, 'peoples' enjoyed the right of self-determination as a step to statehood if linked to a pre-existing territorial unit. Otherwise, such peoples enjoyed the right under international law to have their identity as a separate ethnic group recognised by the 'mother' state, but not in a way that guaranteed them independent statehood. So, coming back to our initial question, *lawful* self-determination is an appropriate way in which a territory may achieve legal capacity and hence statehood in international law bearing in mind that what amounts to 'lawful' self-determination is a matter of controversy.

(b) If we are prepared to accept that the method by which factual independence is achieved is relevant in determining statehood in international law, there is a further problem to be addressed. What if the factual criteria of statehood (population, territory, government) are established but they have been achieved in a manner regarded as unlawful under international law? In this sense, it may be that the criteria of the Montevideo Convention are not of themselves enough to establish statehood in international law. They may be necessary but are not sufficient. There is some evidence to suggest that states must achieve their statehood lawfully before it will be fully effective in international law, and there are several general principles of international law which could have an impact here. For example, international law prohibits the use of armed force and the practice of racial discrimination as well as laying down the principle of self-determination. If a territory satisfies the factual criteria of statehood but also violates one of these general principles, it may not qualify as a state. The area known as the Turkish Republic of Northern Cyprus appears to have a population, territory and government, but it is not regarded as a state in international law because it was born of an illegal use of force by Turkey in 1974. Similarly, Southern Rhodesia was not regarded as a state because of the violation of the principle of self-determination (in that it was the white minority, not the black majority, that achieved power) and the homelands of Venda, Ciskei, Transkei and Bophuthatswana were never regarded as states in international law because their establishment by South Africa in pursuance of *apartheid* violated the principle of non-racial discrimination. On the other hand, there is the case of Bangladesh. Following serious internal disturbances in 1971, India invaded East Pakistan, then part of a Pakistan federal state. Although India herself did not annex the territory, the result of its intervention was the emergence of the independent state of Bangladesh. Following the above theory, this would seem to be an example of the creation of a state by unlawful means — the use of armed force. Yet, within three months Bangladesh had been recognised by over 90 other states and in the following year it was admitted as a full member of the United Nations. It is true that there was a population, territory and an effective government (although the latter was maintained initially by Indian force of arms), but how can we ignore the illegality in the manner of the state's creation? Once again, we are faced with the hard reality that principles of international law do not always govern state conduct or community reaction to it, and that, even in the field of statehood, principle can give way to pragmatism.

5.2.1.6 Recognition One of the most important ways in which this pragmatism takes effect is through the concept of international recognition, discussed more fully in Part Two of this chapter. However, for the moment it is important to realise that subsequent recognition of the 'statehood' or 'sovereignty' of an aspirant state by members of the international community may be sufficient to cure a defect in an otherwise imperfect claim to statehood. In other words, even if a people within a territory have not satisfied in full the objective criteria of the Montevideo Convention, or have achieved them

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through unlawful means, they may still acquire statehood in international law because the formal defect or the violation of international law is 'waived' by the community at large. Effectiveness, that is the ability to operate as a state may, in certain circumstances, take priority over formal legality. Recent examples of collective recognition playing an important role in statehood, even perhaps where the factual criteria of the Montevideo Convention have not been satisfied, include the admission of some of the former Yugoslav republics to the United Nations and the apparent acceptance of the statehood of Bosnia-Herzegovina by the ICJ in the *Prevention of Genocide Case* (1993) 32 ILM 888. It should also be noted that recognition may be relevant for determining subsidiary questions connected with statehood. Thus, Russia has been universally accepted as capable of succeeding to the Soviet Union's place on the Security Council and this was done purely informally through acquiescence of the old Soviet Republics and acceptance by other members of the Council and UN.

Of course, we must be very careful not to accept the principle of the curative effect of recognition without some refinement. As a matter of principle, it is undesirable that recognition should be able to cure defects in any of the criteria of statehood other than that of lawful legal independence. Territory, population and government are in essence factual prerequisites which really do need to be established before there can be any possibility of statehood. Is it desirable, for example, that recognition could promote the statehood of a territory where there was no effective government that could fulfil that state's international obligations? The situation in the recognised state of Bosnia in 1992/3 is a poignant reminder of this. On the other hand, legal capacity and legality of creation are conditions rooted in law, not fact, and there is no reason why they may not be waived by those entitled to enforce a breach of the law — that is, by other states. While this may be a practical solution that has been applied in some cases (e.g. the international recognition of Bangladesh, despite the unlawful use of force), it will not be applicable universally. There are still concerns when admitting the curative effect of recognition, similar to those we shall encounter when examining the constitutive theory of recognition in more detail (see below Part Two). For example, how many states must recognise the 'illegal' state and why? Does membership of an international organisation have any significance?

5.2.1.7 Extinction of statehood Lastly, one must note the near practical impossibility of an involuntary loss of statehood. If an entity ceases to possess any of the qualities of statehood examined above, this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Liberia and Afghanistan did not mean that there were no such states. Likewise, if a state is 'extinguished' through the illegal action of another state, it will remain a state in international law. The occupation and acquisition of territory through the use of force is illegal and territory gained in this manner does not belong to the conqueror. The UN enforcement action which successfully evicted Iraq from Kuwait in 1990/1 was based upon this principle and it was the reason why Estonia, Latvia and Lithuania's

claim to statehood was successful after the collapse of the Soviet Union in 1991. Usually, however, it is governments rather than states which cease to exist through the illegal use of force and then it becomes very much a question of international politics as to whether the 'new' government is accepted by the community at large as capable of acting on behalf of the state. Cambodia, for example, has not ceased to exist by reason of the invasion of Vietnam in 1979, but for many years there was a difference of opinion among the international community as to which body was its lawful government. Likewise, there is no doubt that Yugoslavia exists as a state, but the UN has not recognised the Serbia-Montenegro federal government as being entitled to represent the state at the United Nations.

Of course, it is possible for an entity to cease to be an independent state through lawful means. This may take the form of a voluntary submission to the sovereignty of another state or the merger of two states in an entirely new body. Into this latter category comes the abortive attempt of Egypt and Syria to form the United Arab Republic and the successful union of the small Gulf states to form the United Arab Emirates. Similarly, the unification of West and East Germany and of North and South Yemen falls into this category.

5.2.2 Other territorial entities

The relative nature of international personality, whereby a 'subject' may have certain rights and duties for certain purposes, means that states are not the only territorial entities that can be regarded as subjects of international law.

5.2.2.1 Treaty creations There have been several examples of the creation by international treaty of artificial territorial entities having international personality. Former examples include the cities of Danzig, Berlin and Vienna. Such territories may be granted limited international personality by the states who would otherwise be entitled to exercise sovereign authority and they may have some or all of the capacities of 'a state' in international law. The nature and extent of their personality will depend on the terms of the treaty by which they were created. In the case of Berlin, for example, its status was regulated by the Four Powers Treaty for the Governance of Berlin 1946 between France, the USSR, the USA and the UK, although now, of course, Berlin is part of the sovereign state of Germany. In fact, it was not until the Unification Treaty of November 1990 that full sovereignty was restored to Germany in the measure in which it had existed before World War II. However, whatever the content of the personality of such special entities, it is clearly a form of derived personality and will depend entirely on the acquiescence of the states involved in their administration.

5.2.2.2 Territorial entities as agencies of states Although there are no current examples, it is possible that two states might agree to administer jointly a territory through an autonomous local administration. This local body could be granted limited capacities in international law to act on behalf of the territory. Such a joint exercise of sovereign authority, or condominium, would be suitable where sovereignty was disputed or unresolved, as with the

Falkland Islands. The most recent example was the New Hebrides, where authority was shared between France and the UK until it became independent as the state of Vanuatu.

5.2.2.3 Territories per se As well as those entities just described, there are several other types of territory which may enjoy some measure of international personality. In fact, because of the relative nature of international personality, each aspirant territory should be judged on its own and the categories of international legal persons should not be regarded as closed or exhausted by previous examples. Once common were protectorates, whereby an established state assumed responsibility for certain of the international activities — usually foreign affairs — of another territory or state. In the *Rights of US Nationals in Morocco Case* (*US* v *France*) 1952 ICJ Rep 176, the Court confirmed that Morocco had not lost its personality by virtue of a protectorate agreement, but merely that it had entered into a contractual relationship with France whereby the latter would conduct some of its international responsibilities. Also in this category were the former Mandated territories of the League of Nations and the equivalent Trusteeship territories of the United Nations. These territories were home to 'non self-governing peoples' who had personality for the special purpose of achieving independence and ensuring that the mandate/trusteeship was properly administered (*Namibia Case* 1971 ICJ Rep 16). With the independence of the islands of the Pacific Trust Territory (see e.g. the Federated States of Micronesia, the Republic of the Marshall Islands and the Republic of Palau) and the independence of Namibia in 1990, the UN Trusteeship scheme has ended. Nevertheless, other examples remain. The Palestinian Authority, exercising jurisdiction over the Palestine Autonomous Area, has a certain amount of international personality, concluding treaties and agreements with other states and the United Nations. It is not yet generally regarded as the government of an independent state despite its link to a clearly defined territory. It is a new form of international person, a sort of pre-state.

5.2.3 International organisations

In order that the very many international organisations can carry out their allotted tasks, it is apparent that they must enjoy some measure of international personality. This will vary according to the organisation, its objectives and the terms of its constitution or constituent treaty. In the *Reparations Case* 1949 ICJ Rep 174, one of the issues was whether the United Nations could recover reparations in its own right for the death of one of its staff while engaged on UN business. The Court confirmed that personality was essential if the UN was to discharge its functions effectively. This included the capacity to bring claims, to conclude international agreements and to enjoy privileges and immunities from national jurisdictions (see also UN Charter Art. 105). According to the Court, when the UN was created in 1945, its founding members conferred upon it an objective personality such that it became a subject of international law even in respect of those states coming into being after its creation. So, it seems that the UN is to be regarded as a subject of

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ANNEX 6.

Akehurst's Modern Introduction to International Law (7th edn, Malanczuk (ed.), 1997), pp. 75-81

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AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Seventh revised edition

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5 States and governments

States

Since international law is primarily concerned with the rights and duties of states, it is necessary to have a clear idea of what a state is, for the purposes of international law.[1] The answer to this question is less simple than one might suppose. However, it should be noted that in practice, disputes tend to focus on factual issues rather than on the relevant legal criteria.[2]

The 1933 Montevideo Convention on Rights and Duties of States provides in Article 1:

> The State as a person of international law should possess the following qualifications:
>
> (a) a permanent population;
> (b) a defined territory;
> (c) government; and
> (d) capacity to enter into relations with other States.[3]

The first three criteria (a)–(c) correspond to established international practice and to the so-called doctrine of the three elements ('Drei-Elementen-Lehre') formulated by the German writer Georg Jellinek at the end of the nineteenth century.[4] They will be considered first before discussing suggestions for additional criteria.

Defined territory

The control of territory is the essence of a state.[5] This is the basis of the central notion of 'territorial sovereignty', establishing the exclusive competence to take legal and factual measures within that territory and prohibiting foreign governments from exercising authority in the same area without consent. A leading case in this connection is the *Island of Palmas* case. The case concerned a dispute between the Netherlands and the United States on sovereignty over an island about halfway between the Philippines and the now Indonesian Nanusa Islands. The parties referred the issue to the Permanent Court of Arbitration in The Hague. Max Huber, the President of the Permanent Court of International Justice, was appointed as the sole arbitrator. In his award of 4 April 1928 Judge Huber noted on the concept of territorial sovereignty:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and

1 *Harris CMIL*, 102–26; J. Crawford, The Criteria for Statehood in International Law, *BYIL* 48 (1976–7), 93–182; J.A. Andrews, The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century, *LQR* 94 (1978), 408–27; Crawford, *The Creation of States in International Law*, 1979; 30–86; H. Mosler, Subjects of International Law, *EPIL* 7 (1984), 442–59; J.A. Barberis, *Los sujetos del derecho internacional actual*, 1984; K. Doehring, State, *EPIL* 10 (1987), 423–8; P.K. Menon, The Subjects of Modern International Law, *Hague YIL* 3 (1990), 30–86; N.L. Wallace-Bruce, *Claims to Statehood in International Law*, 1994; S. Magiera, Government, *EPIL* II (1995), 603–7. On state sovereignty see the literature in Chapter 2 above, 17–18.

2 I. Brownlie, *Principles of Public International law*, 4th edn 1990, 72. On the need for a simplified definition in international law to be able to conform to the principle of equality of states, see Doehring, *op. cit.*, 423–4.

3 165 LNTS 19.

4 G. Jellinek, *Allgemeine Staatslehre*, 3rd edn 1914, 396 *et seq.*

5 M.N. Shaw, Territory in International Law, *NYIL* 13 (1982), 61–91; S. Torres Bernardez, Territorial Sovereignty, *EPIL* 10 (1987), 487–94; C.K. Rozakis, Territorial Integrity and Political Independence, *ibid.*, 481–7. On the acquisition of territory see Chapter 10 below, 147–8.

> inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian .[6]

It is important to note that the concept of territory is defined by geographical areas separated by borderlines from other areas and united under a common legal system (e.g. Denmark and Greenland; France and Martinique, East and West Pakistan before the secession of Bangladesh in 1971). It includes the air space above the land (although there is no agreement on the precise upper limit)[7] and the earth beneath it, in theory, reaching to the centre of the globe. It also includes up to twelve miles of the territorial sea adjacent to the coast.[8]

Thus, the delimitation of state boundaries is of crucial importance.[9] But absolute certainty about a state's frontiers is not required; many states have long-standing frontier disputes with their neighbours.[10] In the *North Sea Continental Shelf* cases, the International Court of Justice held:

> The appurtenance of a given area, considered as an entity, in no way governs the precise determination of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not .[11]

What matters is that a state consistently controls a sufficiently identifiable core of territory. Thus, Israel was soon clearly recognized as a state, in spite of the unsettled status of its borders in the Arab-Israeli conflict.[12]

Population

The criterion of a 'permanent population' is connected with that of territory and constitutes the physical basis for the existence of a state.[13] For this reason alone, Antarctica, for example, cannot be regarded as a state. On the other hand, the fact that large numbers of nomads are moving in and out of the country, as in the case of Somalia, is in itself no bar to statehood, as long as there is a significant number of permanent inhabitants.[14]

The size of the population, as well as the size of territory, may be very small. This raises the problem of so-called mini-states which have been admitted as equal members to the United Nations.[15] The Vatican City, the government of which is the Holy See, the administrative centre of the Catholic Church, is a special case. In spite of its small population, the Vatican (or the Holy See) entertains diplomatic relations with many other states, has concluded international agreements and joined international organizations (but it is not a UN member). Many state functions, however, are actually performed by Italy.[16]

Who belongs to the 'permanent population' of a state is determined by the internal law on nationality, which international law leaves to the

6 *Island of Palmas* case, *RIAA* II 829, at 839 (1928). See See also P.C. Jessup, The Palmas Island Arbitration, *AJIL* 22 (1928), 735–52; R. Lagoni, Palmas Island Arbitration, *EPIL* 2 (1981), 223–4; *Harris CMIL*, 173–83. See also Chapters 7, 109–10 and 10, 148, 150, 156 below.

7 See Chapter 13 below, 206.

8 See Chapter 12 below, 178–80.

9 M. Bothe, Boundaries, *EPIL* I (1992), 443–9.

10 See the articles by E.J. de Aréchaga, T. Schweisfurth, I. Brownlie, W. Hummer, R. Khan, and H.D. Treviranus/R. Hilger in *EPIL* I (1992), 449 *et seq.*

11 Judgment of 20 February 1969, *ICJ Rep.* 1969, 3, at 33, para. 46. On the cases see Chapters 3, 44, 46 above and 12 below, 193, 196.

12 See P. Malanczuk, Israel: Status, Territory and Occupied Territories, *EPIL* II (1995), 1468–508; Malanczuk, Jerusalem, *EPIL* 12 (1990), 184–95. On the Arab–Israeli conflict see also Chapters 10, 153 and 22, 417, 422–3 and text below, 77.

13 Brownlie (1990), *op. cit.*, 73.

14 See *Restatement (Third)*, Vol. 1, para. 201, at 73.

15 See D. Orlow, Of Nations Small: The Small State in International Law, *Temple ICLJ* 9 (1995), 115–40; J. Crawford, Islands as Sovereign Nations, *ICLQ* 38 (1989), 277 *et seq.* On the membership of mini-states in the United Nations, see Chapter 21 below, 370.

16 See H.F. Köck, Holy See, *EPIL* II (1995), 866–9; K. Oellers-Frahm, Grenzen hoheitlichen Handelns zwischen der Republik Italien und dem Vatikan, *ZaöRV* 47 (1987), 489 *et seq.* For a recent international treaty concluded by the Holy See establishing diplomatic relations with a state see Holy See-Israel: Fundamental Agreement of 30 December 1993, *ILM* 33 (1994), 153–9.

discretion of states, except for a number of limited circumstances.[17] Many states have a multinational composition as regards population. Thus, it would be absurd to legally require any ethnic, linguistic, historical, cultural or religious homogeneity in the sense of the antiquated political concept of the nation-state.[18] Issues connected with such factors again arise under the topic of self-determination and the rights of minorities and indigenous peoples,[19] but are not relevant as criteria to determine the existence of a state. A state exercises territorial jurisdiction over its inhabitants and personal jurisdiction over its nationals when abroad.[20] The essential aspect, therefore, is the common national legal system which governs individuals and diverse groups in a state.

Effective control by a government

Effective control by a government over territory and population is the third core element which combines the other two into a state for the purposes of international law.[21] There are two aspects following from this control by a government, one internal, the other external. Internally, the existence of a government implies the capacity to establish and maintain a legal order in the sense of constitutional autonomy. Externally, it means the ability to act autonomously on the international level without being legally dependent on other states within the international legal order.

The mere existence of a government, however, in itself does not suffice, if it does not have effective control. In 1920, the International Committee of Jurists submitted its Report on the status of Finland and found that it had not become a sovereign state in the legal sense

> until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.[22]

Thus, the 'State of Palestine' declared in 1988 by Palestinian organizations was not a state, due to lack of effective control over the claimed territory.[23] However, the historic Israeli–Palestinian accord concluded on 14 September 1993 and the subsequent agreements may ultimately, if the peace process is sustained, result in some form of Palestinian statehood, although this issue is controversial between the parties and subject to further negotiations.[24]

The requirement of effective control over territory is not always strictly applied; a state does not cease to exist when it is temporarily deprived of an effective government as a result of civil war or similar upheavals. The long period of *de facto* partition of the Lebanon did not hinder its continued legal appearance as a state. Nor did the lack of a government in Somalia, which was described as a 'unique case' in the resolution of the Security Council authorizing the United Nations humanitarian intervention,[25] abolish the international legal personality of the country as such. Even when all of its territory is occupied by the enemy in wartime, the state continues

17 See Chapter 17 below, 263–6.
18 See Th. M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, *AJIL* 90 (1996), 359–83.
19 See Chapters 6, 105–8 and 19, 338–41 below.
20 See Chapter 7 below, 110–11.
21 See Magiera, *op. cit.*
22 LNOJ, Special Supp. No. 3 (1920), 3.
23 See J. Salmon, Declaration of the State of Palestine, *Palestine YIL* 5 (1989), 48–82; F. Boyle, The Creation of the State of Palestine, *EJIL* 1 (1990), 301–6; J. Crawford, The Creation of the State of Palestine: Too Much Too Soon?, *ibid.*, 307–13; Malanczuk (1995), *op. cit.*, at 1491–2.
24 For the documents see *ILM* 32 (1993), 1525 *et seq.*; *ILM* 34 (1995), 455 *et seq.*; see also E. Benevisti, The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement, *EJIL* 4 (1993), 542–54; R. Shihadeh, Can the Declaration of Principles Bring About a 'Just and Lasting Peace'?, *ibid.*, 555–63; A. Cassese, The Israel-PLO Agreement and Self-Determination, *ibid.*, 555–63; Y.Z. Blum, From Camp David to Oslo, *Israel LR* 28 (1994), 211 *et seq.*; F.A.M. Alting *v.* Geusau, Breaking Away Towards Peace in the Middle East, *LJIL* 8 (1995), 81–101; E. Cotran/C. Mallat (eds), *The Arab-Israeli Accords: Legal Perspectives*, 1996; P. Malanczuk, Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law, *EJIL* 7 1996, 485–500.
25 See Chapter 22 below, 402–5.

to exist, provided that its allies continue the struggle against the enemy, as in the case of the occupation of European states by Germany in the Second World War.[26] The allied occupation of Germany and Japan thereafter also did not terminate their statehood.[27]

The circumstance that the temporary ineffectiveness of a government does not immediately affect the legal existence of the state not only makes it clear that it is necessary to distinguish between states and governments, but also reflects the interest of the international system in stability and to avoid a premature change of the status quo, since the government may be able to restore its effectiveness. The other side of the same coin is that the requirement of government is strictly applied when part of the population of a state tries to break away to form a new state. There is no rule of international law which forbids secession from an existing state; nor is there any rule which forbids the mother state from crushing the secessionary movement, if it can. Whatever the outcome of the struggle, it will be accepted as legal in the eyes of international law.[28] These propositions (and some others in the present chapter) may need modification when one side is acting contrary to the principle of self-determination, but the principle of self-determination has a limited scope, and the propositions remain true in most cases.[29] But, so long as the mother state is still struggling to crush the secessionary movement, it cannot be said that the secessionary authorities are strong enough to maintain control over their territory with any certainty of permanence. Intervention by third states in support of the insurgents is prohibited.[30] Traditionally, therefore, states have refrained from recognizing secessionary movements as independent states until their victory has been assured; for instance, no country recognized the independence of the southern states during the American civil war (1861–5).[31] In recent years, however, states have used (or abused) recognition as a means of showing support for one side or the other in civil wars of a secessionary character; thus in 1968 a few states recognized Biafra as an independent state after the tide of war had begun to turn against Biafra; recognition was intended as a sign of sympathy. Particularly controversial in the context of the Yugoslavian conflict has been the drive for early recognition of Slovenia and Croatia, which Germany and Austria justified as being an attempt to contain the civil war, but which was seen by other states as premature action which actually stimulated it.[32]

The notion of effective government is interlinked with the idea of independence, often termed 'state sovereignty',[33] in the sense that such government only exists if it is free from direct orders from and control by other governments. Indeed, some authors require independence as an additional criterion for statehood.[34] In international law, however, the distinction between independent and dependent states is based on external appearances and not on the underlying political realities of the situation; as long as a state appears to perform the functions which independent states normally perform (sending and receiving ambassadors, signing treaties, making and replying to international claims and so on), international law treats the state as independent and does not investigate the possibility that the state may be acting under the direction of another state. An independent state becomes a dependent state only if it enters into a treaty or some

26 See Chapter 10 below, 151. See also M. Rotter, Government-in-Exile, *EPIL* II (1995), 607–11.

27 See Chapter 10, 151–2 and text below, 83–4.

28 C. Haverland, Secession, *EPIL* 10 (1987), 384.

29 See Crawford (1979), *op. cit.*, 103–6, 247–68 and Chapter 19 below, 326–41.

30 See Chapter 19 below, 319–22, 336–8.

31 P. Malanczuk, American Civil War, *EPIL* I (1992), 129–31.

32 See M. Weiler, The International Response to the Dissolution of the Socialist Republic of Yugoslavia, *AJIL* 86 (1992), 569–607; P. Radan, Secessionist Self-Determination: The Cases of Slovenia and Croatia, *AJIA* 48 (1994), 183–95. See also Chapters 11, 167 and 22, 409–15 and text, 89–90 below.

33 On the theory of sovereignty, see Chapter 2 above, 17–18.

34 See Brownlie (1990), *op. cit.*, 73–4.

other legal commitment whereby it agrees to act under the direction of another state or to assign the management of most of its international relations to another state. It may seem artificial to have described Afghanistan, for instance, as an independent state, at the time when everybody knew that Afghanistan was forced to follow Soviet policy on all important questions;[35] however, if international law tried to take all the political realities into account, it would be impossible to make a clear distinction between dependent and independent states, because all states, even the strongest, are subject to varying degrees of pressure and influence from other states. Therefore, although sometimes amounting to little more than a mere legal fiction, the vast majority of states are considered to be 'independent' in this sense.

Moreover, it is important to note that, in principle, international law is indifferent towards the nature of the internal political structure of states, be it based on Western conceptions of democracy and the rule of law, the supremacy of a Communist Party, Islamic perceptions of state and society, monarchies or republics, or other forms of authoritarian or non-authoritarian rule.[36] The rule is crude and only demands that a government must have established itself in fact. The legality or legitimacy of such an establishment are not decisive for the criteria of a state. Although the Holy Alliance in Europe after the Napoleonic Wars had sought a different solution,[37] revolutions and the overthrow of governments have become accepted in international law; the only relevant question is whether they are successful. The choice of a type of government belongs to the domestic affairs of states and this freedom is an essential pre-condition for the peaceful coexistence in a heterogeneous international society. Thus, international law also does not generally inquire into the question whether the population recognizes the legitimacy of the government in power. Nor is it concerned with the actual form of government, democratic in one sense or another or not so. Certain qualifications in this respect may arise from the recognition of the principle of self-determination of peoples,[38] but this is not pertinent to the question of whether or not a state exists.[39]

35 See I. Jahn-Koch, Conflicts, Afghanistan, in *Wolfrum UNLPP I*, 176–88. See Chapter 19 below, 322–3.
36 But on new theories on the requirements of democracy, see Chapter 2 above, 31.
37 See Chapter 2 above, 11–12.
38 See Chapter 19 below, 326–40.
39 On the UN sponsored intervention to restore an elected government in Haiti, see Chapter 22 below, 407–9.
40 See also Akehurst, 6th edn of this book, 53.
41 See *Restatement (Third)*, Vol. 1, para. 201, Comment e, at 73.

Capacity to enter into relations with other states

The last criterion (d) in the Montevideo Convention suggested by the Latin American doctrine finds support in the literature[40] but is not generally accepted as necessary. Guinea-Bissau, for example, was recognized in the 1970s by the United States and by Germany on the basis of only the first three elements. The *Restatement (Third)* of the American Law Institute, however, basically retains this criterion, although with certain qualifications:

> An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.[41]

In fact, even the Montevideo Convention suggests a different perspective in Article 3:

> The political existence of the State is independent of recognition by the other

> States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.[42]

Although this statement is more directly relevant to the dispute on various theories of the legal effect of recognition,[43] it also implies that the existence of a state does not primarily rest on its relations to other states and its own foreign policy capacity.

There are several examples of dependent states, which have only a limited capacity to enter into international relations and are usually mentioned as a special category. For example, colonies in the process of becoming independent[44] often had a limited capacity to enter into international relations. In practice, the formal grant of independence was usually preceded by a period of training, during which the colonial power delegated certain international functions to the colony, in order to give the local leaders experience of international relations. Protectorates were another example.[45] The basic feature of a protectorate is that it retains control over most of its internal affairs, but agrees to let the protecting state exercise most of its international functions as its agent. However, the exact relationship depends on the terms of the instrument creating the relationship, and no general rules can be laid down. Protectorates were generally a by-product of the colonial period, and most of them have now become independent. Trusteeships and 'associated territories' that were placed under the control of the United Nations after the Second World War were also limited in their capacity to conduct foreign relations.[46]

Self-determination and recognition as additional criteria

Some authors refer to other additional factors that may be relevant as criteria for states, such as self-determination and recognition. These, however, are not generally regarded as constitutive elements for a state and it is agreed that what matters in essence is territorial effectiveness.[47]

For reasons which will be explained later,[48] the better view appears to be that recognition is usually no more than evidence that the three requirements listed above are satisfied. In most cases the facts will be so clear that recognition will not make any difference, but in borderline cases recognition can have an important effect. For instance, recognition of very small states such as Monaco and the Vatican City is important, because otherwise it might be doubted whether the territory and population of such states were large enough to make them states in the eyes of international law. Similar considerations apply in the case of secessionary struggles; outright victory for one side or the other will create a situation which international law cannot ignore, and no amount of recognition or non-recognition will alter the legal position; but in borderline cases such as Rhodesia (now Zimbabwe) between 1965 and 1979, where the mother state's efforts to reassert control are rather feeble, recognition or non-recognition by other states may have a decisive effect on the legal position.[49]

42 Article 3, Montevideo Convention.
43 See text below, 83–6.
44 See Chapter 2 above, 28.
45 G. Hoffmann, Protectorates, *EPIL* 10 (1987), 336–9.
46 See Chapter 19 below, 327–32.
47 See also M.N. Shaw, *International Law*, 3rd edn 1991, 138.
48 See text below, 82–90.
49 See Chapter 22 below, 393–5.

Federal states

Unions of states can take several forms, but one of the most important forms nowadays is the federal state (or federation), as exemplified, for example, by the constitutional systems of the United States, Canada, Australia, Switzerland and Germany.[50] There is no uniform model of federal states, many of which are 'federal' in name only, due to effective centralization, but the basic feature of a federal state is that authority over internal affairs is divided by the constitution between the federal authorities and the member states of the federation, while foreign affairs are normally handled solely by the federal authorities.[51]

International law is concerned only with states capable of carrying on international relations; consequently the federal state is regarded as a state for the purposes of international law, but the member states of the federation are not. If a member state of the federation acts in a manner which is incompatible with the international obligations of the federal state, it is the federal state which is regarded as responsible in international law. For instance, when a mob lynched some Italian nationals in New Orleans in 1891, the United States admitted liability and paid compensation to Italy, even though the prevention and punishment of the crime fell exclusively within the powers of the State of Louisiana, and not within the powers of the federal authorities.[52]

Although the normal practice is for foreign affairs to be handled solely by the federal authorities, there are a few federal constitutions which give member states of the federation a limited capacity to enter into international relations. For instance, in 1944 the constitution of the former USSR was amended so as to allow the Ukraine and Byelorussia (two member states of the USSR) to become members of the United Nations alongside the USSR; the purpose and effect of this device was to give the USSR three votes instead of one.[53] There has been no other comparable example of a member state of a federation exchanging diplomats on this level. The representation of the German Bundesländer on the European level in Brussels is of a different nature.[54] The constitution of the United States permits a constituent state to make compacts or agreements with foreign powers – with certain minor exceptions – only with the consent of Congress, but these are limited in scope and content. It does not allow the exchange of ambassadors (only commercial representatives) or to generally engage in relations with a foreign government.[55] In recent years the province of Quebec has signed treaties on cultural questions with France and other French-speaking countries, under powers reluctantly delegated by the federal authorities of Canada.[56] In Europe, however, there have been interesting developments of direct transfrontier cooperation between entities on the local and regional level.[57]

Governments

A state cannot exist for long, or at least cannot come into existence, unless it has a government. But the state must not be identified with its government; the state's international rights and obligations are not affected by a

50 For the international law aspects see W. Rudolf, Federal States, *EPIL* II (1995), 362–75; R. Dehousse, *Fédéralisme et Relations Internationales*, 1991.

51 For the situation in the United States see *Restatement (Third)*, Vol. 1, para. 202, Reporters' Notes, 76.

52 J.B. Moore, *A Digest of International Law*, 1906, Vol. 6, 837–41. On state responsibility see Chapter 17 below, 255–72.

53 See J.N. Hazard, Soviet Republics in International Law, *EPIL* 10 (1987), 418–23.

54 See P. Malanczuk, European Affairs and the 'Länder' (States) of the Federal Republic of Germany, *CMLR* 22 (1985), 237–72; D. Rauschning, The Authorities of the German Länder in Foreign Relations, *Hague YIL* 2 (1989), 131–9; A. Kleffner-Riedel, Die Mitwirkung der Länder und Regionen im EU-Ministerrat, *BayVBl.* 126 (1995), 104–8.

55 *Restatement (Third)*, Vol. 1, para. 201, Reporters' Notes, 76.

56 R. Lane/P. Malanczuk, Verfassungskrise und Probleme des Föderalismus in Kanada, *Der Staat* 20 (1981), 539–70; on recent secessionist tendencies see S. Dion, The Dynamic of Secessions: Scenarios After a Pro-Separatist Vote in a Quebec Referendum, *CJPS* 28 (1995), 533–51; Ch. F. Doran, Will Canada Unravel?, *FA* 75 (1996), 97–109.

57 U. Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, 1988; N. Levrat, *Le Droit applicable aux accords de coopération transfrontière entre collectivités publiques infra - étatiques*, 1994.

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ANNEX 7.

International Criminal Court: Extracts from website www.icc-cpi.int
Details of Australia's ratification[10]

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[10] Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=42.

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Australia (Asia / Pacific Islands)

Signature status:
Australia signed on 9 December 1998.

Membership:
Like-Minded Country, Commonwealth

Ratification and Implementation Status:
Australia ratified on 1 July 2002, becoming the 75th State Party.

In order to implement the Rome Statute, the Federal Parliament has passed two different pieces of legislation, the Consequential Amendment Act 2002 and the Criminal Court Act.

On 20 June 2002, the Federal Cabinet decided that Australia should ratify the International Criminal Court, with a condition giving special protection to Australians. According to news reports, the declaration provides that Australians could not be tried by the Court without a warrant from the Australian government.

On 11 June 2002, Prime Minister Howard announced the Cabinet's decision to approve the bill on ICC ratification, and this was followed by two weeks of heated debate within Parliament.

In June 2002, the Joint Standing Committee on Treaties (JSCOT) of the Australian Federal Parliament conducted hearings with relevant departments, and recommended that Australia ratify the Rome Statute of the ICC (although these recommendations were not legally binding).

On 30 August 2001, the Attorney-General of Australia submitted to the JSCOT drafts of the legislation to implement the ICC Statute into domestic law. Civil society also made submissions on issues associated with these bills to assist the inquiry.

In 2001, the government developed an early draft in order to allow for suggested amendments. After ten months, the legislation was fully revised. Eight recommendations were suggested that were taken into account by the Government before submission.

Australia's implementing legislation includes all the crimes listed in Art. 5 of the Rome Statute, but it also incorporates the grave breaches that are present in Protocol 1 of the Geneva Convention. The implementing legislation also incorporates principles of Universal Jurisdiction.

A new act, the Cooperation Bill, was drafted to define cooperation procedures with the Court. The Rome Statute has been added as a schedule to the Bill. Most of the provisions included are based on existing procedures.

Ratification and Implementation Process:
Under the Australian Constitution, treaty-making is the formal responsibility of the Executive branch rather than the Parliament. Decisions about the negotiation of multilateral conventions, including determination of objectives,

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negotiating positions, the parameters within which the Australian delegation can operate, and the final decision as to whether to sign and ratify are taken at Ministerial level, and in many cases, by Cabinet. In the case of the ICC treaty, the responsible interministerial committee submits the treaty for the approval of the Cabinet. The Cabinet then submits it to the JSCOT, which by a 1996 reform of the treaty-making process, scrutinizes all proposed treaty action by the Australian government, except for urgent treaties and non-binding treaty action (e.g. signature).

Australia must have any relevant implementing legislation in place before it can ratify a treaty. The JSCOT usually considers implementing legislation at the same time as it reviews proposed treaty actions. Upon completing its report and recommendations, the committee then submits them to Parliament. The Parliament passes ratification and implementing legislation to give effect to a given treaty and the judiciary's oversight of the system.

Last Updated:
30 September 2002

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ANNEX 8.

International Criminal Court: Extracts from website www.icc-cpi.int
Details of Sierra Leone's ratification[11]

[11] Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=17.

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Sierra Leone (Africa)

Signature status:
Sierra Leone signed on 17 October 1998.

Membership:
Commonwealth, Like-Minded Country, African Union, ECOWAS

Ratification and Implementation Status:
Sierra Leone ratified on 15 September 2000, becoming the 20th State Party.

Ratification and Implementation Process:
No information is available.

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ANNEX 9.

International Criminal Court: Extracts from website www.icc-cpi.int
Details of South Africa's ratification[12]

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12 Obtained from: http://www.icc-cpi.int/php/statesparties/country.php?id=18.

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South Africa (Africa)

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Signature status:
South Africa signed on 17 July 1998.

Membership:
Commonwealth, Southern African Development Community (SADC), African Union

Ratification and Implementation Status:
South Africa ratified on 27 November 2000, becoming the 23rd State Party.

In June 2002, Parliament adopted implementation legislation, which includes provisions on cooperation with the Court and universal jurisdiction. This legislation came into effect on 16 August 2002.

Soon after the Rome Conference in July 1998, South Africa submitted the Rome Statute to national advisors to determine its constitutionality. An inter-departmental committee was established to study the Statute. It was found that the Statute is constitutional, and no amendments were required. Ratification only required that an explanatory memorandum attaching the Rome Statute be submitted to Cabinet and then to Parliament.

The first draft of the implementing legislation also went through a consultative phase with other governmental departments. The intent was to have the draft implementing legislation already in place, but not necessarily approved by Parliament, when Cabinet and Parliament were requested to approve ratification.

To assist SADC Member States in enacting legislation, a Southern African Development Community meeting held in Pretoria, South Africa, 5-9 July 1999 adopted a model-enabling-law that each state could adopt and adapt to their national situations. This model law covers virtually all aspects of the ICC Statute that require state action and cooperation.

Ratification and Implementation Process:
The Justice Department is responsible for preparing the ratification bill. The Departments of Justice, Defense, Intelligence, Foreign Affairs, Police, Correctional Services, and Home Affairs are responsible for preparing the implementing legislation. Cabinet must approve the submission of the Statute to Parliament (National Assembly and the Council of Provinces), which must both approve ratification via resolution. Ratification requires that an explanatory memorandum attaching the international treaty be submitted to Cabinet and then to Parliament.

The approach of the model enabling law consolidates all ICC-related matters into one statute, thus avoiding disparate amendments and provisions. It appends the Rome Statute as a schedule to the law, thus making the Statute part of the law and adopting its various definitions.

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16 October 2002

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ANNEX 10.

Parliament of the Commonwealth of Australia, Joint S tanding Committee on Treaties, Report 45, *The Statute of the International Criminal Court* (May 2002), paras. 2.35, 2.41 to 2.55, and 3.40 to 3.49[13]

[13] Full text available at: http://www.aph.gov.au/house/committee/jsct/icc/report.htm.

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The Parliament of the Commonwealth of Australia

Report 45

The Statute of the International Criminal Court

Joint Standing Committee on Treaties

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> The ICC will have jurisdiction whenever it decides that the domestic institutions are not 'genuinely' prosecuting the accused. A no-bill based on insufficiency of evidence, or an acquittal or a light sentence in an Australian court, could easily be treated as showing ineffective domestic jurisdiction entitling the ICC to prosecute.[27]

2.32 The National Civic Council (WA) was likewise suspicious of a principle it saw as being 'uncertain' in application.[28]

2.33 The Council for the National Interest expressed similar concerns, stating that the principle is a 'beguiling falsehood' and suggesting that, as State Parties would be encouraged to ensure that their domestic legal regimes were consistent with the crimes described in the ICC Statute, the principle of complementarity would 'operate as an international supremacy clause instead of protecting national sovereignty.'[29]

2.34 The same argument was presented by the Festival of Light, which concluded that 'the notion of complementarity is a legal shadow' that would force State Parties to amend their national law so that it was consistent with the terms and conditions of the ICC Statute. By this process, complementarity 'instead of being a shield, becomes a sword.'[30]

Concerns about constitutionality

2.35 A number of those who expressed concern about the impact of ratification of the ICC Statute on Australia's sovereignty also argued that ratification would be unconstitutional.

2.36 A number of specific claims were made:

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27 Professor Geoffrey de Q Walker, *Submission No. 228*, p. 5.

28 National Civic Council (WA), *Submission No. 1*, pp. 2-3.

29 See Council for the National Interest (WA), *Transcript of Evidence*, 19 April 2001, p. TR188 and Council for the National Interest (WA), *Submission No.19*, p. 3. In making this point, the Council referred to a *Manual for the Ratification and Implementation of the Rome Statute*. The Manual is not an official document of the Court. It has been prepared by a non-government organisation, the International Centre for Criminal Law and Criminal Justice Policy in Vancouver, Canada.

30 Festival of Light, *Submission No. 30*, p. 4. The Festival of Light, the Council for the National Interest (WA) and others developed this argument further to claim that the ICC will become a tool for 'social engineering', supplanting the policy decisions of democratically elected governments.

- that the ICC Statute, by prohibiting 'official capacity' as a defence against an ICC crime,[31] is inconsistent with section 49 of the Constitution (which provides powers, privileges and immunities for members of Parliament);
- that ratification would be an improper use of section 51(xxix) of the Constitution (which empowers Parliament, subject to the Constitution, to make laws with respect to external affairs);
- that ratification would be inconsistent with Chapter III of the Constitution (which vests Commonwealth judicial power in the High Court of Australia and such other federal courts as Parliament creates and in such other courts as it invests with federal jurisdiction);
- that the ICC's rules of procedure and evidence are not consistent with the implied rights to due process that recent judgements of the High Court have derived from Chapter III;
- that the failure of the ICC Statute to provide trial by jury is inconsistent with section 80 (which provides that trial on indictment of any offence against any law of the Commonwealth shall be by jury); and
- that the ICC Statute, by allowing the ICC scope to interpret and develop the law it applies and the Assembly of States Parties to amend the Statute,[32] delegates legislative power to the ICC (in breach of section 1 which vests the Commonwealth's legislative power in the Parliament).

2.37 Charles Francis QC and Dr Ian Spry QC submitted the argument in relation to section 49 of the Constitution, in a joint opinion. They argued

31 Article 27 of the ICC Statute provides that it 'shall apply equally to all persons without any distinction based on official capacity' and that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

32 Article 21 of the ICC Statute provides that 'the Court shall apply:

(a) in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) failing that, general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards.

Article 121 of the Statute provides that amendments, including amendments to the Statute crimes, may be made after 7 years of operation. This article also allows State Parties not to accept any amendments in relation to crimes committed by their nationals or on their territory and to withdraw from the Statute following any amendment (see Articles 121(5) and (6)).

that the ICC Statute is 'clearly inconsistent' with section 49, which is intended to:

> ... prevent legislators from being sued or prosecuted for carrying out their functions. Therefore ratification of the ICC's attempted negation of this Constitutional protection is prevented by the Constitution.[33]

2.38 Francis and Spry also submitted that 'it is at least very doubtful' that the external affairs power in section 51(xxix) could be relied upon to support ratification of the ICC Statute.

> The range of the external affairs power has varied greatly according to changes in attitude amongst various High Court justices. Sir Garfield Barwick CJ, for example, accorded that power an extremely wide ambit, and his views have been followed generally by many other members of the Court. However, first, there have been a number of recent changes in the composition of the High Court, and it may well be that some of the new appointees do not favour the broader construction of the external affairs power, and, secondly, the ICC Statute represents a more extreme case than any comparable treaties that have been considered by the High Court.[34]

2.39 The Festival of Light likewise argued that section 51(xxix) has been interpreted 'so broadly in a series of judgements by the High Court that it has allowed Commonwealth legislation to override State legislation on matters otherwise outside Commonwealth power'. They called for the Constitution to be amended to restrict the capacity of the Parliament to make laws under the external affairs power.[35]

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33 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 1.

34 Charles Francis QC and Dr I C Spry QC, *Submission No. 18.2*, p. 2.

35 Festival of Light, *Submission No.30*, p. 4. The submission supports the proposal put by Dr Colin Howard (in Colin Howard, 'Amending the External Affairs Power' Ch1 in *Upholding the Australian Constitution*, Proceedings of the Fifth Conference of the Samuel Griffiths Society, Vol 5, April 1995, p. 3) that the following be added after the words 'external affairs' in the Constitution:

'provided that no such law shall apply within the territory of a State unless:

(a) the Parliament has power to make that law otherwise than under this sub-section; or

(b) the law is made at the request or with the consent of the State; or

(c) the law relates to the diplomatic representation of the Commonwealth in other countries or the diplomatic representation of other countries in Australia'.

2.40 A number of other submitters were sympathetic with this view, asserting that the enactment of legislation to give domestic effect to the ICC would be 'another example' of the Commonwealth Parliament abusing the external affairs power. Many of those who put this view also said that the ICC Statute should not be ratified until after it had been submitted to a referendum.[36]

2.41 Concern that ratification of the ICC Statute would be in conflict with Chapter III was raised by a number of witnesses, including Geoffrey Walker, who submitted, among other points that:

> Criminal jurisdiction over Australian territory pre-eminently forms part of the judicial power of the Commonwealth: Huddart Parker & Co. v Moorehead (1909) 8CLR 353, 366. That judicial power may only be invested in courts established under Chapter III of the Constitution: Re Wakim: ex parte McNally (1999) 198 CLR 511, 542, 556, 558, 575. The proposed International Criminal Court fails to meet that standard because its judges would not satisfy the requirements of s.72 of the Constitution in relation to manner of appointment, tenure and removal ...
>
> Further, the ICC would not be a 'court' at all in the sense understood by the Constitution or the Australian people. It would have a full time staff of about 600 and would in fact exercise the powers of prosecutor, judge and jury. It would even determine appeals against its own decisions. ...
>
> As there would be no separation of powers except at a bureaucratic level, the judges' exercise of their functions would inevitably be affected by their close links with the investigation and prosecution roles of the ICC. ...
>
> The requirements of s.72 and of the separation of powers would be fatal to the validity of any legislation purporting to give the ICC jurisdiction over Australian territory.[37]

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36 These views were put, in whole or in part, in submissions from Woolcroft Christian Centre, A & L Barron, Andrew Anderson, Nadim Soukhadar, Michael Kearney, David Mira-Batemen, Marlene Norris, Annette Burke, Stewart Coad, Nic Faulkner, Malcolm Cliff, Joseph Bryant, Valeria Staddon, Michael Sweeney and Ken Lawson. It was also suggested in some submissions that Australia's treaty making power should be amended to require that all treaties be approved by a 75% majority of the Senate and by the Council of Australian Governments before ratification (see, for example, submissions from the Council for the National Interest (WA) and Gareth Kimberley).

37 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 2-3.

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2.42 Francis and Spry also concluded that 'Chapter III does not permit ratification of the ICC Statute', asserting that:

> There are clearly substantial arguments that Chapter III (and especially section 71) merely enables the Commonwealth Parliament to confer jurisdiction upon Australian or at least that it does not enable the Commonwealth Parliament to confer upon foreign courts such as the proposed ICC extensive jurisdiction over Australian nationals and extensive powers to over-ride Australian courts.[38]

2.43 Professor George Winterton also expressed the view that any Commonwealth legislation seeking to implement the ICC Statute 'may contravene Chapter III'. The main themes in his argument were that:

- the power to try a person for a criminal offence is an exercise of judicial power (see *Chu Kheng Lim v Commonwealth* (1992) 176 CLR 1, 27);
- if the ICC's power to try offences under the ICC Statute is an exercise of the judicial power of the Commonwealth for the purposes of Australian law, it would contravene Chapter III because the ICC is neither a State court nor a federal court constituted in compliance with section 72 of the Constitution (see *Brandy v HREOC* (1995 183 CLR 245);
- when the ICC tries a person charged with having committed an offence in Australia, it is arguably exercising 'judicial functions within the Commonwealth' because it is exercising judicial functions in respect of acts which occurred in Australia (see *Commonwealth v Queensland* (1975) 134 CLR 298, 328);
- while the argument advanced by Deane J (in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 627) that Chapter III would not apply to an international tribunal because it exercises the judicial power of the international community rather than the Commonwealth is 'a plausible opinion which might commend itself to some current justices of the High Court', it is:

> ... surely arguable that the ICC would exercise *both* the judicial power of the international community *and*, insofar as it applies to

38 Charles Francis QC and Dr I C Spry QC, *Submission No 18.2*, p. 2. Similar views are put in National Civic Council (WA), *Submission No. 1*, pp. 1-2; Richard Egan (National Civic Council (WA), *Transcript of Evidence*, 19 April 2001, p. TR177; Dr I C Spry QC, *Transcript of Evidence*, 14 March 2001, p. TR155; and in submissions from Robert Downey, Catherine O'Connor and Davydd Williams.

> offences committed in Australia, as a matter of Australian domestic law, the judicial power of the Commonwealth. Insofar as Australian law is concerned, the ICC would be exercising jurisdiction conferred by Commonwealth legislation implementing the Statute, just as would an Australian court trying a defendant for a crime specified in art. 5 of the Statute ... It would seem anomalous for two tribunals exercising the same jurisdiction pursuant to the same legislation to be regarded as exercising the judicial power of different polities *for the purposes of Australian domestic law*;

- in the event that the ICC exercises its jurisdiction where a person has been acquitted of the same or a similar offence by an Australian court, any action by the Executive to arrest and surrender the person to the ICC may contravene the separation of judicial power which requires executive compliance with lawful decisions of courts exercising the judicial power of the Commonwealth.

> It would seem to be a contravention of Ch. III of the Constitution for the executive to arrest a person acquitted by a Ch. III court and surrender him or her for further trial by another court exercising authority derived from Commonwealth law (insofar as Australian law is concerned) for essentially the same offence.[39]

2.44 In submitting these views, Winterton admits to two caveats: first that the legal position will depend upon the specific terms of the legislation; and, second, that there is little or no direct legal authority in support of these arguments and that his observations are 'necessarily somewhat speculative'.[40]

2.45 Geoffrey Walker submits, as a separate claim, that one of the strongest trends in Australian constitutional law in recent years has been for the High Court to conclude that certain basic principles of justice and due process are entrenched within Chapter III and that the ICC's rules of procedure and evidence are inconsistent with these principles.

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39 Professor George Winterton, *Submission No. 231*, pp. 2-3. Nevertheless, Professor Winterton supported Australia's ratification of the ICC Statute, believing that 'international justice requires an International Criminal Court'. He was of the view that: 'since it is extremely unlikely under foreseeable circumstances that the ICC would be called upon to exercise its jurisdiction in respect of an art. 5 crime committed in Australia, the Committee may well conclude that the risk that Ch. III would be successfully invoked is minimal' (see *Submission No. 231*, p. 3).

40 Professor George Winterton, *Submission No. 231*, p. 3.

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> ... procedural due process is a fundamental right protected by the Constitution, which mandates certain principles of open justice that all courts must follow ...
>
> This constitutional guarantee raises further doubts about whether the Parliament could validly confer jurisdiction on the ICC.[41]

2.46 Walker, Francis and Spry raised the further possibility that the absence of trial by jury from the ICC's procedures could infringe against the safeguard of trial by jury provided for in section 80 of the Constitution.[42]

2.47 Other constitutional issues raised by Geoffrey Walker concern the law-making capacity of the ICC and the Assembly of States Parties. Walker submitted that the provisions of the ICC Statute which allow the Court to apply general principles of law and 'principles as interpreted in its previous decisions' (see footnote 34 above) confer on the Court 'vast new fields of discretionary law making'.

> This wholesale delegation of law-making authority to a (putative) court encounters serious objections stemming from the separation of powers. ... They are exemplified in the Native Title Act Case, in which the High Court struck down a provision of the NTA that purported to bestow on the common law of native title the status of a law of the Commonwealth ... [in this decision the majority concluded that] 'Under the Constitution ... the Parliament cannot delegate to the Courts the power to make law involving, as the power does, a discretion or, at least, a choice as to what the law should be' (Western Australia v Cth (1995) 183 CLR 373, 485-87).[43]

2.48 Walker also expressed concern about the capacity of the Assembly of States Parties to amend the Statute crimes after a period of 7 years[44]. In his assessment, to give effect to this mechanism the Parliament would need to:

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41 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 6-7.

42 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 7-8 and Charles Francis QC and Dr I C Spry QC, *Submission 18.2*, p. 3. In his submission Professor Walker noted that the prevailing High Court opinion on section 80 is to limit the trial by jury guarantee to 'trial on indictment', a procedure which strictly speaking does not exist in Australia.

43 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, pp. 9-10.

44 Article 121 allows for amendments to be made by the Assembly of States parties or at a special review conference after 7 years. Adoption of amendments requires a two-thirds majority of States parties. If a State does not agree with the amendment the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. Under Article 121(6) if an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect.

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> ... delegate to the Assembly the power to make laws operating in Australian territory. That it cannot do: Parliament 'is not competent to abdicate its powers of legislation' or to create a separate legislature and endow it with Parliament's own capacity: Victorian Stevedoring and General Contracting Co. v Dignan (1931) 46 CLR 73, 121; Capital Duplicators Pty Ltd v ACT (no 1) (1992) 177 CLR 248; Re Initiative and Referendum Act (1919) AC 935, 945. This is because 'the only power to make Commonwealth law is vested in the parliament (Native Title Act case p 487).[45]

2.49 The Attorney-General has rejected the claims that ratification of the ICC Statute would violate Chapter III of the Constitution, describing them as false and misleading.[46]

> The ICC will exist totally independently of Chapter III of Constitution, it will not have power over any Australian Court and will not in any way affect the delivery of justice in Australia.
>
> Australia has been subject to the International Court of Justice for over 50 years and this has not violated our constitutional or judicial independence. The ICC will not have any effect on our constitution or interfere in any way with the independence of our judiciary.[47]

2.50 At the Committee's request, the Attorney-General's Department sought advice from the Office of General Counsel of the Australian Government Solicitor on a number of the constitutional concerns raised in submissions to our inquiry. The advice, issued with the authority of the acting Chief General Counsel, was as follows:

> The ICC will not exercise the judicial power of the Commonwealth when it exercises its jurisdiction, even when that jurisdiction relates to acts committed on Australian territory by Australian citizens. Ratification of the Statute will not involve a conferral of the judicial power of the Commonwealth on the ICC. Nor would enactment by the Parliament of the draft ICC legislation involve such a conferral.

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45 Professor Emeritus Geoffrey de Q. Walker, *Submission No. 228*, p. 10. Walker noted that the Government's proposed implementing legislation might seek to address this issue (see *Submission No. 228*, p. 10).

46 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

47 The Hon Daryl Williams AM QC MP, *Speech to the WA Division of the Australian Red Cross*, 21 April 2001, p. 5.

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> ... The judicial power of the Commonwealth cannot be vested in a body that is not a Chapter III court. However, the draft ICC legislation does not purport to confer Commonwealth judicial powers or functions on the ICC. The legislation has been drafted on the basis that the powers and functions of the ICC have been conferred on it by the treaty establishing it.
>
> ... The judicial power exercised by the ICC will be that of the international community, not of the Commonwealth of Australia or of any individual nation state. That judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been a party to matters before both of these international judicial institutions.
>
> ... Numerous respected United States commentators have considered the alleged unconstitutionality of ratification of the ICC Statute by the United States and, in relation to those arguments which are relevant in the Australian context, have resoundingly concluded that there is no constitutional objection to ratification. For example, Professor Louis Henkin (*Foreign Affairs and the United States Constitution* (2nd Ed) 1996 at p.269) has written that the ICC would be exercising international judicial power. It would not be exercising the governmental authority of the United States but the authority of the international community, a group of nations of which the United States is but one.
>
> Decisions of the ICC would not be binding on Australian courts, which are only bound to follow decisions of courts above them in the Australian court hierarchy. However, decisions of courts of other systems are often extremely persuasive in Australian courts. It is a normal and well established aspect of the common law that decisions of courts of other countries, such as the United Kingdom are followed in Australian courts. Similarly, were an Australian court called upon to decide a question of international law, it could well find decisions of international tribunals to be persuasive.[48]

2.51 Having reviewed this matter the Attorney-General reported that:

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48 Office of General Counsel, 'Summary of Advice', pp 1-2, attached to Attorney-General's Department, *Submission No. 232.*

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> The Government has satisfied itself that ratification of the Statute and enactment of the necessary legislation will not be inconsistent with any provision of the Constitution.[49]

2.52 Justice John Dowd, on behalf of the International Commission of Jurists, agreed that the ICC 'would not exercise Commonwealth judicial power' and would, therefore, operate independently of Chapter III of the Constitution.

> [Chapter] III applies to Australian courts. The foreign affairs power applies to foreign affairs. What we are doing is setting up something extra-Australian in the power vested in the Commonwealth to do that. The Commonwealth uses that power in a whole range of matters and treaties for the protection of the world. Chapter III deals with our court system....
>
> Chapter III ... is to ensure that the [court] system in Australia has integrity and probity, it does not govern an international treaty [such as would establish] extradition and the International Criminal Court.[50]

2.53 Further argument in response to the constitutional concerns was put in written and oral evidence received from government officials, the Attorney-General and the Minister for Foreign Affairs. The key elements of this argument are reproduced below:

- 'the ICC is not going to be a domestic tribunal of Australia; it does not fit within the Constitution. It is an international tribunal established by the international community to try international crimes ... it operates within its own sphere, just as our courts operate within their own spheres';[51] and
- 'the ICC will have no authority over any Australian court and in particular will not become part of the Australian court system and will have no power to override decisions of the High Court or any other Australian court. As an international court, the ICC will not be subject to the provisions of Chapter III of the Constitution, which governs the exercise of judicial power of the Commonwealth. The High Court has

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49 The Hon Daryl Williams AM QC MP, 'The International Criminal Court – the Australian Experience', an address to the International Society for the Reform of Criminal Law, 30 August 2001, p. 7.

50 The Hon Justice John Dowd, *Transcript of Evidence*, 13 February 2001, p. TR 107.

51 Mark Jennings (Attorney-General's Department), *Transcript of Evidence*, 30 October 2001, p. TR25.

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stated (in the Polyukhovich case) that Chapter III would be inapplicable to Australia's participation in an international tribunal to try crimes against international law. In this regard the ICC will be akin to the International Court of Justice or the International Criminal Tribunals for the former Yugoslavia and Rwanda.'[52]

2.54 The Australian Red Cross (through its National Advisory Committee on International Humanitarian Law) also argued firmly against those who claim ratification would be beyond the Commonwealth's constitutional authority. It referred to such claims as being 'manifestly flawed' and as 'being entirely devoid of legal substance'. The Red Cross submitted that:

> Those who make such naïve arguments fail to mention existing Commonwealth legislation such as the *International War Crimes Tribunals Act 1995* which, on the basis of the same argument must be ultra vires Commonwealth legislative competence - this of course, despite the fact that the validity of that particular legislation has never been challenged. It should also be noted that the *Extradition Act 1998* is predicated upon the notion that the Commonwealth Parliament is constitutionally competent to legislate in respect of the transfer of Australians, and others within our territorial jurisdiction, to foreign courts.
>
> Quite apart from the existence of valid Commonwealth legislation which exposes the fallacy of the argument, the High Court's interpretation of the scope of the External Affairs Power in Section 51(xxix) of the Constitution extends to both the abovementioned Act as well as to any new legislation in respect of the Rome Statute.[53]

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52 The Attorney-General and the Minister for Foreign Affairs, *Submission No. 41*, p. 10. The advice from the Office of General Counsel mentioned above also cites the Polyukhovich case, saying Justice Deane concluded that international tribunals trying crimes against international law would be exercising international judicial power: 'Chapter III of the Constitution would be inapplicable, since the judicial power of the Commonwealth would not be involved' (see Office of General Counsel, 'Summary of Advice', p1, attached to Attorney-General's Department, *Submission No. 232*). Amnesty International endorses the view that Justice Deane's comments in the Polyukhovich case are relevant and aptly cited by the Government witnesses (see Amnesty International, *Submission No. 16.2*, p. 3). Geoffrey Walker noted that Justice Deane's remarks were *obiter dicta;* that is, were said by the way, rather than as part of the essential legal reasoning of the case before him at the time (see Professor Emeritus Geoffrey de Q. Walker, Submission No. 228, p. 3).

53 Australian Red Cross (National Advisory Committee on International Humanitarian Law) *Submission No. 26.1*, pp. 1-2.

2.55 As the Australian Red Cross pointed out, if the arguments about constitutional invalidity are correct, then they should apply to Australia's involvement in other War Crimes Tribunals. That argument made by the RC was not countered in evidence put to the Committee.

The proposed implementing legislation and the ICC crimes

2.56 On 31 August 2001, the Attorney-General referred the following draft legislation to the Committee:

- *International Criminal Court Bill 2001,* (the ICC bill); and
- *International Criminal Court (Consequential Amendments Bill 2001,* (the consequential amendments bill).

The Committee then sought further public submissions from all parties who had previously had input to its review of the Statute to comment on any aspect of the proposed legislation.

2.57 As a result, a number of issues were raised concerning the proposed legislation. As with views on the Statute, there are a range of competing opinions relating to the impact and coverage of the legislation.

2.58 Organisations like the Australian Red Cross, the Australian Institute for Holocaust and Genocide Studies, the Castan Centre for Human Rights Law, Human Rights Watch and Amnesty International, who favour Australia's ratification of the Statute, indicated that in their view the legislation would be sufficient for the purpose of fulfilling Australia's obligations under the Rome Statute. In fact, Human Rights Watch contended that:

> By virtue of the comprehensive nature of this Bill, the likelihood of the ICC ever asserting jurisdiction in a case over which Australia would ordinarily exercise jurisdiction, is now extremely remote.[54]

2.59 The Australian Red Cross considered that while in several areas the legislation may need minor modifications:

> It is the general view of ARC that the Bills as drafted comprehensively provide for the national implementation of

54 Human Rights Watch, *Submission No. 23.1,* pp. 1-2.

offence in another country can be surrendered to face trial in that country. Australian citizens have also been exposed to the prospect of trial by foreign courts for war crimes, in accordance with the 1949 Geneva Conventions. There have been few arguments over the years that any of these arrangements jeopardise our national sovereignty or judicial independence.

3.39 In the event that the ICC acts in a way that corrupts the complementarity principle, thereby compromising the primacy of national judicial systems, Australia, like any other signatory, could always exercise its sovereign right to withdraw from the Statute (see the section "Withdrawal from the Statute" later in this Chapter).

Concerns about constitutionality

3.40 The Parliament's capacity to enact legislation, pursuant to section 51(xxix), to give effect to international obligations is well-established in law and practice. Moreover, this power has been interpreted broadly by the High Court in a series of cases.[4]

3.41 Blackshield and Williams, in *Australian Constitutional Law and Theory*, noted that 'the view that s 51 (xxix) would authorise laws to implement the provisions of an international treaty has been expressed by constitutional authorities since the earliest years of federation.'[5]

3.42 Moens and Trone, in Lumb and Moens *The Constitution of Australia Annotated*, argued that recent decisions of the High Court have 'continued this expansive interpretation of the [external affairs] power', citing Mason J in *Commonwealth* v *Tasmania*:

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4 See Koowarta v. Bjelke-Peterson (153 CLR 168 (1982), discussing section 51 in relation to the *Racial Discrimination Act 1975*; Commonwealth v. Tasmania (158 CLR 1,172 (1983), 'As soon as it is accepted that the Tasmanian wilderness area is part of world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs'; Polyukhovich v. Commonwealth (172 CLR 501, 528 (1991), 'Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia.' (cited by Katherine Doherty and Timothy McCormack in 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 157)

5 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, 2nd Edition, 1998, p. 685. Blackshield and Williams refer to decisions of the High Court in 1906, 1921 and 1936 and statements by Alfred Deakin as Attorney-General in 1902.

> ... it conforms to established principle to say that s 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900.[6]

3.43 Lane, in *Commentary on the Australian Constitution*, summarised the effect of the High Court's interpretation as being that the subject of the Executive's international undertakings is 'virtually limitless' and that the test for validity of such action and its domestic implementation is simple:

> ... the simple test for validity is, is there a Commonwealth Government international commitment on any kind of matter, followed by the Commonwealth Parliament's action under s 51(xxix)? That is all.[7]

3.44 The Committee agrees with the conclusion drawn by Doherty and McCormack that it is:

> ... clear that the Federal Parliament has the requisite constitutional competence to introduce legislation to bring the *Rome Statute* crimes into Australian criminal law should it choose to do so.[8]

3.45 The remaining Constitutional arguments are, to varying degrees, plausible, but are not persuasive.

3.46 The most complete argument presented is that ratification of the ICC Statute would be inconsistent with Chapter III of the Constitution, which provides that Commonwealth judicial power shall be vested in the High Court of Australia and such other federal courts as the Parliament creates. However, the Committee accepts as reasonable the Attorney-General's submission (relying upon advice from the Australian Government Solicitor and referring to Justice Deane's dicta in Polyukhovich) that the ICC will not exercise the judicial power of the Commonwealth, even if it were to hear a case relating to acts committed on Australian territory by Australian citizens. The judicial power to be exercised by the ICC will be that of the international community, not of the Commonwealth of Australia. As noted by the Attorney, the international community's

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6 Gabriel Moens and John Trone, Lumb and Moens *The Constitution of the Commonwealth of Australia Annotated*, 6th Edition, 2001, p. 144

7 PH Lane, *Commentary on the Australian Constitution*, 2nd Edition, 1997, p. 301

8 Doherty and McCormack, 'Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation', *UC Davis Journal of International Law and Policy*, Vol 5, Spring 1999, No. 2, p. 161

judicial power has been exercised on previous occasions, for example in the International Court of Justice and the International Tribunal for the Law of the Sea. Australia has been party to matters before both these tribunals.

3.47 In summary, the Committee's view is that:

- while acknowledging that some of the evidence received presents an arguable case, the Committee is not persuaded that the High Court would find the Government's proposed implementing legislation to be invalid;
- it is reasonable for Parliament to proceed on the basis of properly considered advice from the Attorney-General that the proposed implementing legislation will not be in breach of the Constitution; and
- it is extremely unlikely that the matter will ever be tested by the High Court, as there is very little chance that an Australian national will ever be charged with a Statute crime for an offence committed in Australia *and* that the Australian judicial system will show itself to be unwilling or unable genuinely to carry out the investigation or prosecution.

3.48 The Committee does not accept that the legislation is likely to contravene the Constitution. In any case, the new laws could be tested in accordance with usual practice if there were any constitutional concerns.

3.49 It is of considerable importance that Australia be at the first assembly of the States Parties to take place after the Statute comes into force on 1 July 2002. That first meeting is likely to be held in September 2002 and is expected to settle the rules of procedure and evidence, the *Elements of Crimes* document, the timing and procedure for the election of judges, and the first annual budget. To participate in the first meeting of State Parties, Australia needs to deposit its instrument of ratification by 2 July 2002.[9] The Committee was advised by the Attorney-General's Department that ratification should not proceed until domestic legislation is in place. The Committee has carried out a thorough examination of the draft legislation during the course of this inquiry.

Recommendation 5

3.50 **The Committee recommends that the *International Criminal Court Bill* and the *International Criminal Court (Consequential Amendments) Bill***

9 Joanne Blackburn, *Transcript of Evidence*, 10 April 2002, p. TR289.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 11.

Constitution of South Africa, sections 165 and 166[14]

[14] Obtained from: http://www.polity.org.za/html/govdocs/constitution/saconst08.html?rebookmark=1. Full text available at: http://www.polity.org.za/govdocs/constitution/saconst.html.

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Chapter 8

Courts and Administration of Justice

Index of Sections

Judicial authority

165. (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

Judicial system

166. The courts are

a. the Constitutional Court;
b. the Supreme Court of Appeal;
c. the High Courts, including any high court of appeal that may be established by an Act of

Parliament to hear appeals from High Courts;
d. the Magistrates' Courts; and
e. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

Constitutional Court

167. (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court

a. is the highest court in all constitutional matters;
b. may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the Constitutional Court may

a. decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
b. decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
c. decide applications envisaged in section 80 or 122;
d. decide on the constitutionality of any amendment to the Constitution;
e. decide that Parliament or the President has failed to fulfil a constitutional obligation; or
f. certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court

a. to bring a matter directly to the Constitutional Court; or
b. to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Supreme Court of Appeal

168. (1) The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament.

(2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 12.

Sierra Leone Telecommunications Co Ltd v. Barclays Bank plc, [1998] 2 All ER 821 (United Kingdom: Queen's Bench Division (Commercial Court))

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1 of 2 DOCUMENTS

Sierra Leone Telecommunications Co Ltd v Barclays Bank plc

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[1998] 2 All ER 821

HEARING-DATES: 6 February 1998

6 February 1998

CATCHWORDS:

Conflict of laws - Contract - Proper law of contract - Bank - English bank holding account for Sierra Leone company owned by Sierra Leone government - Company's articles of association providing that board of directors to consist of eight members appointed by 'the Government of Sierra Leone' - Mandate completed authorising four signatories to sign payment requests on company's behalf - Coup subsequently taking place, new board appointed by junta and authority of signatories purportedly revoked - Whether mandate determined - Whether law governing contract English law - Contracts (Applicable Law) Act 1990, Sch 1, art 4.

Conflict of laws - Foreign government - Recognition - Articles of association of Sierra Leone company owned by Sierra Leone government providing that board of directors to consist of eight members appointed by 'the Government of Sierra Leone' - Company holding bank account with English bank and mandate completed authorising four signatories to sign payment requests on company's behalf - Coup subsequently taking place, new board appointed by junta and authority of signatories purportedly revoked - Whether junta 'the Government of Sierra Leone' - Whether authority of signatories validly revoked.

HEADNOTE:

The plaintiff company was incorporated in Sierra Leone on 1 April 1995 and was wholly owned by the Sierra Leone government which controlled its business dealings. By art 71(1) of its articles of association, its board of directors consisted of eight members appointed by 'the Government of Sierra Leone'. The plaintiff held a US dollar account with the defendant bank in London and on 31 July 1996 a bank mandate was completed authorising four signatories to sign payment requests on the plaintiff's behalf, two signatures being required for any payments. On 25 May 1997 a coup took place in Sierra Leone. The UK government consistently condemned the coup and continued to deal with the democratically elected government. On 24 December the bank received a letter dated 22 December purportedly from the plaintiff suspending with immediate effect three signatories to the account and informing the bank that the company's board of directors had been dissolved and a new board appointed. The letter was signed by the Secretary of State, Transport and Communications and the executive chairman of the board. The bank replied by fax on 31 December and a response by fax of the same date was received from the executive chairman, which stated that payments outlined had not been authorised by the board and were not to be honoured without reference to the board. The bank thereafter refused to meet several payment requests on the ground that it had reasonable grounds for believing that they had been made without authority, although they were regular and in accordance with the mandate, and it was therefore justified in refusing to honour them. The plaintiff applied to the court for a declaration that the account remained subject to the terms of the mandate of 31 July and to instructions given by the signatories named therein, contending (i) that the mandate had not been determined under English law, which was the law governing the contract under art 4 of the Rome Convention on the law applicable to contractual obligations (which had the force of law in the United Kingdom by virtue of s 2(1) of the Contracts (Applicable Law) Act 1990 and was set out in Sch 1 thereto), and (ii) that the authority of the signatories had not been validly revoked, since the new board of directors had not been appointed by 'the Government of Sierra Leone'.

Held - (1) Under art 4(1) of the convention the basic rule was that, in the absence of a choice of law, a contract was governed by the law of the country with which it was most closely connected. For that purpose it was presumed that the contract was most closely connected with the country where the party who was to effect 'characteristic performance' had, in the case of a body corporate, its central administration, and in the case of a bank account, such party would be the bank. Performance, ie repayment of the sum deposited in a bank account, was effected through the branch where the account was kept and it was the law of the country where the account was kept which governed the contract. It followed, in the instant case, that the governing law of the contract was English law (see p 827 b to e, post); Libyan Arab Foreign Bank v Bankers Trust Co [1989] 3 All ER 252 considered.

(2) In deciding whether a government existed as the government of a state the factors to be taken into account were (i) whether it was the constitutional government of the state, (ii) the degree, nature and stability of the administrative control, if any, that it of itself exercised over the territory of the state, (iii) whether the UK government had had any dealings with it and (iv) in marginal cases, the extent of international recognition that it had as the government of the state. In the instant case, the UK government continued to deal with the democratically elected government and had no dealings with the military junta. Moreover, the junta had no control over two-thirds of the country, and the coup had been condemned by the Commonwealth, the Organisation of African Unity and the European Community. In those circumstances, the military junta were not 'the Government of Sierra Leone' for the purposes of art 71(1) of the plaintiff's articles of association. Accordingly, the mandate to the bank of 31 July 1996 stood and was not affected by anything that the junta had purported to do since May 1997; the letters of 22 and 31 December 1997 from those associated with the junta were therefore of no effect and the new directors were not validly appointed. It followed that the plaintiff was entitled to the declaration sought (see p 829 e f, p 830 b c, p 831 h and p 832 b e f, post); dictum of Hobhouse J in Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary [1993] 1 All ER 371 at 384 applied.

NOTES:

For determination of the governing law in the case of contracts made after 1 April 1991, see 8(1) Halsbury's Laws (4th edn reissue) paras 844-856.

For the recognition of states and governments generally, see 18 Halsbury's Laws (4th edn) paras 1425-1435.

For the Contracts (Applicable Law) Act 1990, Sch 1, art 4, see 11 Halsbury's Statutes (4th edn) (1991 reissue) 224.

CASES-REF-TO:
Arantzazu Mendi, The [1939] 1 All ER 719, [1939] AC 256, HL.
Barclays Bank plc v Quincecare Ltd (1988) [1992] 4 All ER 363.
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536, [1967] 1 AC 853, [1966] 3 WLR 125, HL.
GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party) [1986] 3 All ER 449, [1987] QB 599, [1986] 3 WLR 583, QBD and CA.
Libyan Arab Foreign Bank v Bankers Trust Co [1989] 3 All ER 252, [1989] QB 728, [1989] 3 WLR 314.
Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co [1988] 2 Lloyd's Rep 494.
Lipkin Gorman (a firm) v Karpnale Ltd (1989) [1992] 4 All ER 409, [1989] 1 WLR 1340, CA; rvsd in part [1992] 4 All ER 512, [1991] 2 AC 548, [1991] 3 WLR 10, HL.
Somalia (Republic) v Woodhouse Drake & Carey (Suisse) SA, The Mary [1993] 1 All ER 371, [1993] QB 54, [1992] 3 WLR 744.

CASES-CITED:
Banco de Bilbao v Rey, Banco de Bilbao v Sancha [1938] 2 All ER 253, [1938] 2 KB 176, CA.
Duff Development Co Ltd v Government of Kelantan [1924] AC 797, [1924] All ER Rep 1, HL.

INTRODUCTION:

The plaintiff, Sierra Leone Telecommunications Co Ltd (Sierratel), brought an action against the defendant, Barclays Bank plc, seeking by amended points of claim a declaration that its US dollar account held at the bank's Knightsbridge International Banking Centre remained subject to the original terms of a mandate dated 31 July 1996 and in particular remained subject to instructions given on behalf of the plaintiff by the named signatories identified therein and no others. The facts are set out in the judgment.

COUNSEL:

Timothy Saloman QC for Sierratel; Richard de Lacy for the bank.

PANEL: CRESSWELL J

JUDGMENTBY-1: CRESSWELL J

JUDGMENT-1:

CRESSWELL J: This cases raises important issues as to international recognition and international banking. It reflects the problems faced by an international bank when it holds an account of a company wholly owned by a foreign government and there is a military coup in the country in question.

This matter came before me on 23 January 1998 on an application by the plaintiff company, Sierra Leone Telecommunications Co Ltd (to whom I shall refer as 'Sierratel'), for a mandatory injunction. On that occasion it was accepted by both parties that the appropriate relief to be claimed by those representing the plaintiff company was a declaration. Accordingly I gave leave to serve amended points of claim seeking declaratory relief and in addition gave directions for a speedy trial of the issue whether the plaintiff is entitled to declaratory relief.

The trial has come on for hearing today two weeks after the first application to the court. In this way the court has demonstrated its readiness to bring on a trial in a very short period of time, so as to resolve questions of immediate importance in the commercial and international field. By letter dated 29 January Messrs Lovell White Durrant gave notice of today's hearing to The Secretary, Sierratel, Freetown, Sierra Leone. Sierratel's claim as pleaded in the amended points of claim is for --

'a declaration that the Plaintiff's US Dollar account no. 83051922 held at the Defendants' Knightsbridge International Banking Centre remains subject to the original terms of the Mandate dated 31 July 1996 and, in particular, remains subject to instructions given on behalf of the Plaintiffs by the named signatories identified therein (and no others) . . .'

The background

Sierratel is a company incorporated in Sierra Leone as a parastatal company, ie a company wholly owned by the Sierra Leone government which controls its business dealings. Sierratel holds a US dollar account at Barclays Bank plc's (Barclays) Knightsbridge International Banking Centre, London, SW1. On 25 May 1997 a coup took place in the Republic of Sierra Leone. The democratically elected government of President Kabbah has since then continued as the government of Sierra Leone from Conakry, Republic of Guinea. The British government has consistently condemned the military coup and continues to deal with the democratically elected government of Sierra Leone under President Kabbah.

Sierratel was incorporated in Sierra Leone on 1 April 1995. Since the coup in May 1997 the company has continued to carry on its business activities from Washington, London and Guinea. In mid-1996 Sierratel opened the US dollar bank account with Barclays. The account became operational in October 1996. On 31 July 1996 a bank mandate was completed authorising the following signatories to sign payment requests on the company's behalf: (1) F E Jarrett, managing director; (2) S R Tumoe, deputy managing director; (3) A R Wurie, financial controller; (4) A E O Brima, manager, financial accounts. Two signatures from the above are required by the mandate for any payments. A security code system was established between Sierratel and Barclays with each payment request carrying this code. After the coup a new security code was established in London in August 1997. This new code is still in operation.

Sierratel by the above signatories continued to use, and Barclays continued to authorise the use of, the account following the coup. The bank has, however, not met several payment requests issued by Sierratel recently and presented to the bank. These requests, which total approximately $ US1,080,000 and DM108,192, are in respect of outstanding payments to creditors. All the payment requests relate to contracts entered into prior to the coup.

The reason for Barclays' failure to meet the payment requests is as follows. On 24 December 1997 Barclays received a letter dated 22 December purportedly from Sierratel in Freetown as follows:

'At the Board meeting of the New Board of Directors of . . . (SIERRATEL) -- minutes attached . . . it was resolved that the Signatories of the following be suspended with immediate effect: -- (1) Mr. Frank E. Jarrett, Managing Director (2) Mr. Sahr R. Tumoe, Deputy Managing Director (3) Mr. Allmamy Wurie, Financial Controller . . .'

The letter was signed by Mr Osho Williams (described as Secretary of State, Transport and Communications) and Mr Victor B Foh (described as executive chairman, board of directors, Sierratel). Enclosed with that letter were what purport to be minutes of a meeting of the board of directors of Sierratel on Wednesday, 3 December 1997. At para 1 of the minutes it is stated: '. . . the old Board was dissolved by letters from the Ministry of Transport and Communications on the 28 August 1997 . . .' At para 3(2) it is stated:

'. . . It was resolved that in the interim, the signatures of the first three senior members of staff currently out of the country be suspended from all Local and Foreign Accounts.'

Barclays replied by fax on 31 December 1997. A response of the same date was received in the form of a handwritten fax from Mr Foh, which stated: 'Your fax of 31 December 1997 refers. Payments outlined not authorised by Board and must not be honoured without reference to Board . . .'

Since that date Barclays has not responded to the payment requests referred to above. Barclays denies that the position it has taken amounts to a breach of contract. Mr Timothy Saloman QC, who is instructed by the Sierra Leone High Commissioner, who represents the government of President Kabbah, has not suggested that the initial stance taken by Barclays in freezing the account was other than reasonable. The affidavit of Mr Matthew Harrison, international corporate manager with Barclays, puts the matter in this way:

'Barclays has been effectively asked by the original signatories to make a difficult choice whether to ignore completely the letter of 22 December 1997 addressed to Barclays from the head office of Sierratel, or the conflicting instructions emanating from the original signatories.'

Barclays says that the payment instructions of Sierratel will be honoured immediately once this court has decided and declared how and by whom instructions are to be given on behalf of Sierratel.

The evidence

I record that the evidence before the court comprises (a) the first and second affidavits of Mr Gibbons and the first affidavit of Mr Solomon Berewa, the Attorney General and Minister of Justice in President Kabbah's government, on behalf of Sierratel and (b) the first affidavit of Mr Harrison, on behalf of the bank. In accordance with the directions that I gave on 23 January 1998 those affidavits stand as evidence for the purpose of this trial. Neither party has given notice to the other requiring any deponent to attend for cross-examination.

The submissions by Mr Saloman on behalf of Sierratel

Mr Saloman (instructed by the Sierra Leone High Commissioner, Professor Foray, who represents the government of President Kabbah) submitted as follows. The defendant bank's duty is based on contract or agency. On either basis, its duty was to comply with the terms of its mandate, paying sums and debiting its accounts as therein authorised. The terms of the mandate were agreed by Sierratel's board of directors on 31 July 1996. The mandate has not been determined or varied as a matter of the proper law of the contract (English law). Prima facie, therefore, the plaintiff's account remains subject to the terms of the mandate dated 31 July 1996 and to instructions given by the signatories named therein (and no others) and they are entitled to a declaration accordingly. As to any defence or question that the authority of the named signatories to represent the plaintiff has been validly revoked, this is unsustainable for two reasons. (1) The 'new Board of Directors' (including Mr Victor B Foh, signatory of the letters of 22 and 31 December 1997) was not appointed by the government of Sierra Leone or the President. The acts of the 'new Board' in purportedly suspending the named signatories are not valid acts binding upon the plaintiff company. (2) The authority of the signatories and directors named in the mandate (Mr Jarrett, Mr Tumoe and Mr Wurie) has never been validly revoked. The first two mentioned (at least) are directors and they have never been validly removed from their positions.

The submissions by Mr de Lacy on behalf of the bank

Mr de Lacy on behalf of the bank submitted as follows. A bank's obligation to its current account customer is generally to honour its customer's orders in the ordinary course of business with reasonable skill and care, subject to the availability of funds or credit. Where the bank has reasonable grounds (falling short of proof) for believing that a payment order has been made without authority, although it is regular and in accordance with the mandate, it is justified in refusing to honour the order: Barclays Bank plc v Quincecare Ltd (1988) [1992] 4 All ER 363 at 375-376 per Steyn J

and Lipkin Gorman (a firm) v Karpnale Ltd (1989) [1992] 4 All ER 409 at 421, [1989] 1 WLR 1340 at 1356 per May LJ and [1992] 4 All ER 409 at 439, 441, [1989] 1 WLR 1340 at 1376, 1378 (particularly the reference to 'serious or real possibility albeit not amounting to a probability') per Parker LJ. A case where a bank has reasonable grounds for believing that there is a possibility that the existing mandate has been revoked is a case a fortiori to the case of a regular order complying with a mandate but in fact unauthorised by the customer (eg because of the customer's agent's fraud).

Where the issue is as sensitive and important as the question of the continued authority of a foreign government, the bank was entitled to take the stand which it did, and effectively freeze the account. In all the circumstances of this case, however, the evidence shows that Sierratel, acting through the agency of the former board, is entitled to a declaration that the former board has not been effectively displaced and is able to control the terms of the bank's mandate and hence the accounts of Sierratel. In the special circumstances of this case the bank (1) claims no interest of its own in the issue; (2) seeks to assist the court impartially to determine whether the declaration as to the control of Sierratel should be granted; (3) leaves it to the court to make that determination.

The law governing the contract between Sierratel and Barclays

Rule 180 in Dicey and Morris on the Conflict of Laws (12th edn, 1993) vol 2, p 1259 states:

'(1) The law applicable to a contract by virtue of Rules 175 and 176 governs in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions. (2) In relation to the manner of performance and the steps to be taken in the event of defective performance regard is to be had to the law of the country in which performance takes place.'

It was held in Libyan Arab Foreign Bank v Bankers Trust Co [1989] 3 All ER 252 at 266, [1989] QB 728 at 746 that as a general rule the contract between a bank and its customer is governed by the law of the place where the account is kept, in the absence of agreement to the contrary. The rule was reaffirmed in Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co [1988] 2 Lloyd's Rep 494 at 502, in which it was said that solid grounds are needed for holding that this general rule does not apply. It is a rule of the greatest commercial importance, and there is a risk of grave difficulty and confusion if some other law is the governing law.

These cases must now be reconsidered in the light of the Rome Convention on the law applicable to contractual obligations, which was given the force of law in the United Kingdom on 1 April 1991 by the Contracts (Applicable Law) Act 1990. The basic rule under the convention is that in the absence of a choice of law, a contract is governed by the law of the country with which it is most closely connected: art 4(1). The rule is qualified by a number of rebuttable presumptions. It is presumed that the contract is most closely connected with the country where the party who is to effect 'characteristic performance' has its central administration. In the case of a bank account, such party will be the bank. However, if the contract is entered into in the course of that party's trade, the governing law will be that of the country in which the principal place of business is situated or, where performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated: art 4(2). As to bank accounts it seems to me that the principle established in the Libyan assets cases is substantially unchanged. Performance, ie repayment of the sum deposited, is to be effected through the branch where the account is kept. It is the law of the country where the account is kept which governs the contract. This view appears to be consistent with that expressed in the Giuliano and Lagarde Report (see OJ 1980 C282 p 21), which states that 'in a banking contract the law of the country of the banking establishment with which a transaction is made will normally govern the contract'. The governing law of the contract between Sierratel and Barclays is thus English law.

Payment within mandate

It is a basic obligation owed by a bank to its customer that the bank will honour on presentation a cheque drawn by the customer on the bank provided that there are sufficient funds in the customer's account to meet the cheque or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honours such a cheque or other instructions it acts within its mandate, with the result that the bank is entitled to debit the customer's account with the amount of the cheque or other instruction.

Capacity and internal management of Sierratel

The law of Sierra Leone determines who are Sierratel's officials authorised to act on its behalf. Rule 156 in Dicey and Morris vol 2, p 1111 states:

'(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question. (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.'

The law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf: Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536 at 556, 568 and 588, [1967] 1 AC 853 at 919, 939 and 972.

The new board of directors was not appointed by the government of Sierra Leone: its purported acts are accordingly invalid

Sierratel has a memorandum and articles in many respects similar to those of companies incorporated in England and Wales. Under Sierratel's articles of association only 'the Government of Sierra Leone' may appoint the directors. Article 71(I) provides:

'The Board of Directors of the Company shall consist of eight members appointed by the Government of Sierra Leone: one of whom shall be appointed Chairman of the Board.'

According to the evidence of Mr Berewa, pursuant to s 70 of the Constitution of Sierra Leone 1991 the appointment of the directors of all parastatals must be made by the President and approved by Parliament. Section 70 of the Constitution provides:

'The President may appoint, in accordance with the provisions of this Constitution or any other law the following persons . . . (e) the Chairman and other Members of the governing body of any corporation established by an Act of Parliament, a statutory instrument, or out of public funds, subject to the approval of Parliament.'

See further ss 40(3) and (4), 46(4) of and Sch 2 to the Constitution.

Mr Berewa further states that the junta has not lawfully set aside or revised the constitution itself.

In the field of foreign relations the Crown in its executive and judicial functions ought to speak with one voice and the recognition of a foreign state or government is a matter of foreign policy on which the executive is in a markedly superior position to form a judgment: see GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party) [1986] 3 All ER 449 at 454, [1987] QB 599 at 604 per Steyn J, and see further [1986] 3 All ER 449 at 459 and 466-467, [1987] QB 599 at 616 and 625 per Donaldson MR and Nourse LJ.

The policy of the United Kingdom is now not to confer recognition on governments as opposed to on states. The new policy of Her Majesty's government was stated in parliamentary answers in April and May 1980: see 48 HL Official Report (5th series) cols 1121-1122, 28 April 1980; 983 HC Official Report (5th series) written answers cols 277-279, 25 April 1980 and 985 HC Official Report (5th series) written answers col 385, 23 May 1980:

'In future cases where a new regime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a Government will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal Government to Government basis.'

In Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary [1993] 1 All ER 371 at 382, [1993] QB 54 at 65-66 Hobhouse J stated:

'Where Her Majesty's government is dealing with the foreign government on a normal government to government basis as the government of the relevant foreign state, it is unlikely in the extreme that the inference that the foreign government is the government of that state will be capable of being rebutted and questions of public policy and considerations of the interrelationship of the judicial and executive arms of Government may be paramount: see The Arantzazu Mendi [1939] 1 All ER 719 at 722, [1939] AC 256 at 264 and GUR Corp v Trust Bank of Africa Ltd (Government of the Republic of Ciskei, third party) [1986] 3 All ER 449 at 466, [1987] QB 599 at 625. But now that the question has ceased to be one of recognition, the theoretical possibility of rebuttal must exist.'

Hobhouse J pointed out that it would be contrary to public policy for the court not to recognise as a qualified representative of the head of state of a foreign state the diplomatic representative recognised by Her Majesty's government (see [1993] 1 All ER 371 at 382, [1993] QB 54 at 66).

Hobhouse J stated ([1993] 1 All ER 371 at 383, [1993] QB 54 at 67):

'. . . it is relevant to distinguish between regimes that have been the constitutional and established government of a state and a regime which is seeking to achieve that position either displacing a former government or to fill a vacuum. Since the question is now whether a government exists, there is no room for more than one government at a time nor for separate de jure and de facto governments in respect of the same state. But a loss of control by a constitutional government may not immediately deprive it of its status, whereas an insurgent regime will require to establish control before it can exist as a government.' (Hobhouse J's emphasis.)

The factors to be taken into account in deciding whether a government exists as the government of a state are set out by Hobhouse J as follows:

'Accordingly, the factors to be taken into account in deciding whether a government exists as the government of the state are: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether Her Majesty's government has any dealings with it and if so what is the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.' (See [1993] 1 All ER 371 at 384, [1993] QB 54 at 68.)

See further The Arantzazu Mendi [1939] 1 All ER 719 at 722, [1939] AC 256 at 264 as to 'exercising effective administrative control'.

I turn to consider the factors identified by Hobhouse J in turn.

(a) Whether it is the constitutional government of the state

On 27 June 1997 Mr Tony Lloyd, Minister of State at the Foreign and Commonwealth Office, issued the following statement on Sierra Leone:

'The British Government has followed the events in Sierra Leone since the illegal overthrow of President Kabbah's government on 25 May with serious concern. It has been actively involved in attempts to find a peaceful resolution which will lead to the restoration of the legitimate government of President Kabbah. In this regard it welcomes the meeting of ECOWAS states held in Guinea on 26 June, and looks forward to the report of the Committee established by ECOWAS to take the process forward. In recognition of the close ties which have always existed between United Kingdom and Sierra Leone, the Government underlines its continued support to the courageous people of Sierra Leone who have so steadfastly rejected this attempt to reverse the progress to democracy achieved last year. It looks forward to recommencing its assistance to the reconstruction, rehabilitation and development of Sierra Leone once, but not until, constitutional order has been restored.'

On 28 November 1997 the Foreign and Commonwealth Office wrote to Messrs Stephenson Harwood as follows:

'You asked me to set out the British Government's policy towards Sierra Leone . . . The British Government welcomed the election in Sierra Leone of President Ahmad Tejan Kabbah in February 1996. We have consistently condemned the military coup of 25 May 1997 which overthrew the democratically elected government of Sierra Leone. We look forward to the restoration of constitutional order in that country. We continue to deal with the democratically elected government of Sierra Leone under President Kabbah. We have no dealings with the military junta in Freetown.'

In a letter to Professor Foray, Sierra Leone High Commissioner, dated 13 January 1998 the Foreign and Commonwealth Office stated:

'. . . I attach a copy of my letter to Stephenson Harwood of 28 November 1997. British Government policy on Sierra Leone has not changed since then. I also attach for your information an extract from Hansard showing a written answer to the House of Lords of 12 January 1998. This sets out the British Government's position on Sierra Leone.'

The written answer to the House of Lords of 12 January 1998 stated:

'Baroness Symons of Vernham Dean: Where democratic governments have been overthrown by violence we have often worked with them in exile as part of our global support for democracy. Tejan Kabbah is not the "former" President of Sierra Leone; he remains the legitimate leader of that country.'

(b) The degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state

According to the Sierra Leone High Commissioner the military junta presently has no control whatsoever over the country outside of Freetown and there are civil unrest problems in Freetown. There are still defence units loyal to President Kabbah throughout the country. These units have imposed an internal blockade. A soldier loyal to the junta visited a shop in Freetown recently and made various demands to the shopkeeper. The shopkeeper refused to bow to the soldier's demands and the shopkeeper was then shot. A local crowd subsequently lynched the soldier. This sort of thing has happened on a number of occasions recently. The junta has very little real control over the administrative affairs of the country. There were some civil servants left after the coup who had not managed to flee the country. They only number approximately a quarter of the full complement under the legitimate government and therefore none of the departments of government are functioning properly, if at all.

According to the affidavit of Mr Berewa, Attorney General and Minister of Justice in President Kabbah's government, it is precisely because there is in fact no semblance of order in Freetown that the expatriate community and diplomatic missions, which were evacuated following the coup, still remain out of the country. Looting and robbery still remain the order of the day in Freetown and are often perpetrated by members of the junta itself. It has been the clear aim of the junta to coerce the civil population to collaborate with them. They have failed in this aim, and to such an extent that there has been a very significant defection by members of the Sierra Leone army and civilian police to the forces of the West African Peace Keeping Force ECOMOG, and the Civil Defence Militia, which is loyal to President Kabbah.

Of the three tiers of superior courts (the High Court, Court of Appeal and Supreme Court), none are sitting or hearing cases. Over 80% of the judges of the superior courts have fled the country since the coup. Of the inferior (ie magistrates) courts only three are nominally sitting in Freetown. These three courts are not functioning properly, since the junta is a law unto itself and settles matters arbitrarily. It often hands down sentences of summary execution, which are carried out indiscriminately.

The situation described in para 9(d) of Mr Harrison's affidavit is accurate:

'The Bank of Sierra Leone (Central Bank) and Sierra Leone Commercial Bank Limited (wholly owned by Government) are operating. The other commercial banks namely Barclays Bank of Sierra Leone Limited, Standard Chartered Sierra Leone Limited and Union Trust Bank Limited, accounting for over 75% of the banking sector business, have remained closed since the coup. The manufacturing sector has virtually ceased production. The majority of the working population has not returned to work and numerous Sierra Leoneans, including many professionals, have fled the country.'

This situation results from the lack of a semblance of order in Sierra Leone and the refusal by the civil population, both manual workers and professionals, to co-operate with the junta. The majority of the citizens of Sierra Leone are waiting for the democratically elected government to be restored. The infrastructure of the country has collapsed. Basic amenities such as water and electricity are virtually non-existent. Owing to the embargo on postal activities by the Universal Postal Union there is no postal communication between Sierra Leone and the outside world. Hospitals function only at the behest of Midecin Sans Frontihres or the International Red Cross. The junta itself is not providing medical services. Despite strenuous attempts by the junta to reopen schools, the majority of schools have remained closed since the coup because parents do not co-operate with the junta and are afraid that their children may be kidnapped, harmed or raped. Petrol is in extremely short supply and although the diesel that runs generators is sometimes available, a shortage of essential fuels has meant that Freetown has had rotating power cuts ever since the coup. The junta has no control over more than two-thirds of the country. They do not control the country's only international airport situated at Lungi, near Freetown, nor the main internal airfield at Hastings. Both these airfields are controlled by the forces of ECOMOG. The Port of Freetown at Queen Elizabeth II Quay is also under the control of the ECOMOG Forces. Similarly ECOMOG controls the main routes to and from the capital city, Freetown, and even members of the junta are not allowed to move freely from Freetown to the provinces and back. The civil defence units which remain loyal to President Kabbah and which are fighting for the restoration of democracy are in control of a very significant portion of the territory up-country. There have been some armed hostilities recently and the government of President Kabbah has received reports of some casualties. The most recent reports show that forces loyal to President Kabbah are in control of the most important areas up-country.

(c) Whether Her Majesty's government has any dealings with it and if so what is the nature of those dealings

See under (a) above.

(d) In marginal cases, the extent of international recognition that it has as the government of the state

The United Nations has imposed sanctions relating to the supply of arms and petroleum products to Sierra Leone: see United Nations Resolution SCR 1132 of 8 October 1997. The resolution has been enacted in England by various statutory instruments. In addition the coup has also been condemned by the Commonwealth, the Organisation of African Unity and the European Community. A number of West African states, which together formed the Economic Community of West African States (ECOWAS), have been involved in attempts to stabilise the situation in Sierra Leone. ECOWAS troops are presently in Freetown and ECOWAS' representatives have met with representatives of the military junta. At a meeting in Conakry, Guinea, on 22/23 October 1997 a peace plan between ECOWAS Ministerial Committee of Five on Sierra Leone, and representatives of the military junta leader, Major Johnny Koroma, adopted a ECOWAS peace plan for Sierra Leone. This peace plan provides for the reinstatement of the legitimate government of President Kabbah within a period of six months. The peace plan remains operative and it is fully expected that the legitimate government of President Kabbah will be reinstated in Sierra Leone within the stated timeframe.

In the light of my analysis of the factors in The Mary [1993] 1 All ER 371, [1993] QB 54 I conclude that the military junta are not 'the Government of Sierra Leone'. The mandate to Barclays of 31 July 1996 stands. Nothing that the military junta has purported to do since May 1997 affects that mandate. The letters of 22 December 1997 and 31 December 1997 from those associated with the junta to the bank are of no effect. The military junta is not the government of Sierra Leone. The 'new directors' were not validly appointed. It follows that Sierratel is entitled to the declaration sought and I order accordingly.

DISPOSITION:

Declaration granted.

SOLICITORS:

Stephenson Harwood; Lovell White Durrant.

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PROSECUTION INDEX OF AUTHORITIES

ANNEX 13.

Prosecutor v. Kvocka et al., Decision on Prosecution's Motion to Strike Portion of Reply, Case No. IT-98-30/1-A, Appeals Chamber (Pre-Appeal Judge), 30 September 2002

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Case: IT-98-30/1-A

IN THE APPEALS CHAMBER

Before: Pre-Appeal Judge, Judge David Hunt

Registrar: Mr Hans Holthuis

Decision of: 30 September 2002

PROSECUTOR
v
Miroslav KVOCKA
Milojica KOS
Mladjo RADIC
Zoran ZIGIC
Dragoljub PRCAC

DECISION ON PROSECUTION'S MOTION TO STRIKE PORTION OF REPLY

Counsel for the Prosecutor:

Ms Susan L Somers for the Prosecutor

Counsel for the Defence:

Mr Slobodan Stojanovic for Zoran Zigic

I, Judge David Hunt, Pre-Appeal Judge,

NOTING Zoran Zigic's confidential "Motion to Present Additional Evidence", filed on 23 August 2002 ("Motion");

NOTING the "Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 9 September 2002;

NOTING paragraphs 33 and 34 of Zigic's confidential "Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 23 September 2002 ("Zigic's Reply"), where he refers to and summarises the statement of Faruk Hrncic ("Hrncic") a witness which he wishes to call;

BEING SEISED OF "Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed on 26 September 2002, whereby the prosecution requests that paragraphs 33 and 34 of Zigic's Reply be struck out on the basis that these two paragraphs go beyond the proper scope and ambit of a reply;

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NOTING Zigic's "Reply to Prosecution's Motion to Strike Portion of Zigic's Reply to Prosecution's Response to Zoran Zigic's Motion to Present Additional Evidence", filed confidentially on 30 September 2002;

NOTING that Zigic complains in his Motion that certain alleged eyewitness to the murder of Becir Medunjanin for which he was convicted were not called at trial, although available, but he does not identify Hrncic as one of those witnesses;

NOTING that Zigic submits in his Reply for the first time that the prosecution refused to help him at the trial to call five witnesses[1] and that he identifies in his Reply also for the first time that one of them, Hrncic, should now be called "in the interests of justice";[2]

CONSIDERING that the letter of the prosecution's Senior Trial Attorney dated 25 October 2000 to which Zigic referred in his Motion was put forward by him as being itself evidence which he sought to have admitted in evidence;[3]

CONSIDERING, therefore, that paragraphs 33 and 34 of Zigic's Reply contain new material going beyond the scope of what is permissible to include in a reply;

HEREBY GRANT the motion and **ORDER** that paragraphs 33 and 34 be struck out of Zigic's Reply.

NOTING, however, that if he decides to pursue the matter further, Zigic may seek leave to add the content of those paragraphs to his original Motion. If he does so, the prosecution will have the right to file a further response to it.

Done in English and French, the English text being authoritative.

Dated this 30th day of September 2002,
At The Hague,
The Netherlands.

_____
David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

1 - Motion, page 6 and letter annexed in the Motion.
2 - Motion, page 2.
3 - Letter annexed in the Motion.