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SCSL-2003-11-PT
(3037-3075)

3037

THE APPEALS CHAMBER

Before:	Judge Geoffrey Robertson, President
	Judge Emmanuel Ayoola
	Judge George Gelaga King
	Judge Renate Winter
	Fifth Judge to be determined
Registrar:	Mr. Robin Vincent
Date:	6 January 2004

THE PROSECUTOR

Against

MOININA FOFANA

CASE NO. SCSL-2003-11-PT

ADDITIONAL SUBMISSIONS PERTAINING TO THE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: ILLEGAL DELEGATION OF JURISDICTION BY SIERRA LEONE

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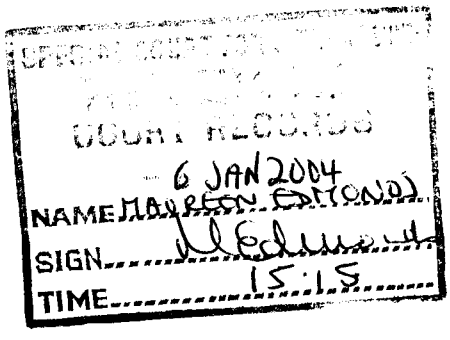

1. On 14 November 2003, the Defence for Mr. Fofana filed its Preliminary Motion on the Lack of Jurisdiction: Illegal Delegation of Powers by the United Nations (the "Preliminary Motion"). The prosecution response to the Preliminary Motion was filed on 21 November 2003 (the "Prosecution Response"). The Defence filed its reply to the Prosecution Response on 30 November 2003 (the "Reply"). On 3 December 2003, the Trial Chamber referred the Preliminary Motion, the Prosecution Response and the Reply to the Appeals Chamber for determination pursuant to Rule 72(E) of the Rules of Procedure and Evidence. The Defence now makes use of its right to file additional written submissions.

2. The Defence does here not repeat the arguments set forth in the Preliminary Motion and the Reply. Rather it will identify what appear to be the main points of controversy between Defence and Prosecutor and provide, in regard to these points, further authorities to develop and support its argument. Wherever relevant, it will refer to arguments made in the Preliminary Motion and the Reply.

3. The core of the argument of the Defence is that the Special Court was established by a treaty between Sierra Leone and the United Nations; that, by this treaty, Sierra Leone delegated its power to prosecute the Defendant to the Special Court;[1] that it is a well-established principle of international law that a State cannot transfer powers it does not possess;[2] that Sierra Leone by virtue of Article IX of the Lomé Agreement had given up its right to prosecute the Defendant;[3] that Sierra Leone could not therefore have transferred jurisdiction over the Defendant; and that the Special Court thus lacks jurisdiction to try the Defendant for all crimes allegedly committed before the signing of the Lomé Agreement on 7 July 1999.[4]

4. The Prosecution has not contested the argument that the Special Court was established by a delegation of powers by Sierra Leone, nor that it is a well-established principle of international law that a State cannot transfer powers it does not possess.

5. The main issues on which the Prosecution appears to disagree with the Defence are (1) whether the Lomé Agreement is a treaty under international law; (2) whether, assuming the

[1] Preliminary Motion, paras. 4-6.
[2] Preliminary Motion, paras. 7-11
[3] Preliminary Motion, para. 12.

Lomé Agreement is *not* a treaty under international law, a breach of the Lomé Agreement can affect the jurisdiction of the Special Court; and (3) whether Sierra Leone was permitted to grant amnesty for serious violations of international law. The third point has been adequately countered in the Defence's Reply, in which it concluded that State practice does not allow the conclusion that such amnesties are illegal and that the amnesty under the Lomé Agreement thus is valid under international law.[5] On the two remaining points the Defence deems it appropriate to offer a number of additional submissions.

The Lomé Agreement is an agreement under international law

6. In the Reply, the Defence argued that the RUF had limited international personality, at least during the armed conflict, and that groups with limited personality have the capacity to conclude agreements under international law.[6] Given the general possibility that opposition groups who are in effective control of territory can conclude agreements under international law, the question whether the Lomé Agreement is an agreement under international law deserves some closer analysis.

7. Given that the Lomé Agreement is concluded between two subjects who at the time of the conclusion of the Agreement had a certain international personality, it is submitted that the criteria for determining whether a particular agreement is an agreement under international law are the same that apply for determining whether a particular instrument concluded between states is an agreement governed by international law. It is well-established that the decisive criterion for determining whether a particular instrument is an agreement governed by international law is the intention of the parties to create international legal rights and obligations.[7] Whether or not such an intention existed, needs to be determined in the light of all the circumstances of the case.[8]

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[4] Preliminary Motion, paras. 13-14.
[5] Reply, para. 20.
[6] Reply, paras. 3-9.
[7] Oppenheim's International Law (R. Jennings and R. Watts eds.), Ninth Edition, Volume I (hereinafter: Oppenheim's International Law), pp. 1201-1202; Yearbook ILC 1966, Vol. II, p. 189; Official Records of the United Nations Conference on the Law of Treaties, 2nd Session (1969), p. 346, para. 22; J.E.S. Fawcett, *The Legal Character of International Agreements*, The British Yearbook of International Law 1953 Vol. 30 (1954), pp. 387-388.
[8] Oppenheim's International Law, pp. 1201-1202.

8. It is noteworthy that there is nothing at all in the Lomé Agreement that would suggest an intention that the Agreement be governed by internal law. In contrast, there are a variety of indications in the text that suggest an intention to lift the Agreement to the level of international law:

- Article II(1) creates a Cease-fire Monitoring Committee chaired by the United Nations Observer Mission in Sierra Leone with, among others, representation by ECOMOG. The article sets out the tasks of the Committee in legally obligating language;
- Article II(2) creates a Joint Monitoring Commission chaired by the United Nations Observer Mission in Sierra Leone with, among others, representation by ECOMOG. The article sets out the tasks of the Commission in legally obligating language;
- Article XIV requests the Security Council to amend the mandate of UNOMSIL. Article XXXII provides that this article enters into force upon the adoption of a resolution by the Security Council.
- Article XXXV provides that the Governments of a large number of states as well as a number of international organisations provide international support.

9. It is sometimes unclear exactly to whom the Agreement is addressed, and the precise legal nature of the provisions. However, there can be no doubt that the parties intended to create an agreement that was in the scope of its obligations and effect not limited to the national legal order of Sierra Leone.

10. The fact that the Agreement provides that the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations "shall stand as Moral Guarantors that this Peace Agreement is implemented with integrity and in good faith" is also relevant.[9] The inclusion of provisions in agreements by which other states or organisations guarantee the implementation of that agreement is a technique that has been widely used in international law.[10] By acting as a guarantor, even if a state is not a party to the agreement, it participates in the agreement.[11] This is emphasized in the current matter by the fact that the guarantors signed the agreement. Participation by the Togolese Republic, the United Nations, the OAU,

[9] Article 34 of the Lomé Agreement.
[10] Oppenheim's International Law, pp. 1257-1258.
[11] Oppenheim's International Law, pp. 1265-1266.

ECOWAS and the Commonwealth of Nations is a strong indication that the agreement is an agreement under international law.

11. It appears that the Prosecutor attributes weight to the term "*moral* guarantors" (emphasis added). However, the term moral may be deceptive. Article 34 of the Lomé Agreement provides that the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations "*shall* stand as Moral Guarantors" (emphasis added). What determines the legal nature of the commitment is the use of the term "shall" – not the use of the term "moral". One can easily conceive of a legal obligation to stand as a moral guarantor or of a political obligation to do so.[12] What distinguishes these two obligations is whether the parties intended to create a legally binding obligation. The use of the term "shall" leaves no room for another conclusion than that the obligation is a legal one. This too provides an indication of the commitment of the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations to guarantee the agreement, which adds further support to the conclusion that the agreement is governed by international law.

12. A final factor of much weight that indicates the intention to create an agreement under international law was already referred to in the Reply: the fact that Sierra Leone adopted the Lomé Peace Agreement (Ratification) Act 1999.[13]

13. In the light of these circumstances, the only appropriate conclusion is that the Lomé Agreement is to be considered as an agreement under international law.

Breach of national law can affect the jurisdiction of the Special Court

14. Even if, *arguendo*, it were assumed that the Lomé Agreement is not an agreement under international law, the breach of the Lomé Agreement as an instrument of national law should prevent the Special Court from exercising jurisdiction over the Defendant.

15. The Prosecution analyses the matter in terms of Article 46 of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between

[12] Oppenheim's International Law, pp. 1323-1324.
[13] Reply, para. 9.

International Organizations.[14] It is submitted that this analysis is not relevant to the question before the Appeals Chamber. Article 46 stipulates the conditions under which a state or an international organization can invoke provisions of internal law to invalidate a treaty. That is not the legal situation before the Special Court. Neither Sierra Leone nor the United Nations has indicated that it seeks to invoke in this respect a provision of national law. The legal effects of a breach of a fundamental rule of national law for the jurisdiction of an international court over an individual are to be examined in different terms.

16. If the Lomé Agreement is to be considered as an act under national law, the proper starting point of legal analysis is that Sierra Leone arrested the Defendant and delivered him into the custody of the Special Court in violation of an amnesty granted under national law. The "Special Court Agreement, 2002, Ratification Act, 2002" does not expressly repeal the amnesty granted under the Lomé Agreement. By adopting the "Special Court Agreement, 2002, Ratification Acts, 2002" and in particular Part VI thereof on the Arrest and Delivery of Persons, Sierra Leone put itself in the position where amnesties that were previously granted could be undone. It is submitted that this results in an arbitrariness that violates the rights of the Defendant.

17. As an international tribunal, the Special Court is required to apply fundamental human rights of an accused person.[15] One of the fundamental rights the Special Court has to apply is Article 9(1) of the International Covenant on Civil and Political Rights (the "ICCPR"). This provides:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

18. The requirement of lawfulness in Article 9(1) refers both to national and to international law.[16] However, the decisive test for the protection of the right to liberty is not the lawfulness of a deprivation of liberty in terms of conformity with written law. It is whether the deprivation of liberty is consistent with the objective of Article 19: to protect individuals from

[14] Prosecution Response, paras. 7-9.
[15] ICTY, Trial Chamber, *Prosecutor v Milosevic,* Decision on Preliminary Motions, 8 November 2001, para. 37.
[16] ECHR, *Ocalan v Turkey,* Judgment, 12 March 2003, para. 92

arbitrariness.[17] Arbitrariness is not to be equated with "against the law". The Human Rights Committee has explained that this legal term:

> "must be interpreted more broadly to include elements of inappropriateness, justice and lack of predictability. This means that remand in custody pursuant to a lawful arrest must not only be lawful but reasonable in all circumstances.".[18]

The arrest of a person who has been given an amnesty, in accordance with international precedent and as a condition and element for a peaceful resolution of a conflict, is a pre-eminent example of an arrest that is not predictable, unreasonable and therefore arbitrary. The arrest of the Defendant by Sierra Leone, his surrender to the Special Court and his continued detention violate the principle contained in Article 9(1) of the ICCPR.

19. A state that arrests a person in violation of Article 9 ICCPR cannot exercise jurisdiction over him. If, therefore, the Lomé Agreement is considered as an act of national law, Sierra Leone has no jurisdiction over the Defendant and so no has no jurisdiction to transfer to the Special Court.

20. The Special Court should attach legal consequences to this violation of Article 9 ICCPR. In the *Nikolic case*, the ICTY cited with approval the findings of several national courts that a state must come to court with clean hands and that when a state violates individual rights, this can undermine the jurisdiction of the court. It noted that there exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law:

> "Ensuring that the Accused's rights are respected ... forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular

[17] ECHR, *Ocalan v Turkey,* Judgment, 12 March 2003, para. 86.
[18] HRC, *Van Alphen v the Netherlands* (305/88), 15 August 1990, para. 5.8; HRC, *A v Australia* (560/93), 30 April 1997, para. 9.2.

> case and how an Accused has been brought into the jurisdiction of the Tribunal. ... In addition, this Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if 'in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice'".[19]

The Trail Chamber added that a Chamber needs to rely upon this abuse of process doctrine if it is clear that the rights of the Accused have been egregiously violated. It has been demonstrated that in this case there is such a violation of the rights of the Defendant. The abuse of process doctrine precludes the right of Sierra Leone to transfer the power to try the Defendant to the Special Court and, therefore, the Special Court lacks jurisdiction.

21. The Special Court should decline jurisdiction for all crimes allegedly committed by the Defendant before the signing of the Lomé Agreement on 7 July 1999.

COUNSEL FOR THE ACCUSED

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Prof. André Nollkaemper
Dr. Liesbeth Zegveld

[19] ICTY, Trial Chamber, *Prosecutor v Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 111.

Defence list of authorities

1. Oppenheim's International Law (R. Jennings and R. Watts eds.), Ninth Edition, Volume I, pp. 1201-1202, 1257-1258, 1265-1266, 1322-1324.

2. Yearbook ILC 1966, Vol. II, pp. 186-189.

3. Official Records of the United Nations Conference on the Law of Treaties, 2nd Session (1969), pp. 344-347.

4. J.E.S. Fawcett, *The Legal Character of International Agreements*, The British Yearbook of International Law 1953 Vol. 30 (1954), pp. 386-389.

5. ICTY, Trial Chamber, *Prosecutor v Milosevic,* Decision on Preliminary Motions, 8 November 2001, para. 37.

6. ECHR, *Ocalan v Turkey,* Judgment of 12 March 2003, paras. 82-92.

7. HRC, *Van Alphen v the Netherlands* (305/88), 15 August 1990, para. 5.8.

8. HRC, *A v Australia* (560/93), 30 April 1997, para. 9.2.

9. ICTY, Trial Chamber, *Prosecutor v Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, paras. 106-112.

OPPENHEIM'S INTERNATIONAL LAW

NINTH EDITION

Volume I

PEACE

PARTS 2 TO 4

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the governments of the contracting parties, are, in their legal effect, in the same category as ordinary treaties concluded on behalf of the state. They are not limited to matters of minor or transient importance. The main reason for adopting this form of treaty is that it is attended by less formality and that, occasionally, it obviates certain inconveniences connected with the internal law of the country concerned.[10]

However that may be, the international validity of such agreements is the same as that of ordinary treaties. The same applies to agreements made, with the authority of the governments concerned, between government departments or ministries.[11] Often treaties provide expressly for inter-departmental arrangements of this nature.[12]

(6) Although the agreement must be in written form in order to come within the scope of the Convention, this does not affect the legal force of oral agreements.[13]

(7) The definition does not assist very much with the answer to the question whether a particular instrument is 'an international agreement ... gov-

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that the opening passage of the Preamble to the Charter of the United Nations is: 'We, the peoples of the United Nations ...' The Preamble to the Constitution of the Food and Agriculture Organisation of the United Nations begins: 'The Nations accepting this Constitution ...'

In *Loschetter v Public Prosecutor* (1960), ILR, 31, p 425, a Protocol signed by Ministers of Agriculture was held to be still a valid international agreement even though the constitution of the state concerned required treaties to be signed by the Head of State; in *United States of America v Novick* (1960), ILR, 32, p 275, a treaty concluded in the name of 'Canada' was held to have been validly concluded notwithstanding that the relevant national law referred to treaties concluded by 'Her Majesty'. Cf *Re Chatelain* (1965), ILR, 47, p 113, denying the status of an international agreement to an agreement signed by the heads of two states' fisheries services.

[9] See, eg as to the use by the USA of 'executive agreements' in a sense different from 'treaty' as used in the Constitution, § 19, n 95, and in particular the judgment of the Supreme Court in *Weinberger v Rossi*, ILM, 21 (1982), p 660. See also extracts from the *Congressional Record* (9 October 1975), and the position of the State Department Legal Adviser (6 October 1975), on various US–Israel arrangements concluded in 1975: ILM, 14 (1975), pp 1585–96.

For a time some of the British Dominions attached importance to being able to conclude treaties without resorting to the somewhat cumbrous procedure of receiving authority for the issue of Full Powers under the Great Seal: see § 78, n 8.

[10] See, eg the Agreement concerning Telecommunications concluded on 15 December 1936, between the Telegraph Administrations of Denmark, Finland, Iceland, Norway, and Sweden: Hudson, *Legislation*, vii, p 492; or the Agreement between the post office authorities of those countries of 31 December 1934, concerning postal exchanges: *ibid*, vi, p 365. However, for an agreement between the Postmaster-General of the UK, the Danish General Directorate of Posts and Telegraphs, the Icelandic General Directorate of Posts and Telegraphs and the Great Northern Telegraph Company Ltd, see comment in ICLQ, 10 (1961), p 575, but note *Williams v Blount* (1970), ILR, 56, p 234, treating the Universal Postal Convention as only having the effect of an administrative regulation (at p 240), but *semble* within the framework of US law rather than international law. For purposes of national law an agreement between the heads of the French and Swiss fisheries services has been held not to constitute a treaty, as has an agreement between the ministries of justice of the Federal Republic of Germany and Austria: *Re Chatelain* (1965), ILR, 47, p 113; *Prosecution for Misdemeanours (Germany) Case*, ILR, 22 (1955), p 560. In the case of interdepartmental agreements it is essential, if they are to be regarded as treaties, that their effect should be to bind the states concerned.

[11] See, eg an Agreement cited by M Jones, BY, 21 (1944), p 119, n 4, between the British Air Ministry and the Austrian Federal Ministry of Commerce, based on Art 1, para 2 of the Air Navigation Convention concluded between the two countries in 1933.

[12] Article 3; see YBILC (1982), II, pt 2, p 22, para (2). See also §§ 459, n 4, 577 and 585, n 2. In *United States v Gonzalez*, AJ, 80 (1986), p 653, a conversation by telephone was held to constitute an 'arrangement' with another government.

erned by international law'. It is suggested that the decisive factor is still[14] whether the instrument is intended to create international legal rights and obligations between the parties – an element which the International Law Commission regarded as embraced within the phrase 'governed by international law'.[15] The existence or otherwise of such an intention will need to be determined in the light of all the circumstances of each case. The registration of an instrument with the United Nations may imply that it was intended and understood to be a treaty.[16] In some cases, as with the Universal Declaration of Human Rights,[17] the absence of an intention to undertake a legal obligation appears clearly from the statements made by governments prior to the adoption of the text of the instrument. In other cases the clauses of the instrument indicate with sufficient clarity that they are intended as formulating general statements of principle and policy rather than legal obligations.[18] A difficult question arises in cases in which the terms of the undertaking leave to the parties a measure of discretion so wide as to raise doubts whether there exists a legal obligation.[19] In such cases, it is believed, the determination of the extent of the obligation of a state, although lying within the competence of the interested state, must take place in accordance with the legal duty to act in good faith. The fact that the interested state is the judge of the existence of the obligation is, although otherwise of considerable importance, not of decisive relevance for the determination of the legal character of the instrument.[20] Where states wish to record certain matters in writing, but wish to do so in a manner which is not intended to create legal rights and obligations and

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[14] See vol I of 8th ed of this work, § 508a. See also Fawcett, BY, 30 (1953), pp 381–400.

[15] See ILC Commentary (Treaties), Art 2, para (6): YBILC (1966), ii, p 189.

[16] *South West Africa Cases* (Preliminary Objections), ICJ Rep (1962), at pp 331–2. *A contrario*, non-registration may be taken to indicate an intention to enter into only a non-binding engagement, or as supporting statements to that effect: see the Joint Dissenting Opinion of Judges Spender and Fitzmaurice, *ibid*, p 503.

[17] See § 437.

[18] See, eg Fawcett in YB of World Affairs (1951), pp 286–9, with regard to the Havana Charter of the International Trade Organisation of 1948 and Mann, BY, 26 (1949), pp 264–5 with regard to certain declarations of monetary policy. As to declarations in general, see § 577. Two acts, in themselves unilateral, may taken together establish a consensual relationship, as with Declarations accepting the 'optional' clause for the jurisdiction of the ICJ: see *Rights of Passage Case* (Preliminary Objections), ICJ Rep (1957), at pp 145–7.

A growing practice is to adopt international 'Codes of Conduct' on various matters, such as the 'Guidelines for Multinational Enterprises' adopted by the OECD in 1976 (ILM, 15 (1976), p 297), and the Code of Conduct for Liner Conferences 1974 (but note that this Code was embodied in a convention): see Odier, AFDI, 25 (1979), pp 686–92. A UN Code of Conduct for Transnational Corporations has been under discussion for a number of years, and 'substantial provisional understanding on [its] contents' has been reached (GA Res 45/186 (1990)): see on this draft Code Francioni, Ital YBIL, 3 (1977), pp 143–70; Spröte, Germ YBIL, 33 (1990), pp 331–48. On these and other codes and on the general question of the voluntary or binding nature of such codes, see Coonrod, Harv ILJ, 18 (1977), pp 273–307; Jeffries, *ibid*, pp 309–42; Schwartz, *International Lawyer*, 11 (1977), pp 529–36; Davidow and Chiles, AJ, 72 (1978), pp 247–71; Decaux, AFDI, 29 (1983), pp 81–97. And see § 380, n 15.

[19] As to certain Declarations accepting the compulsory jurisdiction of the ICJ, see § 577, nn 21–4.

[20] The same applies to treaties such as the North Atlantic Treaty of 4 April 1949 (see § 665), in which each party agrees to assist others by 'such action as it deems necessary'.

performance of their obligations, and does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole, and is not prohibited by the treaty.

§625 Securing the performance of treaties In order to secure the due performance of a treaty, states have had resort to a variety of practices and procedures,[1] including notably the following:

Charges

The practice of creating a charge upon some or all of the assets of a contracting state, and particularly upon its revenues, to secure payments due under a treaty was adopted, for instance,[2] in Article 248 of the Treaty of Peace with Germany of 1919 and the 'Dawes Agreement' of August 1924,[3] between the Reparation Commission and the German Government, relating to security for the payment by Germany of reparations.

Occupation of territory

As a means of securing the performance of a treaty this has been made use of,[4] especially in connection with treaties of peace providing for the payment of a war indemnity, as well as for other reasons. Thus the Treaty of Versailles 1919,[5] provided that 'as a guarantee for the execution of the present treaty by Germany, the German territory situated to the west of the Rhine, together with the bridgeheads, will be occupied by Allied and Associated troops for a period of 15 years from the coming into force of the present treaty'.[6]

Guarantee

Treaties are often secured by the guarantee[7] of other states not directly affected by them. Such a guarantee may involve accession[8] to the treaty guaranteed, and

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[1] See generally Heyland, *Die Rechtsstellung der besetzten Rheinlande* in Stier-Somlo's *Handbuch des Völkerrechts* (1923), pp 37–74; Satow, *Cambridge Historical Journal*, i (1925), pp 295–318; Wild, *Sanctions and Treaty Enforcement* (1934); Frangulis, *Theorie et pratique des traités internationaux* (1936), pp 189–206; Wright, *AS Proceedings* (1932), pp 101–19.

For some obsolete means of securing the performance of treaties see vol I of 8th ed of this work, §§ 523–5. For a wide-ranging study of the performance of treaties by the USSR, covering many aspects of Soviet treaty practice, see Triska and Slusser, *The Theory, Law and Policy of Soviet Treaties* (1962). For some examples of treaty provisions establishing procedures for securing the enforcement of the treaties in questions, see Blix and Emerson, *The Treaty-Maker's Handbook* (1973), pp 132–55.

[2] See literature cited above, § 408.

[3] *Parliamentary Papers*, Misc No 17 (1924); Cmd 2270; AJ, 19 (1925), Suppl pp 23–52.

[4] See Robin, *Des Occupations militaires en dehors des occupations de guerre* (1913), particularly pp 471–82, 696–706, and other literature cited in bibliography preceding § 556.

[5] Similarly, the preliminary Peace Treaty of Versailles 1871, stipulated that Germany should have the right to keep certain parts of France under military occupation until the final payment of the war indemnity of five milliard francs.

[6] Article 428. See vol II of 7th ed of this work, § 277 (n). For the Agreement on the Evacuation of the Rhineland 1929, see TS No 16 (1931).

[7] As to guarantees in general, see §§ 667–8.

[8] See § 628.

may be a treaty in itself – namely, the promise of the guarantor, should occasion arise, to do what is in its power to compel the contracting party or parties to execute the treaty. In this category there must be included the various Minority Treaties concluded in and after 1919 and placed 'under the guarantee of the League of Nations'.[9]

Monitoring procedures

A growing number of treaties establish procedures whereby a check may be kept on the way in which states give effect to their obligations under the treaties in question. The procedures include the requirement to submit to an international body periodic reports on the implementation of the treaty by the reporting state;[10] the obligation to submit to inspection of relevant facilities on their territories, to see whether treaty obligations are being complied with;[11] the holding of periodic conferences to review the operation of the treaty;[12] and the establishment of an international body whose functions include overseeing the implementation of the treaty.[13] By subjecting the practice of states in areas covered by these treaties to such forms of external monitoring, observance by states of their treaty obligations is encouraged.

Retributive action under express treaty provisions

Some treaties contain their own procedures for taking measures designed to ensure that contracting parties observe their obligations under the treaty. Thus Article 19 of the United Nations Charter provides for a member which is in arrears in the payment of its financial contributions to the organisation to have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Commission of the European Communities has the power under the Treaty establishing the European Coal and Steel Community,[14] in relation to a member state which is in breach of its obligations under that Treaty, to deprive it of certain benefits which it would derive from the Treaty and to authorise other member states to take against that state certain actions which would otherwise be prohibited. Under Article 14 of the Convention of 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs there is provision for

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[9] See §§ 426–7.

[10] This practice has been adopted particularly in the context of some human rights treaties. See § 439, n 13; § 440, n 33; and § 441, n 12.

[11] This practice is a feature of some disarmament treaties, and of treaties concerned with safeguards on the use of atomic energy: see Blix, AFDI, 29 (1983), pp 37–58. See § 571. See also the Report of the Group of Qualified Experts on the Role of the United Nations in the Field of Verification 1990, especially paras 60–67 (UN Doc A/45/372, 28 August 1990), and GA Res 45/65 (1990).

[12] See § 624, n 4 (fourth paragraph).

[13] See, eg Arts 21 and 22 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (ILM, 28 (1989), p 493).

[14] Article 88. Under Arts 90–92 of the Treaty the Commission may impose certain sanctions against individual enterprises to which the Treaty applies. The Commission has certain similar powers in relation to undertakings under the Treaty establishing the EEC, particularly in implementation of the rules of competition. Chapter VIII of the Havana Charter of the International Trade Organisation 1948 would have had the effect of releasing members from or some of the obligations to the member who has acted in violation of the Charter. See Fawcett, YB of World Affairs (1951), p 287.

The International Court of Justice has held that the international personality conferred on the United Nations by the great majority of the members of the international community, including in particular the right to present international claims, is effective even in relation to non-member states;[5] and that non-member states must act in accordance with the United Nations' decisions which terminated the Mandate for South-West Africa and declared South Africa's continued presence in that territory illegal.[6] In imposing mandatory sanctions on Southern Rhodesia, on South Africa and on Iraq, the Security Council expressly included non-member states within the scope of its resolutions, although in terms generally consistent with the limitations of Article 2(6) of the Charter.[7]

§ 628 Participation of third states in treaties In addition to the acquisition by third states of rights and obligations under treaties concluded between other states, and the common situation in which a third state has some kind of interest in a treaty concluded by other states, a third state may also be said to participate in a treaty in certain circumstances. Thus it may accede to a treaty concluded between other states, thereby becoming a party to the treaty.[1] Again, it may,

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[5] See the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*: ICJ Rep (1949), p 185. See also § 7, at n 16ff.

[6] *Namibia (South West Africa) Legal Consequences*, ICJ Rep (1971), p 56.

[7] Thus, para 7 of SC Res 232 (1966), the first to impose sanctions on Southern Rhodesia, 'urges, having regard to the principles stated in Article 2 of the United Nations Charter, States not members of the United Nations to act in accordance with the provisions of the present resolution'. Paragraph 14 of SC Res 253 (1968) and para 18 of SC Res 277 (1970) were in similar terms. SC Res 314 (1972) urged 'all States' to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia 'in accordance with their obligations under Article 25 and Article 2(6) of the Charter': it is unclear whether this is addressed only to members of the UN, requiring them to ensure that non-member states act accordingly, or is addressed to non-members themselves in the apparent belief that they have 'obligations' under Art 2(6). Paragraph 2 of SC Res 320 (1972) was in similar terms, but without mention of 'obligations'. Later resolutions, eg SC Res 388 (1976), para 3, and SC Res 409 (1973), para 2, reverted to the pattern of the first resolutions. In relation to South Africa, SC Res 418 (1977) 'decides that all States' shall forthwith apply an arms embargo, and 'calls upon all States, including non-members of the United Nations, to act strictly in accordance with the provisions of this resolution'. Several paragraphs of the various sanctions resolutions call upon 'all States' to take the action specified: it would seem, given the express reference to non-member states in appropriate paragraphs, that such general references should be taken to refer only to members of the UN, but the drafting of the resolutions is not wholly clear on the point. See generally Widdows, ICLQ, 27 (1978), pp 459–62. As to sanctions imposed against Iraq in 1990, see para 5 of SC Res 661 (1990), which is addressed to 'all States, including States non-members of the United Nations'. Paragraph 1 of SC Res 670 (1990), addressed to 'all States', refers to their 'obligations' under, *inter alia*, para 5 of the earlier resolution. Many provisions of the Iraq sanctions resolutions refer to 'all States', without special reference to non-members of the UN. As to compliance by Switzerland with sanctions against Southern Rhodesia and Iraq, see § 97, n 6.

[1] See § 611.

The emergence of international organisations, particularly in the economic field, to which the member states have transferred certain competences for matters covered by existing treaties may have the effect that the other parties to the treaties find that, for those matters, they have to deal not with the member states which were parties to the treaty in question but with the organisation, which had thus in practice acquired much of the position usually flowing from accession. The position may be regularised by the organisation acceding to the treaty, if necessary following the

without becoming a party to the treaty, through its good offices or mediation[2] assist the parties in the conclusion of the treaty; or it may intervene by interposing dictatorially between the negotiating states and requesting them to drop or to insert certain stipulations;[3] or it may act as guarantor of the performance of a treaty between other states.[4]

A somewhat special case arises where one state concludes a treaty on behalf of another state.[5] This is not strictly a question involving a 'third' state, but is more a matter of agency.

INTERPRETATION OF TREATIES

Harv Research (1935), pt III, pp 937–77 Verdross in Strupp, *Wört*, ii, p 663 Ralston, §§ 26–39 Yü, *The Interpretation of Treaties* (1927) Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933) Jokl, *De l'Interprétation des traités normatifs* (1936) Frangulis, *Théorie et pratique des traités internationaux* (1936), pp 107–20 Hyde, 24 (1930), pp 1–19 Ruegger, ZI, 28 (1919–20), pp 426–502 Diaz, RG, 32 (1925), pp 429–42 Ehrlich, Hag R, 24 (1921), iv, pp 5–139 McNair, Hag R, 43 (1933), i, pp 251–79 Fairman, *Grotius Society*, 20 (1934), pp 123–39 Wilson, AJ, 33 (1939), pp 541–5 H Lauterpacht, BY, 26 (1949), pp 86–107 Fitzmaurice, *ibid*, 28 (1951), pp 1–28 H Lauterpacht and others, *Annuaire*, 43 (1) (1950), pp 366–460; and 44 (1) (1952), pp 197–224; and 46 (1956), pp 317–49 Fitzmaurice, BY, 33 (1957), pp 203–38 Neri, *Sull' Interpretazione dei Trattati nel Diritto Internazionale* (1958) Favre, *Ann Suisse*, 17 (1960), pp 75–98 Charles de Visscher, *Varia Juris Gentium: Liber Amicorum J P A François* (1959), pp 383–90 and *Problèmes d'interprétation judiciaire en droit international public* (1963) McNair, *Treaties*, pp 345–489 Degan, *L'Interprétation des accords en droit international* (1963) Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), pp 302–9 Bernhardt, *Die Auslegung*

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amendment of its accession clause to allow for such accession; or the other parties may tacitly consent to the organisation fulfilling the role it has assumed; or the member states may continue to act as parties to the treaty, but as an internal matter between themselves adopt a uniform position as may be required by the organisation now possessing the relevant competences. The participation of the EEC in many multilateral treaties affords examples of practice in these matters. See, eg Case Nos 21–42/72, *NV International Fruit Co v Produktschap voor Groenten en Fruit* [1972] ECR 1219, 1224–5 and Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439 (both as to the GATT).

2 See vol II of 7th ed of this work, § 9.

3 As to intervention in general, see §§ 128–33, and vol II of 7th ed of this work, § 50.

4 See § 667.

5 Eg, the US–Korea Utilities Claims Settlement Agreement 1958 (TS No 57 (1959)). And see UN Juridical YB (1975), pp 196–9. The Federal Republic of Germany was entitled to act on behalf of Berlin (which was an entity not forming part of the Federal Republic) in its international relations, including the conclusion of treaties: see § 48, n 35ff (and generally § 82 on the making of treaties on behalf of protected states). However, the conclusion of agreements on behalf of Germany by the Allied military authorities after the Second World War was a different matter, as in most cases the Allied authorities were acting as the governing authority of Germany. Upon the creation of the Federal Republic of Germany, these agreements remained valid as treaties of the Federal Republic. See the Convention on the Settlement of Matters Arising out of the War and the Occupation, 1952–54, ch 1, Art 2.2; and Bathurst and Simpson, *Germany and the North Atlantic Community* (1956), pp 82–9; Mann, BY, 23 (1946), p 354, and BY, 24 (1947), p 240; Simpson, BY, 35 (1058), p 374. See also § 626, n 4, as to treaties concluded by the EEC as such without the direct participation of the member states, but nevertheless binding on them; and § 626, n 3, para 3.

the Australia–New Zealand–United States Pacific Security Treaty 1951 (ANZUS).[21] Insofar as it establishes a system of collective security, the Charter of the United Nations, in which the parties undertake to lend assistance for the collective repression of an attack directed against any of them, may also be considered an alliance.

§ 666 The *casus foederis* is the event upon the occurrence of which it becomes the duty of one of the allies to render the promised assistance to the other. Thus, in the case of a defensive alliance, the *casus foederis* occurs when war is declared or commenced against one of the allies. Treaties of alliance very often define precisely the event which is to be regarded as the *casus foederis*. But many alliances have been concluded without such precise definition, and, consequently, disputes have arisen later between the parties as to the *casus foederis*.[1]

TREATIES OF GUARANTEE AND OF PROTECTION

Bussmann, *Der völkerrechtliche Garantievertrag*, etc (1927) Freytagh-Loringhoven, *Die Regionalverträge* (1937) Zietzschmann, *Die völkerrechtliche Garantie seit den Locarnoverträgen* (1938) Satow, *Cambridge Historical Journal*, 1 (1925), pp 295–318 Headlam-Morley, *ibid*, 2 (1927), pp 151–70 Zwaardemaker, ZV, 23 (1939), pp 301–16 McNair, *Treaties*, pp 239–54 Verzijl, *International Law in Historical Perspective*, 6 (1973), pp 457–9.

§ 667 Concept and objects of treaties of guarantee A treaty of guarantee is a treaty whereby one or more states – the guarantor (or guarantors) – undertake an obligation to secure by lawful means a certain object to another party or

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p 1004. With the reunification of Germany in 1990 (see § 40, n 32), the German Democratic Republic withdrew from the Warsaw Pact in accordance with a Protocol signed on 24 September 1990. By an agreement signed in February 1991 the military structures of the Warsaw Pact were to be brought to an end by 31 March 1991.

[21] UNTS, 131, p 83; AJ, 46 (1952), Suppl, p 93. See Starke, YB of World Affairs (1956), pp 110–27 (reprinted in Starke, *Studies in International Law* (1965), pp 121–39), and *The ANZUS Alliance* (1966); Dunbar, in *International Law in Australia* (ed O'Connell, 1965), pp 401–19. As to the suspension by the USA of certain provisions of the treaty in relation to New Zealand in 1986, in response to certain policies adopted by New Zealand, see § 649, n 4, para 4.

[1] Thus, during the First World War, Italy declined to recognise that a *casus foederis* had occurred under the Triple Alliance (see AJ, 8 (1914), Suppl, p 368), and Greece refused to recognise that a *casus foederis* had occurred under the Graeco-Serbian Treaty of 1913 (see AJ, 12 (1918), p 312). For the assertion that no *casus foederis* had arisen under the Warsaw Pact so as to justify Russian action in Hungary in 1956, see Szikszoy, *The Legal Aspects of the Hungarian Question* (1963). For some definitions of the *casus foederis* in a number of treaties, see Bowett, BY, 32 (1955–6), pp 130, 142–9, and *Self-Defence in International Law* (1958), pp 225–38, and Skubiszewski, AJ, 53 (1959), pp 613, 614–17.

Where war breaks out between two states this does not have the effect *ipso jure* of giving rise to a state of war involving the allies of those states: see *Re AB*, AD (1943–45), No 96. Cf *Thomas v Metropolitan Life Insurance Co*, ILR, 26 (1958–II), at p 635.

parties.[1] Guarantee treaties may be mutual or unilateral. They may be concluded by two states only, or by a number of states jointly. In the latter case, the various guarantors may give their guarantee severally, or collectively, or both. The guarantee may be for a certain period of time only, or permanent.

The possible objects of guarantee treaties are numerous, and the following examples may be given: the performance of a particular act on the part of a certain state such as the discharge of a debt[2] or the cession of territory; certain rights or duties[3] belonging to a state; the undisturbed possession of the whole, or a particular part, of its territory; a particular form of constitution; a certain status, such as permanent neutrality or neutralisation,[4] or independence,[5] or integrity;[6] a particular dynastic succession;[7] the fulfilment of a treaty concluded by a third state; or the pacific settlement of disputes.[8]

To be distinguished from a treaty of guarantee in the strictly legal sense, are treaties which are sometimes loosely referred to as treaties of guarantee even though they do not impose on the 'guarantor' state any legally binding commitment to secure the object in question. These 'guarantees' are usually of political rather than legal significance. They may be implicit as well as express, and often

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[1] Note also guarantees given by states or (international organisations) in relation to such matters as investments or loans. See § 407, n 8, as to investment guarantees; Meron, *Investment Insurance in International Law* (1976); and, as to loan and guarantee arrangements by the IBRD, see Broches, Hag R, 98 (1959), ii, pp 339–73.

[2] See Meyer-Balding, ZI, 26 (1916), pp 387–426, and the literature there quoted.

[3] As to the guarantees by the League of Nations of the 'minorities clauses' in certain treaties concluded after the First World War, see §§ 426–7.

[4] See § 96. See also the Convention of 10 October 1921 (LNTS, 9, p 212; TS No 6 (1922); AJ, 17 (1923), Suppl, pp 1–6) between ten states regarding the non-fortification and neutralisation of the Aaland Islands, and in particular Art 7 as to utilising the machinery of the League for giving effect to the guarantee; see Charles de Visscher, RI, 3rd series, 2 (1921), pp 580–85; vol ii of 7th ed of this work, § 72 (8); Modeen, ZöV, 37 (1977), pp 604–18; and Strupp, *Wört*, i, p 22, for bibliography.

[5] Thus the UK, France and Russia by the Treaty with Greece of 13 July 1863, guaranteed Greece as 'a monarchical, independent, and constitutional State' (Martens, NRG, 16, pt ii, p 79); § 131, n 40. For the bearing of this Treaty upon the action of the Allies in regard to Greece during the First World War see 8th ed of this work, p 965, n 4.

The USA guaranteed the independence of Cuba by the Treaty of Havana of 22 May 1903 (Martens, NRG, 2nd series, 32, p 79); of Panama by the Treaty of Washington of 18 November 1903 (Martens, NRG, 2nd series, 31, p 599); and of Haiti by Art 14 of the Treaty of Port-au-Prince of 16 September 1915 (see AJ, 10 (1916), Suppl, p 234).

In 1961, Greece, Turkey and the UK guaranteed 'the independence, territorial integrity and security' of Cyprus: TS No 5 (1961). See Lavroff, RG, 65 (1961), pp 527–45. For the events of 1974–75 which led to the invasion and occupation of part of Cyprus by Turkish forces and in which the Treaty of Guarantee was invoked, see § 55, n 15.

[6] Thus the integrity of Norway was guaranteed by the UK, Germany, France, and Russia by the Treaty of Christiania of 2 November 1907 (see Martens, NRG, 3rd series, 1, pp 14, and 2, p 9), a condition of this integrity being that Norway did not cede any part of its territory to any foreign Power (see Morgenstierne, LQR, 31 (1905), pp 389–96). However, by a note of 8 January 1924, addressed to three of the guarantors, Norway denounced this treaty, on the grounds (it is understood) of its incompatibility with its obligations under the Covenant of the League (see RG, 31 (1924), p 299, and LNTS, 23, p 64). In the Peace Treaty with Italy of 1946 the parties agreed that the integrity and independence of the Free Territory of Trieste shall be assured by the Security Council of the UN (Art 21 of the Treaty and Art 2 of the Permanent Statute of the Territory).

[7] See § 131, nn 39, 40.

[8] See § 668, n 5.

come about by the association of the 'guarantor' state with the transaction whose purpose and result is to be assured, thereby demonstrating its political commitment even if in legal terms it has not assumed any specific obligation amounting to a guarantee. Such informal guarantees may involve, for example, giving a general indication of approval for the terms of some transaction, acting as a witness to the terms of a settlement, or even becoming a party to the treaty embodying a settlement, although without assuming any specific obligations under it.[9]

§ 668 Effect of treaties of guarantee The effect of a guarantee treaty depends upon its terms, but in general they will be such as to impose a duty upon the guarantors to do what is in their power to secure the guaranteed objects. The nature of the compulsion to be applied by a guarantor for that purpose depends upon the circumstances. Any compulsion used must, of course, be consistent with international law; in particular, any question of the use of force must take account of the prohibition upon recourse to threats or use of force, which is subject only to limited exceptions, such as the right of self-defence.

It is not always easy to establish what events bring the guarantee into operation. Nor, where there are several guarantors, is the extent of their individual obligations always clear. In the case of a collective guarantee,[1] one of the

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[9] Thus, an undertaking by a third state 'to respect' a settlement, or a state of affairs established by or recorded in a treaty, does not amount to an obligation to guarantee that settlement or state of affairs against unwanted change, but only involves an obligation by that state not to take destabilising action itself. However, such an undertaking will often suffice to establish that state's political backing for the settlement or state of affairs, and may in practice secure its protection. See, eg the Final Declaration of the 1954 Geneva Conference on Indo-China (see § 40, n 54); Art 2 of the Austrian State Treaty 1955 (see § 98); the 1962 Declaration on the Neutrality of Laos (see § 96, n 9); the 1973 Act of the International Conference on Vietnam (see § 40, nn 57, 58); and the 1988 Declaration on International Guarantees concluded between the USA and USSR in the context of a settlement of problems arising out of the USSR's intervention in Afghanistan (see § 130, n 14, para 2). All of these involved undertakings falling some way short of a guarantee in the legal sense of the term.

Similar are treaties which merely declare the policy of the parties with regard to the maintenance of a territorial *status quo*. Such treaties do not establish any legal obligation to preserve the *status quo*, or to pursue policies to that end, but only state the parties' firm resolution to that end. Examples of such treaties include two sets of declarations which were of considerable diplomatic importance before the First World War: (1) The declarations (see Martens, NRG, 2nd series, 35, p 692, and 3rd series, 1, p 3) exchanged on 16 May 1907, between France and Spain on the one hand, and, on the other hand, between the UK and Spain, concerning the territorial *status quo* in the Mediterranean. (2) The declarations (see Martens, NRG, 3rd series, 1, pp 17, 18) concerning the maintenance of the territorial *status quo* in the North Sea, signed at Berlin on 23 April 1908, by the UK, Germany, Denmark, France, Holland and Sweden, and concerning the maintenance of the territorial *status quo* in the Baltic, signed at St Petersburg, on the same date, by Germany, Denmark, Russia and Sweden.

See also a declaration as to the *status quo* in the Pacific Ocean, namely, the Quadruple Pacific Treaty of 13 December 1921, between the USA, the British Empire, France, and Japan; TS No 6 (1924), and AJ, 16 (1922), Suppl, pp 60–64; and the Political Agreement between France and Poland of 19 February 1921, LNTS, 18, p 11.

[1] The mere fact that a number of states guarantee a certain object to another state in one and the same treaty does not make the guarantee a *collective* guarantee; for a guarantee is collective only when it is expressly stated to be so, by the use of the terms 'collective' or 'joint' or the like.

(*b*) **Does not otherwise affect the legal relations between the parties established by the treaty.**

2. During the period of the suspension the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible.

Part VI.—Miscellaneous provisions

Article 69. Cases of State succession and State responsibility

The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State.

Article 70. Case of an aggressor State

The present articles are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

Part VII.—Depositaries, notifications, corrections and registration

Article 71. Depositaries of treaties

1. The depositary of a treaty, which may be a State or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance.

Article 72. Functions of depositaries

1. The functions of a depositary, unless the treaty otherwise provides, comprise in particular:

(*a*) Keeping the custody of the original text of the treaty, if entrusted to it;

(*b*) Preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(*d*) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the States entitled to become parties to the treaty of acts, communications and notifications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty has been received or deposited;

(*g*) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the other States entitled to become parties to the treaty or, where appropriate, of the competent organ of the organization concerned.

Article 73. Notifications and communications

Except as the treaty or the present articles otherwise provide, any notification or communication to be made by any State under the present articles shall:

(*a*) **If there is no depositary, be transmitted directly to the States for which it is intended, or if there is a depositary, to the latter;**

(*b*) **Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;**

(*c*) **If transmitted to a depositary, be considered as received by the State for which it was intended only upon the latter State's having been informed by the depositary in accordance with article 72, paragraph 1(*e*).**

Article 74. Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter:

(*a*) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(*b*) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(*c*) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the contracting States agree should be corrected.

4. (*a*) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide.

(*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.

Article 75. Registration and publication of treaties

Treaties entered into by parties to the present articles shall as soon as possible be registered with the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.

Draft articles on the law of treaties with commentaries

Part I.—Introduction

Article 1.[38] The scope of the present articles

The present articles relate to treaties concluded between States.

Commentary

(1) This provision defining the scope of the present articles as relating to "treaties concluded between States" has to be read in close conjunction not only with article 2(1)(*a*), which states the meaning with which the term "treaty" is used in the articles, but also with article 3, which contains a general reservation regarding certain other categories of international agreements. The sole but important purpose of this provision is to underline at the outset that all the articles which follow have been formulated with particular reference to treaties concluded between States and are designed for application only to such treaties.

(2) Article 1 gives effect to and is the logical consequence of the Commission's decision at its fourteenth session not to include any special provisions dealing with the treaties of international organizations and to confine the draft articles to treaties concluded between States. Treaties concluded by international organizations have many special characteristics, and the Commission considered that it would both unduly complicate and delay the drafting of the present articles if it were to attempt to include in them satisfactory provisions concerning treaties of international organizations. It is true that in the draft provisionally adopted in 1962, article 1 defined the term treaty "for the purpose of the present articles" as covering treaties "concluded between two or more States or other subjects of international law". It is also true that article 3 of that draft contained a very general reference to the capacity of "other subjects of international law" to conclude treaties and a very general rule concerning the capacity of international organizations in particular. But no other article of that draft or of those provisionally adopted in 1963 and 1964 made any specific reference to the treaties of international organizations or of any other "subject of international law".

(3) The Commission, since the draft articles were being prepared as a basis for a possible convention, considered it essential, first, to remove from former articles 1 and 3 (articles 2 and 5 of the present draft) the provisions relating to treaties not specifically the subject of the present articles and, secondly, to indicate clearly the restriction of the present articles to treaties concluded between States. Accordingly, it decided to make the appropriate adjustments in articles 1 and 5 and to insert article 3 restricting the scope of the draft articles to treaties concluded between States. The Commission examined whether the object could be more appropriately achieved by merely amending the definition of treaty in article 2. But considerations of emphasis and of drafting convenience led it to conclude that the definition of the scope of the draft articles in the first article is desirable.

(4) The Commission considered it no less essential to prevent any misconception from arising from the express restriction of the draft articles to treaties concluded between States or from the elimination of the references to treaties of "other subjects of international law" and of "international organizations". It accordingly decided to underline in the present commentary that the elimination of those references is not to be understood as implying any change of opinion on the part of the Commission as to the legal nature of those forms of international agreements. It further decided to add to article 3 (former article 2) a specific reservation with respect to their legal force and the rules applicable to them.

Article 2.[39] Use of terms

1. For the purposes of the present articles:

(*a*) **"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.**

(*b*) **"Ratification", "Acceptance", "Approval", and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.**

(*c*) **"Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.**

(*d*) **"Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.**

(*e*) **"Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty.**

(*f*) **"Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.**

(*g*) **"Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.**

[38] 1965 draft, article 0.

[39] 1962 and 1965 drafts, article 1.

(*h*) "Third State" means a State not a party to the treaty.

(*i*) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meanings with which terms are used in the draft articles.

(2) "*Treaty*". The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing concluded between States. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding", could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties. A general convention on the law of treaties must cover all such agreements, and the question whether, for the purpose of describing them, the expression "treaties" should be employed rather than "international agreements" is a question of terminology rather than of substance. In the opinion of the Commission a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) First, the treaty in simplified form, far from being at all exceptional, is very common, and its use is steadily increasing.[37] Secondly, the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.[38] But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in regard to the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements. Thirdly, even in the case of single formal agreements an extraordinarily varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty", "convention" and "protocol", one not infrequently finds titles such as "declaration", "charter", "covenant", "pact", "act", "statute", "agreement", "concordat", whilst names like "declaration" "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement", "exchange of notes", "exchange of letters", "memorandum of agreement", or "agreed minute" may be more common than others.[39] It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction. Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.

(4) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "*a.* the interpretation of a treaty". But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Court for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "*a.* international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" is used serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement", which would not only make the drafting more cumbrous but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(5) The term "treaty", as used in the draft articles, covers only international agreements made between "two or more States". The fact that the term is so defined here and

[37] See first report by Sir H. Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, pp. 101-106.

[38] See on this subject the commentaries to Sir G. Fitzmaurice's second report (*Yearbook of the International Law Commission, 1957*, vol. II, p. 16, paras. 115, 120, 125-128 and 165-168); and his third report (*Yearbook of the International Law Commission, 1958*, vol. II, p. 20, paras. 90-93).

[39] See the list given in Sir H. Lauterpacht's first report (*Yearbook of the International Law Commission, 1953*, vol. II, p. 101), paragraph 1 of the commentary to his article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement, whatever its form and descriptive name".

so used throughout the articles is not, as already underlined in the commentary to the previous article, in any way intended to deny that other subjects of international law, such as international organizations and insurgent communities, may conclude treaties. On the contrary, the reservation in article 3 regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States.

(6) The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between States, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties). The Commission examined the question whether the element of "intention to create obligations under international law" should be added to the definition. Some members considered this to be actually undesirable since it might imply that States always had the option to choose between international and municipal law as the law to govern the treaty, whereas this was often not open to them. Others considered that the very nature of the contracting parties necessarily made an inter-State agreement subject to international law, at any rate in the first instance. The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase "governed by international law", and it decided not to make any mention of the element of intention in the definition.

(7) The restriction of the use of the term "treaty" in the draft articles to international agreements expressed in writing is not intended to deny the legal force of oral agreements under international law or to imply that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form, and in any case the Commission considered that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more instruments. The definition, by the phrase "whether embodied in a single instrument or in two or more related instruments", brings all these forms of international agreement within the term "treaty".

(8) The text provisionally adopted in 1962 also contained definitions of two separate categories of treaty: (*a*) a "treaty in simplified form" and (*b*) a "general multilateral treaty". The former term was employed in articles 4 and 12 of the 1962 draft in connexion with the rules governing respectively "full powers" and "ratification". The definition, to which the Commission did not find it easy to give sufficient precision, was employed in those articles as a criterion for the application of certain rules. On re-examining the two articles at its seventeenth session, the Commission revised the formulation of their provisions considerably and in the process found it possible to eliminate the distinctions made in them between "treaties in simplified form" and other treaties which had necessitated the definition of the term. In consequence, it no longer appears in the present article. The second term "general multilateral treaty" was employed in article 8 of the 1962 draft as a criterion for the application of the rules then included in the draft regarding "participation in treaties". The article, for reasons which are explained in a discussion of the question of participation in treaties appended to the commentary to article 12, has been omitted from the draft articles, which do not now contain any rules dealing specifically with participation in treaties. Accordingly this definition also ceases to be necessary for the purposes of the draft articles and no longer appears among the terms defined in the present article.

(9) "*Ratification*", "*Acceptance*", "*Approval*" and "*Accession*". The purpose of this definition is to underline that these terms, as used throughout the draft articles, relate exclusively to the international act by which the consent of a State to be bound by a treaty is established on the international plane. The constitutions of many States contain specific requirements of internal law regarding the submission of treaties to the "ratification" or the "approval" of a particular organ or organs of the State. These procedures of "ratification" and "approval" have their effects in internal law as requirements to be fulfilled before the competent organs of the State may proceed to the international act which will establish the State's consent to be bound. The international act establishing that consent, on the other hand, is the exchange, deposit or notification internationally of the instrument specified in the treaty as the means by which States may become parties to it. Nor is there any exact or necessary correspondence between the use of the terms in internal law and international law, or between one system of internal law and another. Since it is clear that there is some tendency for the international and internal procedures to be confused and since it is only the international procedures which are relevant in the international law of treaties, the Commission thought it desirable in the definition to lay heavy emphasis on the fact that it is purely the international act to which the terms ratification, acceptance, approval and accession relate in the present articles.

(10) "*Full powers*". The definition of this term does not appear to require any comment except to indicate the significance of the final phrase "or for accomplishing any other act with respect to a treaty". Although "full powers" normally come into consideration with respect to conclusion of treaties (see articles 6, 10 and 11), it is possible that they may be called for in connexion with other acts such as the termination or denunciation of a treaty (see article 63, paragraph 2).

(11) "*Reservation*". The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular pro-

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problems, but that was inevitable, since the codification of international law would not come to an end with the convention on the law of treaties and some gaps would necessarily remain, which would be gradually filled by subsequent codification or [illegible].

[illegible] The solution of such problems would put an end to the claims of certain groups of people who, while they exercised temporary control over a particular territory, attempted to participate in multilateral treaties entered into by sovereign States. At some future date the codification of international law would set out the requirements which must be fulfilled by subjects of international law, which at present were governed by the rules of internal constitutional law. Those problems, and some of a merely administrative nature which admitted of easy solution, should not be a ground for not accepting the noble principle of universality, which concerned all the States in the world, or a few countries on the legal principles which should govern relations in the international community.

[illegible] Mr. ALCIVAR-CASTILLO (Ecuador) said that his delegation would vote for the proposed new article 5 bis, because it felt strongly that there was no justification for [illegible] the principle of the universality of international legal norms laid down by a treaty with the question of the recognition of States. The universality of norms of general international law was closely linked with the universal dimensions of the international community. The limited concept of the international community under the Covenant of the League of Nations had accorded with the political realities of an international society governed by colonialist empires, which had maintained vast areas of the world in subjection. [illegible] San Francisco a new concept of the international community had emerged, and the present international community was characterized by its unlimited universality.

[illegible] Customary law, formerly considered as the most general form of positive law governing the international legal order, had been the legal outcome of custom imposed by political power, but new factors, which in the past had been given the utmost [illegible], establishing [illegible], had become the most important source of general norms of international law. The universality of norms of customary law derived from the obligations imposed by custom, whereas the universality of treaty norms could only be achieved, at least in the initial stages, by the joint [illegible] of sovereign States. The issue of the recognition of States did not fall within the scope of the Conference's task, which was to treaty law, and there was nothing to justify any [illegible] of the principle of universality in the convention on the law of treaties.

[illegible] Mr. SHEVCHENKO (Ukrainian Soviet Socialist Republic) said that the proposed new article 5 bis, like the final clauses, reflected the principle of universality. The convention on the law of treaties was unique in character in that it would constitute the foundation of treaty law and all future treaties would be based on it. It was thus of particular importance that the principle of universality should be incorporated in the convention. The validity of the principle of universality was indisputable and the statements which had been made in connexion with the right of States to take part in the convention had not been political manoeuvres designed to diminish the validity of the convention's text, and were not based on principles of law. Whatever the result of the vote on article 5 bis, his delegation would continue to strive for the acceptance of the principle of universality and it was convinced that in the long run that principle would triumph.

[illegible] The CHAIRMAN invited the Committee to vote on the proposed new article 5 bis (A/CONF.39/C.1/L.388 and Add.1).

The amendment was rejected by [illegible] votes to [illegible] with [illegible] abstentions.

[illegible], having been drawn by the Chairman, was called upon to vote first.

In favour: [illegible] Kenya, [illegible] Mexico, Mongolia, [illegible] Nepal, [illegible] Poland, Romania, [illegible], Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, [illegible], Yugoslavia, [illegible], Afghanistan, Algeria, Bulgaria, Burundi, Byelorussian Soviet Socialist Republic, [illegible], Ceylon, Congo (Brazzaville), [illegible], Czechoslovakia, [illegible], Hungary, India, Indonesia, Iraq.

Against: [illegible], Lebanon, [illegible], Luxembourg, Madagascar, Malaysia, Malta, Netherlands, New Zealand, Nicaragua, Panama, [illegible], Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, [illegible], Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, [illegible], Australia, Austria, Belgium, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Denmark, Dominican Republic, [illegible], Federal Republic of Germany, Finland, France, Gabon, [illegible], Guatemala, [illegible], [illegible], Iran, Ireland, Israel, Italy, [illegible], Ivory Coast, Jamaica, Japan.

Abstaining: [illegible], Kuwait, [illegible], Mauritania, Morocco, [illegible], Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, [illegible], [illegible], Trinidad and Tobago, [illegible], Ethiopia, Ghana, [illegible], Cambodia, Chile, Cyprus, [illegible].

The proposed new article 5 bis (A/CONF.39/C.1/L.388 and Add.1) was rejected by [illegible] votes to [illegible], with [illegible] abstentions.

[illegible] Mr. JACOVIDES (Cyprus), explaining his vote, said that his delegation's attitude to the controversial issues involved in article 5 bis and in the final clauses was governed by its earnest desire to see the Conference produce a legally sound and practically acceptable convention which would stand a good chance of being accepted by the largest possible number of States in the shortest possible time. If that objective was to be achieved, a solution acceptable to a substantial number of States should be found. The proposed new article 5 bis, if adopted, would not support that contention.

[illegible] While his delegation recognized the principle of universality in general and its manifestation in the convention in particular, it could not ignore the practical problems which would result from the adoption of the all States formula. The amendment by Ghana and India (A/CONF.39/C.1/L.399), according to the final clauses, had gone a long way towards meeting some of the deficiencies of the "all States" formula but had fallen short. For instance, in the field of [illegible]. The Vienna formula had its own deficiencies, but it had [illegible] the merit of a position that had obtained status in a world [illegible] and more, only in view of the implications of the method adopted to enable States to participate in the Nuclear Test Ban Treaty. Every effort must be made to accommodate conflicting views if the Conference were to achieve success, and his delegation had therefore [illegible] itself to either extreme view.

[illegible] Mr. KOROTEIK (Ukrainian Soviet Socialist Republic) said that the vote on the principle of universality and the statements made against it in the Committee showed that many delegations were guided by purely political motives. In rejecting that realistic principle, its opponents had resorted, not to fair and logical arguments, but to the purely arithmetical pressure of votes, through a manoeuvre detrimental to international co-operation and to the interests of all States and peoples, since [illegible] of [illegible] considerations had no validity. The Ukrainian delegation had voted in favour of including the principle of universality, which was an indisputable part of contemporary international law, in the convention on the law of treaties, since its omission from the convention would seriously be affected by the absence of such a provision.

PROPOSALS BY THE DRAFTING COMMITTEE

[illegible] The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 12, [illegible] and 62 [illegible] and annex [illegible], as adopted by the Drafting Committee.

Article 12 (Consent to be bound by a treaty expressed by accession)[illegible]

[illegible] Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 12 by the Drafting Committee read:

[illegible]

The consent of a State to be bound by a treaty is expressed by accession when:

(a) The treaty provides that such consent may be expressed by that State by means of accession;

(b) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(c) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

[illegible] The only amendment submitted to article 12 had been the Czechoslovak proposal (A/CONF.39/C.1/L.[illegible]), which had not been voted on by the Committee

of the Whole. The Drafting Committee had decided to delete the words "or an amendment to the treaty" in sub-paragraph (a), because the amendment to the treaty was an integral part of the instrument and a reference to amendment, which, moreover, did not appear in any other part of the convention, might give rise to difficulties of interpretation.

17. Mr. SMEJKAL (Czechoslovakia) said that, when commenting on article 5 bis at the [illegible] meeting, his delegation had stated that it would be prepared to withdraw its amendment to article 12 if a provision along the lines of article 5 bis were adopted. By proposing that compromise solution it had hoped to [illegible] article 5 bis and 62 bis. Unfortunately, however, the rigid attitudes of some delegations had prevented any such conciliatory solution; indeed the Committee had even been unable to adopt the compromise solution for the final clauses proposed by Ghana and India. His delegation therefore did not consider that it would serve any useful purpose to press for a vote on a possibly inadequate proposal and therefore withdrew its amendment (A/CONF.39/C.1/L.[illegible]).

18. The CHAIRMAN suggested that article 12, as amended by the Drafting Committee, be considered as approved.

It was so agreed.[illegible]

Article 2 (Use of terms)[illegible]

19. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 2 by the Drafting Committee read:

Article 2

1. For the purposes of the present Convention:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(c) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(e) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty;

[illegible] For earlier discussion of article 12, see [illegible] meeting.

[illegible] For earlier discussion of article 2, see [illegible] meeting.

[illegible] For earlier discussion of article 2, see [illegible] meeting.

(b) "Contracting State" means a State which has consented to be bound by the treaty, whether the treaty has entered into force or not;

(c) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(d) "third State" means a State not a party to the treaty;

(e) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 concerning the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

24. The Committee of the Whole had referred to the Drafting Committee at the first session and five at the second session.

21. In principle, the Committee had rejected all amendments which sought a reference to the legal effect of treaties. It did not underestimate the scientific merits of such a reference but considered that it would be superfluous in a definition whose scope, as expressly stated at the beginning of the article, was limited to "the purposes of the present Convention".

22. The Committee had considered that the expression "agreement governed by international law" in paragraph 1 (a) covered the element of "an intention to create obligations and rights in international law". It had also noted that States had the right to choose whether a treaty concluded by them should be governed, by international law or by internal law only in so far as such choice was permitted by international law itself.

23. The Committee had also not accepted the revised amendment by Ecuador (A/CONF.39/C.1/L.25/Rev.1) to insert the words "freely consented to" between the words "agreement" and "concluded", because it felt that such an insertion would have been incompatible with the structure of Part V of the draft. If the Ecuadorian amendment were accepted, an international agreement not freely consented to would not be a treaty. Under the provisions of Part V, such an agreement was void but was still a treaty.

24. The only amendment to paragraph 1 (a) accepted by the Drafting Committee was the second amendment proposed by Spain (A/CONF.39/C.1/L.281), whereby in the French version the words "ne saurait avoir aucun effet juridique" would be replaced by the word "*n'existe*". That in the Spanish version the words "no surtirán efecto jurídico" would be replaced by the words "*no existirán*". That amendment did not affect the English version.

25. Amendments had been submitted to paragraph 1 (b) by the United States (A/CONF.39/C.1/L.316) and Belgium (A/CONF.39/C.1/L.383) respectively. The United States amendment had been withdrawn. The Belgian amendment (A/CONF.39/C.1/L.383) which did not affect the English version, was to replace the words "*dûment autorisé*" by the words "*muni de pleins pouvoirs*". The Drafting Committee had considered that amendment an improvement of the wording.

26. The only amendment submitted to paragraph 1 (c) was the amendment by Austria and Spain (A/CONF.39/C.1/L.[illegible]) to replace the word "*formellement*" by the word "*définitivement*". The Drafting Committee had rejected that amendment because it had taken the view that international practice in general was often contained in documents which could not be described as instruments.

27. For grammatical reasons, the Committee had to adopt the drafting words of the French version, "*n'est pas en vigueur*", by the words "*n'est pas entré en vigueur*".

28. The Drafting Committee had referred as superfluous the amendments to paragraph 1 (d), except the Hungarian amendment (A/CONF.39/C.1/L.342) proposing the words "signing, ratifying, accepting, approving or acceding" as the order in which they appeared in article 16. That amendment only affected the English and Russian versions, as the order proposed was the order followed in all other language versions.

29. In the interests of uniformity of terminology, the Drafting Committee had replaced the expression "to vary the legal effect" in the English version by the expression "to modify the legal effect", which was used in connexion with the legal effect of reservations, and the term "to nullify" by the term "to vary".

30. The Drafting Committee had rejected all the amendments submitted to paragraph 1 (e) to 1 (g), but on its own initiative had replaced in the French version of sub-paragraph 1 (e) the expression "*faisant une partie d'un traité*" by the expression "*faisant partie d'un traité*" and, in the English version, had replaced the word "*drawing up*" by the word "*adoption*". A similar modification had been made in the Spanish version. A drafting change had also been made in the Russian version of paragraph 1 (e).

31. In the light of communications from GATT and the United International Bureaux for the Protection of Intellectual Property (BIRPI) concerning paragraph 1 (i) the Drafting Committee had considered that the rules on the meaning to be given to the term "international organization", which was the subject of the paragraph. The Drafting Committee had considered that the term covered institutions established by intergovernmental agreements or by processes and which exercised normative functions of some permanence, but the expansion of the definition, the agreements or the processes to establish those institutions played no role in the constitutional instruments mentioned.

32. The Drafting Committee had considered the amendments to add definitions of terms not included in article 2, but had considered that there was no necessity for this interpretation of the Convention and had therefore rejected them all.

33. It had also rejected an amendment to paragraph 2, the first by Ceylon (A/CONF.39/C.1/L.[illegible]) to add, at the end of the paragraph, the words "or in the conduct of international organizations or in any treaty". The Committee had considered that to add those words would duplicate the general reservation set forth in article 5, and therefore had rejected the amendment.

34. Mr. SAHOVIC (Yugoslavia), introducing his delegation's amendment (A/CONF.39/C.1/L.[illegible]) to the Drafting Committee's text of paragraph 1 (a), said that it was designed to bring that text into line with the decision taken by the Drafting Committee to accept the Ecuadorian amendment (A/CONF.39/C.1/L.25/Rev.1) to article 2, paragraph 1 (a). For the purpose of which are to be found in the text of the Vienna Convention, and to which his delegation would attach great importance, it was necessary to include in article 2 the definition of "agreement governed by international law". His delegation would not press its amendment because the Drafting Committee had now approved the amendment by Ecuador, but the fact remained that elimination of the element of consent was the only change made in Part V of the convention, and not merely a change of the concept, but merely a brief explanation, was needed to facilitate the understanding of the texts of the convention.

35. His delegation, however, wished to place on record its position in relation to paragraph 1 (a) of article 2, because it considered the criterion therein set out to be too limited. A further definition of the term "treaty" would have been more acceptable. As at present worded, that text dealt with only one particular element of a treaty and only rather general reference to those elements of an international agreement could be drawn from the characteristic features mentioned in international instruments.

36. As interpreted by his delegation the words "*agreement governed by international law*" used in the present text covered both the form and content of the treaty and of subsequent actions by the parties participating in the conclusion, that they were to conclude in good faith and that they must have a licit object.

37. He requested the Drafting Committee to take that interpretation by his delegation of the definition of "treaty" in his report.

38. He went also on the Drafting Committee, which in drafting its report to the conference, to give the reasons for the rejection of amendments, so that conference participants would be aware of its views in the plenary meetings and in the Committee of the Whole. Those views had been expressed in the amendment (A/CONF.39/C.1/L.25/Rev.1) which had not been accepted by the Drafting Committee purely for technical reasons.

39. He also noted in the Spanish version of the opening sentence of paragraph 1 of article 2 the expression "*a los efectos de los presentes Convenios*". That was a spelling error and should be replaced by the expression "*a los efectos de la presente Convención*". The same error should be made wherever it occurred throughout the eight authentic texts of the Convention.

40. The CHAIRMAN said that the Committee did not, for the purpose of its amendments to article 2, the Spanish amendment (A/CONF.39/C.1/L.[illegible]) and the United States amendment (A/CONF.39/C.1/L.316/Rev.1),

41. Mr. USTOR (Hungary) said that his amendment (A/CONF.39/C.1/L.[illegible]) had been intended to supplement article 5 (see 59th meeting). The Committee had rejected the proposal to include article 5 bis, its amendment dropped into line automatically.

42. Mr. USTOR (Hungary), speaking also for Hungary as sponsor of the eight-Power amendment (A/CONF.39/C.1/L.[illegible]/Rev.1), said that the amendment no longer had any object since the definition of "agreement governed by international law" would, in article 2, only state that it was used in the convention itself.

43. The CHAIRMAN said that, in the absence of any comment by the other sponsors of the eight-Power amendment (A/CONF.39/C.1/L.[illegible]/Rev.1) he would take it that they accepted that view. The two amendments would therefore be considered as withdrawn.

Article 2 was adopted.

Article 62 bis

44. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 62 bis by the Drafting Committee was:

Article 62 bis

1. Under paragraph 3 of article 62, the parties may first make use of any of the means of reaching a solution which are indicated in that paragraph. They may also, if they think fit, submit to the Secretary-General of the United Nations a request that he should himself propose to the parties the name of one or more persons, one of whom would be designated by him as arbitrator. If within a period of twelve months following such a request or such longer period as may be decided upon by the parties the parties have not succeeded in reaching a solution, any dispute between them as to the application or the interpretation of the articles of this Convention may be submitted to the International Court of Justice by a request made by any one of the parties.

2. Nothing in the foregoing paragraph shall affect the rules in force among the parties to any treaty providing that, in settling a dispute, they shall have recourse to a procedure different from that provided for in the present Convention.

45. Article 62 (Article [illegible] A/CONF.39/C.1/L.[illegible]) to which was annexed article 62 bis, repeated the substance of a provision already approved by the Committee of the Whole for article 62. That provision, however, did not constitute a separate article but only paragraph 3 of article 62. In the interests of symmetry, the Drafting Committee had therefore made article 2 amend the second paragraph of article 62.[1]

46. In the first paragraph of article 62 bis, the Drafting Committee had only made slight drafting changes. It had noted in the French version of that paragraph, which was the original text, the terms "*règlement judiciaire*" and "*arbitrage*" which appeared in Article 33 of the Charter. The terminology used in the Charter had not been followed in the translation of those expressions into the other languages, so the Committee had made the necessary corrections.

47. It would now consider the request to amend the [illegible]

[1] The earlier discussion on article 2, see the plenary meetings devoted to article 62, paragraph 3 of the 75 plenary meetings.

[2] For earlier discussion see 82nd to 84th meeting.

[3] See below, para. 64.

Scrutton L.J. said:

'I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean.'[1]

In *Balfour* v. *Balfour*[2] Atkin L.J. had also said:

'[Such agreements] are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon.'

Two rules are enunciated in these passages: first, the intention to create legal relations is an intention to create rights and duties which may be declared or enforced in a court of law. Secondly, there is a presumption that parties, who have expressed their agreement consistently with the rules for the formation of contracts, intend to create legal relations between them. The first rule seems to be part of many systems of municipal law and is perhaps accepted generally. For example, it is to be found in Roman Law,[3] the German Civil Code,[4] the Italian Civil Code,[5] and the Soviet Civil Code.[6] It is submitted that the first rule is equally applicable to international agreements[7] but that the second rule is not so, for there are compelling reasons against any presumption that legal relations are intended, arising from the bare fact of the conclusion of an inter-State agreement. In the first place, States and Governments differ greatly from individuals in the type of business they transact by means of inter-State agreements; the whole field of joint administrative and technical enterprise between Governments resembles the co-operation between the separate departments of a single Government rather than the contractual business relations of individuals; and just as joint undertakings between, for example, the Treasury and the War Office are removed from the cognizance of the courts, not least because of the manifest lack of any intention that they should constitute legal obligations or that the agreed minutes or memoranda in which they are embodied should be regarded as contractual instruments, so it would be both unrealistic and inconvenient to treat international

[1] At p. 288.

[2] [1919] 2 K.B. 571.

[3] Debitor intelligitur is a quo invito pecunia *exigi* potest: *Dig.* 50. 16. 108; Obligatio est iuris vinculum quo necessitate *adstringimur* alicuius solvendae rei secundum nostrae civitatis iura: *Inst.* 3. 13.

[4] 1900, § 241: By virtue of an obligation, the creditor is entitled to *demand* a performance from the debtor. Performance may consist of an act of omission.

[5] 1942, § 1173: Obligations arise from contracts, wrongful acts, or any other acts or facts which are capable of producing obligations *under law*.

[6] § 26: Legal transactions, that is to say, acts intended to establish, modify or terminate civil legal relations may be unilateral or bilateral (contracts); § 107: By virtue of an obligation the creditor has the right to *claim from the debtor the performance* of a specific act, in particular, to deliver things or to pay money, or to abstain from an act.

[7] See *Report*, loc. cit., Draft Article 1.

agreements having a similar scope and object as being legally binding upon the parties.

Secondly, the principles, on the one hand, of the interpretation of agreements between States in favour of their liberty of action and, on the other hand, of the necessity of the consent of States to the assumption by international tribunals of jurisdiction over them, raise the contrary presumption that an inter-State agreement does not create for the parties obligations enforceable by judicial process, unless such an intention is clearly expressed or necessarily to be inferred from the terms of the agreement. However, in his Dissenting Opinion on the *Status of South-West Africa*,[1] Judge Read said:

'It is sufficient for the present purposes, to state that an 'arrangement agreed between' the United Nations and the Union [of South Africa] necessarily included two elements: a meeting of minds, and an intention to constitute a legal obligation.'

The use of the word 'necessarily' here raises the question whether in the view of Judge Read the bare fact of agreement between international persons raises a presumption that legal relations are intended to be created between them. In this case the question was how far a number of unilateral statements and communications by South Africa constituted binding arrangements for a clarification of the legal status of South-West Africa; since the legal status of the territory was in issue, it followed that any arrangement concluded between South Africa and the United Nations affecting it would have had legal consequences. It is submitted with respect that Judge Read's words, and particularly the word 'necessarily', are to be read in this sense. Where he differed from the Court was on the question of fact whether South Africa's various statements and communications to the United Nations did or did not establish such an 'arrangement'.

How, then, is the intention[2] of the parties to be legally bound by an international agreement manifested? A number of tests suggest themselves. First, have the parties included in the agreement provision for the settlement by compulsory judicial process of disputes arising out of it? Secondly, have they both accepted the jurisdiction of the International Court of Justice under Article 36 of its Statute in terms which would give the Court jurisdiction over any such dispute? Third, has the agreement been registered under Article 102 of the Charter of the United Nations or Article 18 of the Covenant of the League of Nations? Fourth, is there an intention declared, or to be deduced from the subject-matter of the agreement, that the agreement or particular provisions of it are to be governed by public

[1] *I.C.J. Reports*, 1950, pp. 170–1.

[2] For the problem of discovery of the intentions of the parties to international agreements see Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation', in this *Year Book*, 28 (1951), pp. 1–28; and Lauterpacht, loc. cit., p. 76.

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ternational law, or by a specified system of municipal law, or by the general principles of law recognized by civilized nations?

The first test appears to be decisive. But the requirements that the process of settlement be judicial and compulsory must be fully present. That the process must be judicial, in that the dispute as to the interpretation or application of the agreement must be settled by an impartial outsider after hearing evidence, if necessary, and the opinions of all parties, seems to be a principle recognized in the English court decisions and the foreign codes already referred to. The process of settlement must be compulsory in the sense that the dispute is justiciable at the instance of any party to the agreement and that the decision, given in settlement of the dispute, is binding on the parties. This is obvious; for there could otherwise be no relationship of obligation. Therefore the settlement of disputes, arising out of international agreements, by diplomatic exchanges or other negotiations between Governments is not a mode of settlement from which it can be inferred that the parties contemplate a legal relationship under the agreement.

The second test is a complicated extension of the first; and it is applicable to the case where there is no provision in the agreement itself for the judicial settlement of disputes. If the parties to such an agreement have accepted the jurisdiction of the Court under Article 36 of its Statute, the question may be asked whether there is any implied intention to create legal relations under the agreement. The implication will arise, if at all, only if, on the one hand, there is no provision in the agreement itself ousting the jurisdiction of the Court,[1] and, on the other hand, there is no reservation in the instruments of acceptance of the Court's jurisdiction which would exclude disputes arising out of the agreement in question. Where there is a disputes clause in the agreement and this provides for the settlement of disputes by diplomatic or analogous process, then the jurisdiction of the Court must be taken to be ousted and cannot be invoked under Article 36. Again, if the agreement as a whole falls into a class, such that any dispute arising out of it would be a dispute excluded by express reservation from the scope of a country's acceptance of the Court's jurisdiction, then no implication of intention to create legal relations can arise from that acceptance; an example would be any dispute arising out of any agreement between the United Kingdom and another member of the Commonwealth.[2] The position would be the same if the dispute in question was expressly excluded by the terms of acceptance.

[1] As, for example, in the European Convention on Human Rights, 1953, Article 62.

[2] The United Kingdom Declaration of 28 February 1940 excepts, *inter alia*, 'disputes with the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the Parties have agreed or shall agree'.

But in cases where these obstacles do not appear, there seems to be no reason why the implication should not arise. In other words, the acceptance of the Court's jurisdiction under Article 36 by any two or more parties to the Statute has the consequence that any agreements concluded between them are, subject to the exceptions suggested above, established as agreements of legal obligation. This conclusion seems to be consistent with the policy of Article 36 of the Statute, which is to extend the compulsory judicial settlement of disputes as widely as possible. But a difficulty remains. Suppose that a dispute arises between two States over the application of an agreement made by them, and that, as far as concerns the date when the dispute arose and the character of the agreement, the dispute is within the terms of the acceptances by both States of the Court's jurisdiction. If one State refers the dispute to the Court by application, and the other State takes the preliminary objection that the Court has no jurisdiction on the ground that the agreement in question did not, and was not intended by the parties to, create legal relations, how is this objection to be determined? Since the Court's jurisdiction rests if at all upon the acceptances by the parties under Article 36 and not upon the agreement in question, there is not here the logical difficulty that one party is seeking to establish jurisdiction under an agreement the very existence of which the other party denies. Further, where an objection to the jurisdiction of the Court is taken, the Court is to determine it.[1] It follows, then, that the Court could decide the question whether the agreement between the parties had created legal relations and, in particular, whether that effect had been brought about by their acceptance of the jurisdiction of the Court under Article 36. It is submitted that the Court should decide in favour of jurisdiction.

The third test is inconclusive and therefore useless as far as Article 102 of the Charter of the United Nations goes. For under this Article[2] any 'treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after October 24, 1945 . . . shall as soon as possible be registered with the Secretariat'; while Article 102 itself provides that such an agreement may not be invoked by a party before any organ of the United Nations without prior registration. The test of registration is inconclusive for two reasons. First, neither Article 102 nor the regulations made under it define 'treaty' or 'international agreement' and do not require that such instruments shall be intended to create legal relations. Article 18 of the League Covenant, as explained by a memorandum of the Secretary-General approved by the League Council,[3] was more precise and more comprehensive. The memorandum laid it down

[1] Article 36 (6) of the Statute.

[2] As elaborated by General Assembly Resolution 97 (I): U.N. Doc. A/64, Add. 1.

[3] *League of Nations Treaty Series*, vol. 1, p. 9.

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
8 November 2001

PROSECUTOR

v.

SLOBODAN MILOSEVIC

DECISION ON PRELIMINARY MOTIONS

The Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Daniel Saxon
Mr. Dirk Ryneveld
Ms. Julia Baly
Ms. Cristina Romano
Mr. Daryl A. Mundis
Mr. Milbert Shin

The Accused:
Slobodan Milosevic

Amici Curiae:
Mr. Steven Kay
Mr. Branislav Tapuskovic
Mr. Michaïl Wladimiroff

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of two motions filed by the accused on 9 and 30 August 2001 (together "the Motions").[1] The Office of the Prosecutor ("Prosecution") filed its responses on 16 August and 13 September 2001.[2] On 19 October 2001, the *amici curiae* appointed at the request of the Trial Chamber filed a brief elaborating upon those issues that had been raised by the accused in the Motions,[3] to which the Prosecution responded on 26 October 2001.[4] Both parties and the *amici curiae* were heard by the Trial Chamber on 29 October 2001.

(...)

37. Article 9, paragraph 4, of the ICCPR provides:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

38. This provision is not reflected in the International Tribunal's Statute. However , as one of the fundamental human rights of an accused person under customary international law, it is, nonetheless, applicable, and indeed, has been acted upon by this International Tribunal.

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EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF ÖCALAN v. TURKEY

(Application no. 46221/99)

JUDGMENT

STRASBOURG

12 March 2003

of guilt.

82. In his submission, the Commission's decision in the case of *Illich Sanchez Ramirez v. France* (application no 28780/95, Commission decision of 24 June 1996, DR 86, p. 155) was not relevant to the present case. Whereas in the aforementioned case there had been cooperation between France and Sudan, the Kenyan authorities had not cooperated with the Turkish authorities in the instant case. In the former case, the Commission considered that Mr Sanchez Ramirez was indisputably a terrorist, whereas the applicant and the PKK had had recourse to force in order to assert the right of the population of Kurdish origin to self-determination.

83. Relying on the case-law of various domestic courts (the House of Lord's decision in the case of *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*, Appeals Court 1994, vol. 1, p. 42; the decision of the Court of Appeal of New Zealand in the case of *Reg. v. Hartley*, New Zealand Law Reports 1978, vol. 2, p. 199; the decision of the United States Court of Appeals for the Second Circuit in the case of *United States v. Toscanino* (1974) 555 F. 2d. 267, 268; the decision of 28 May 2001 of the Constitutional Court of South Africa in the case of *Mohammed and Dalvie v. The President of the Republic of South Africa and others*, (CCT 17/01, 2001 (3) SA 893 CC) the applicant maintained that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.

2. The Government's submissions

84. In their observations of 7 January 2002 the Government affirmed, without further explanation, that, in the light of the Court's case-law in the case of *Bankovic and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), their responsibility was not engaged by the applicant's arrest abroad.

The Government further maintained that the applicant had been arrested and detained in accordance with a procedure prescribed by law, following cooperation between two States, Turkey and Kenya. They said that the applicant had entered Kenya not as an asylum-seeker, but by using false identity papers, and added that since Kenya was a sovereign State, Turkey had no means of exercising its authority there. The Government also pointed to the fact that there was no extradition treaty between Kenya and Turkey. The applicant had been apprehended by the Kenyan authorities and handed over to the Turkish authorities under arrangements for cooperation between the two States. On arriving in Turkey, he had been taken into custody under arrest warrants issued by the proper and lawful judicial authorities in Turkey, in order to be brought before a judge (the Turkish courts had issued seven warrants for the applicant's arrest before his capture and Interpol had circulated a wanted notice ("red notice")). The Government was adamant that there had been no extradition in disguise, as Turkey had accepted the Kenyan authorities' offer to hand over the applicant, who was in any event an illegal immigrant in Kenya.

85. The Government referred in that connection to the aforementioned case of *Illich Ramirez Sanchez v. France*, which the Commission had declared inadmissible. They maintained that there were major similarities between the Franco-Sudanese cooperation that had achieved an arrest in that case and the cooperation between Turkey and Kenya that had led to Mr Öcalan's arrest. They submitted that the Commission's approach should accordingly be followed, namely that cooperation between States confronted with terrorism was normal in such cases and did not infringe the Convention. The Government maintained, therefore, that the applicant had been brought before a Turkish judicial authority at the end of a lawful procedure, in conformity with customary international law and as part of the strategy of cooperation between sovereign States in the prevention of terrorism.

3. The Court's assessment

(a) General principles

86. The Court reiterates that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. What is at stake here is not only the "right to liberty" but also the "right to security of person" (see, among other authorities, *Bozano v. France* cited above, p. 23, § 54; *Wassink v. the Netherlands*, 27 September 1990, Series A no. 185-A, p. 11, § 24). The Court has previously stressed the importance of effective safeguards, such as the remedy of habeas corpus, to provide protection against arbitrary behaviour and incommunicado detention (see, among other authorities, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B, pp. 55-56, §§ 62-63).

87. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (*Benham v. the United*

Kingdom, 10 June 1996 – *Reports of Judgments and Decisions* 1996-III, p. 753, § 41; and *Bouamar v. Belgium*, 29 February 1988, Series A no. 129, p. 21, § 49).

88. The Court accepts that an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person's individual rights to security under Article 5 § 1 (see, to the same effect, *Stocké v. Germany*, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167).

89. The Court points out that "the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention" (ibid., pp. 24-25, § 169).

90. As regards extradition arrangements between States when one is a party to the Convention and the other not, the Court considers that the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see, to the same effect, *Freda v. Italy*, application no. 8916/80, Commission decision of 7 October 1980, (DR) 21 p. 250; *Klaus Altmann (Barbie) v. France*, application no. 10689/83, Commission decision of 4 July 1984, (DR) 37, p. 225; *Luc Reinette v. France*, application no. 14009/88, Commission decision of 2 October 1989, (DR) 63 p. 189). The Court reiterates that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition" (*Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 35, § 89).

91. The Court further notes that the Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It considers that, subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an extradition in disguise cannot as such be regarded as being contrary to the Convention (see the Commission's case-law to this effect, *Illich Sánchez Ramírez v. France*, cited above).

92. Independently of the question whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question which only falls to be examined by the Court if the host State is a party to the Convention – it must be established to the Court "beyond all reasonable doubt" that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law (see, *mutatis mutandis*, *Stocké v. Germany* cited above, p. 19, § 54).

(b) Application of the principles to the present case

93. As regards the responsibility of Turkey in the applicant's arrest, the Court reiterates its reasoning in the case of *Bankovic and Others* (cited above, §§ 59-60 and 67):

"As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States...

Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence... In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence...

...

In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the

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International Covenant on Civil and Political Rights

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15 August 1990

Original: ENGLISH

Human Rights Committee
Thirty-ninth session

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

-Thirty-ninth session-

concerning

Communication No. 305/1988

Submitted by: Hugo van Alphen

Alleged victim: The author

State party concerned: The Netherlands

Date of communication: 12 April 1988 (date of initial letter)

Date of the decision on admissibility: 29 March 1989

The Human Rights Committee, established under article 28 of the international Covenant on Civil and Political Rights,

Meeting, on 23 July 1990,

Having, concluded its consideration of communication No. 305/1988, submitted to the Committee by Hugo van Alphen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and by the State party,

Adopts the following:

respect of the author's claims relating to violations of articles 9 and 14 of the Covenant.

5.3 The Committee has considered the present communication in the light of all the information provided by the parties. It has taken note of the State party's contention that with respect to the alleged violations of articles 9 and 14, the author has failed to exhaust domestic remedies because he did not invoke substantive rights guaranteed by the Covenant before the courts.

5.4 With respect to the alleged violation of article 14, paragraph 3 (c), the author has not contradicted the State party's contention that, in his appeal to the Amsterdam Court of Appeal, he did not complain about the length of the proceedings before the District Court. Further, it must be noted that the appeal was filed on 6 October 1988, almost six months after the author had submitted his communication to the Committee for consideration under the Optional Protocol to the Covenant (because of the delay of the District Court in providing its written judgment). The Committee is precluded from considering claims which had not been made, or in respect of which local remedies had not been exhausted, at the time the Committee was seized of the case. Accordingly, the communication is inadmissible in respect of the author's claim that his request for compensation was not adjudicated without
undue delay .

5.5 Concerning the alleged violations of articles 9 and 17, the Committee begins by noting that no appeal is possible against the judgement of the Amsterdam Court of Appeal of 24 February 1989. The State party has contended that the author did not invoke the substantive rights in the Covenant during his detention or during the judicial proceedings, and that he is, accordingly, precluded from claiming violation of article 9 before the Committee. The Committee reiterates that authors are not required, for purposes of the Optional Protocol, to invoke specific articles of the Covenant in the course of domestic judicial proceedings, although they must invoke the substantive rights protected by the Covenant. **(1)** After the decision of the public prosecutor to drop the criminal charges against the author and to settle the case by fiscal means, on the grounds that criminal proceedings would be expected to infringe article 6 of the European Convention on Human Rights and article 14, paragraph 3 (c) of the Covenant, the author could only file a claim for compensation. He did file such a claim alleging that the detention between December 1983 and February 1984 had been an arbitrary one. Thus, it cannot be said that the author failed, in the course of the proceedings, to invoke "substantive rights protected by the Covenant". The Committee concludes, accordingly, that there is no reason to review its decision of 29 March 1989 in respect of alleged violations of articles 9 and 17.

5.6 The principal issue before the Committee is whether the author's detention from 5 December 1983 to 9 February 1984 was arbitrary. It is uncontested that the Netherlands judicial authorities, in determinating repeatedly whether to prolong the author's detention, observed the rules governing pre-trial detention laid down in the Code of Criminal Procedure. It remains to be determined whether other factors may render an otherwise lawful. detention arbitrary, and whether the author enjoys an absolute right to invoke his professional obligation to secrecy regardless of the circumstances of a criminal investigation.

5.7 In the instant case, the Committee has examined the reasons adduced by the State party for a prolongation of the author's detention for a period of nine weeks. The Committee observes that the privilege that protects a lawyer-client relationship belongs to the tenets of most legal systems. But this privilege is intended to protect the client. In the case under consideration the client had waived the privilege. The Committee does not know the circumstances of the client's decision to withdraw the duty Of confidentiality in the case. However, the author himself was a suspect, and although he was freed from his duty of confidentiality, he was not obliged to assist the State in mounting a case against him.

5.8 The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. It has, in fact, stated that the reason for the duration of the author's detention "was that the applicant continued to invoke his obligation to maintain confidentiality

despite the fact that the interested party had released him from his obligations in this respect", and that "the importance of the criminal investigation necessitated detaining the applicant for reasons of accessibility'. Notwithstanding the waiver of the author's professional duty of confidentiality, he was not obliged to provide such co-operation. The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.

5.9 With respect to an alleged violation of article 17, the Committee finds that the author has failed to submit sufficient evidence to substantiate such a violation by the State party.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the communication disclose a violation of article 9, paragraph 1, of the Covenant.

7. The State party is under an obligation to take effective measures to remedy the violation suffered by the author and to ensure that similar violations do not occur in the future. The Committee takes this opportunity to indicate that it would wish to receive information on any relevant measures taken by the State party in respect of the Committee's views.

Notes

1. See communication No. 273/1988 (B.d.B. v. Netherlands), decision of 30 March 1989, para. 6.3.

APPENDIX
Individual opinion submitted by Mr. Nisuke Ando

The central issue of the present case is whether the author's detention of nine weeks -from 5 December 1983 to 9 February 1984 - should be regarded as "arbitrary" under the provision of article 9, paragraph 1, of the International Covenant on Civil and Political Rights. Article 9, paragraph 1, prohibits "unlawful" detention as well as arbitrary detention. With respect to the relations between unlawful detention and arbitrary detention, I agree with the Committee's view that the latter is to be more broadly interpreted than the former to include the elements of inappropriateness, injustice, and lack of predictability. (See 5.8 of the views.) However, it is presumed that the laws of many States parties to the Covenant regulating detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary and that any lawful detention under those laws should not be regarded as arbitrary unless the aforementioned elements are clearly established to exist by undoubted evidence. In this respect, I consider that the laws of the State party regulating detention are not per se arbitrary (...) and that the author's detention was in compliance with those laws. As to the question whether this lawful detention of the author should be regarded as arbitrary, the Committee bases its views on the submission of the State party that "the reason for the length of the detention period was that the author continued to invoke his obligation to maintain confidentiality despite the fact that the interested party had released him from this obligation in this respect. The importance of the criminal investigation necessitated the author's detention for reasons of accessibility" (5.8). Presumably, the Committee considers that the facts as submitted, together with the search of the author's home and office and the seizure of documents as well as the subsequent dropping by the Public Prosecutor of the charges against the author, reveal the elements of inappropriateness, injustice and lack of predictability, thus making the detention arbitrary (2.1, 2.9).

On the other hand, the State party also submits that extensive judicial investigations took place for two years - from 1984 to 1986 - into the complex tax fraud scheme the author was suspected to be an accomplice in, or accessory to. It is true that the Public Prosecutor requested the discontinuance of these investigations and dropped the charges against the author (2.9).

Nevertheless, it is also true that the case was not terminated permanently but was to be settled by fiscal means (2.9, 5.5). In addition, in its judgments of 24 February 1989, the Netherlands Court of Appeal held that, in the light of statements made by the author and other witnesses heard in connection with the tax fraud scheme, the official reports of the Fiscal Intelligence and Investigation Department and the formal grounds for applications for a preliminary judicial

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Fifty-ninth session
24 March - 11 April 1997

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Fifty-ninth session -

Communication No. 560/1993**

Submitted by: A (name deleted) [represented by counsel]

Victim: The author

State party: Australia

Date of communication: 20 June 1993 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1997,

Having concluded its consideration of communication No. 560/1993 submitted to the Human Rights Committee on behalf of A under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

cease to apply to a designated person who has been in immigration detention for more than 273 days, it is submitted that a period of 273 days during which there is no possibility of release by the courts is per se arbitrary within the meaning of article 9, paragraph 1. According to counsel, it is virtually impossible for a designated person to be released even after the 273 calendar days since, under Section 54Q, the countdown towards the 273 day cut-off date ceases where the Department of Immigration is awaiting information from individuals outside its control.

8.10 Counsel rejects the argument that since the guarantees of article 14, paragraph 3(d), are not spelled out in article 9, paragraph 4, A had no right to access to state-funded legal aid. He argues that immigration detention is a quasi-criminal form of detention which in his opinion requires the procedural protection spelled out in article 14, paragraph 3. In this context, he notes that other international instruments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 17) recognize that all persons subjected to any form of detention are entitled to have access to legal advice, and be assigned legal advisers without payment where the interests of justice so require.

8.11 Finally, counsel reaffirms that the proceedings concerning A's status under the Migration Amendment Act can be subsumed under article 14, paragraph 1: (even) during its administrative stage, the author's application for refugee status came within the scope of article 14. The exercise of his rights to judicial review in relation to his application for refugee status, as well as his challenge to detention in the local courts gave rise to a "suit at law". In this connection, counsel contends that by initiating proceedings against the Department of Immigration, with a view to reviewing the decisions to refuse his application for refugee status, the proceedings went beyond any review on the merits of his application and became a civil dispute about the Department's failure to guarantee him procedural fairness. And by filing proceedings seeking his release, the author disputed the constitutionality of the Migration Act's new provisions under which he was held - again, this is said to have been a civil dispute.

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

(a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;

(b) whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4; and

(c) whether the proceedings concerning his application for refugee status fall within the scope of application of article 14, paragraph 1 and whether, in the affirmative, there has been a violation of article 14, paragraph 1.

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4. The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding
Judge Florence Ndpele Mwachande Mumba
Judge Carmel Agius

Registrar:
Mr. Hans Holthuis

PROSECUTOR
v.
Dragan NIKOLIC

DECISION ON DEFENCE MOTION CHALLENGING THE EXERCISE OF JURISDICTION BY THE TRIBUNAL

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Accused:

Mr. Howard Morrison
Ms. Tanja Radosavljevic

1. 3. Violation of human rights and due process of law?

106 2. The Defence also argues that the arrest and transfer of the Accused amounts to a violation of internationally recognised human rights and a violation of the fundamental principle of due process of law. In relation to the question of whether a violation of human rights has occurred, the following factors in particular may play a role: how was the accused arrested, how was he treated, who was involved in the arrest and treatment? As regards the question of whether a violation of the principle of due process of law occurred, the same factors may play a role. In addition , the question may arise as to whether the Accused can still be considered to receive a fair trial. As both arguments are closely connected to each other, they will be discussed here together.

107 3. In order to support the contention that the abduction of the Accused amounts to a violation of his human rights, the Defence invokes, in particular, Article 5 of the European Convention on Human Rights and Article 9 of the Covenant on Civil and Political Rights. It refers to a number of decisions and judgements taken by regional and international human rights institutions. In its view, this case law shows that an abduction is manifestly arbitrary, constitutes a violation of the principle of legality and is not in accordance with procedures prescribed by law .[115]

108 4. The Defence further submits that since the abduction was unlawful, the exercise of jurisdiction over the individual becomes irregular as well, regardless of whether the abduction was State-sponsored or undertaken by private individuals. In cases where "there has been a serious violation of the rule of law or an abuse of process ", the Tribunal should "consider divesting itself of jurisdiction over the defendant ." "It is submitted that while an abduction is *per se* both an abuse of process and a breach of the rule of law, the subsequent transfer of a defendant as a direct consequence of an abduction into a different jurisdiction to face criminal proceedings is, it is suggested, an abuse of process." [116] The Defence adds here that, as such, it is not suggesting that the Accused will not receive a fair trial but that proceeding with the trial, in light of how he was brought within the jurisdiction of this Tribunal, will undermine the integrity of the judicial process. The Defence refers here to the "abuse of process" doctrine , applied by the Appeals Chamber in the *Barayagwiza* case. In this case, the Appeals Chamber held that a court may decline – as a matter of discretion – to exercise its jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's right would prove detrimental to the court's integrity". [117]

109 5. The Prosecution submits that the remedy sought by the Defence, i.e. the dismissal of the indictment and the return of the Accused to the FRY, is a remedy that should apply only to very extreme cases of violations of the rights of the Accused. The Prosecution argues that the Trial Chamber needs to undertake a balancing exercise between the duty to respect the rights of the Accused and the duty to prosecute very serious violations of humanitarian law. According to the Prosecution, "doctrinal support can be found for the view that the exercise of jurisdiction over an accused apprehended in violation of international law is not in itself contrary to international law."[118] The Prosecution further submits that, in practice, the abuse of process doctrine may be invoked successfully when not only very serious violations of the Accused's fundamental rights have occurred but also when those violations can be attributed to a State. According to the Prosecution , this threshold has not been met in the present case.[119]

110 6. The Trial Chamber observes first that it attaches great importance to respect for the human rights of the Accused and to proceedings that fully respect due process of law. It is also duty-bound to respect the rights laid down in Article 21 of the Statute. This Tribunal has a paramount duty and responsibility to respect fully the norms developed over the last decades in this field, especially within, but not limited to, the framework of the United Nations. For this reason, this Tribunal has a responsibility to fully respect "internationally recognized standards regarding the rights of the accused at all stages of its proceedings."

Such standards "are , *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights"[120]; such standards are e.g. also contained in Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. This Chamber observes that these norms only provide for the absolute minimum standards applicable.

111 7. There exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure due process of law. Ensuring that the Accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal. In addition, this Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice ". However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated.[121]

112 8. The Chamber must undertake a balancing exercise in order to assess all the factors of relevance in the case at hand and in order to conclude whether, in light of all these factors, the Chamber can exercise jurisdiction over the Accused.